No. 17-961	
Title:	Theodore H. Frank, et al., Petitioners v. Paloma Gaos, Individually and on Behalf of All Others Similarly Situated, et al.
Docketed:	January 8, 2018
Linked with 18A242	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(15-15858)
Decision Date:	August 22, 2017
Rehearing Denied:	October 5, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jan 03 2018	Petition for a writ of certiorari filed. (Response due February 7, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Jan 23 2018	Motion to extend the time to file a response from February 7, 2018 to March 9, 2018, submitted to The Clerk. **Main Document**
Jan 24 2018	Motion to extend the time to file a response is granted and the time is extended to and including March 9, 2018, for all respondents.
Feb 07 2018	Brief amicus curiae of Cato Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 07 2018	Brief amicus curiae of Center for Constitutional Jurisprudence filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 07 2018	Brief amicus curiae of Center for Individual Rights filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Feb 07 2018	Brief amici curiae of Attorney General of Arizona, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 09 2018	Brief of respondents Paloma Gaos, et al. in opposition filed.

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Mar 09 2018	Brief of respondent Google LLC in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 22 2018	Reply of petitioners Theodore H. Frank, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 28 2018	DISTRIBUTED for Conference of 4/13/2018.
Apr 16 2018	DISTRIBUTED for Conference of 4/20/2018.
Apr 23 2018	DISTRIBUTED for Conference of 4/27/2018.
Apr 30 2018	Petition GRANTED.
May 03 2018	Motion for an extension of time filed. **Main Document**
May 15 2018	Motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix and petitioners' brief on the merits is extended to and including July 9, 2018. The time to file respondents' briefs on the merits is extended to and including August 29, 2018.
Jul 02 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service** **Other**
Jul 09 2018	Brief of petitioners Theodore H. Frank, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 12 2018	Amicus brief of Cato Institute not accepted for filing. (July 12, 2018)
Jul 12 2018	Brief amici curiae of Cato Institute and Americans for Prosperity filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 13 2018	Brief amici curiae of Center for Constitutional Jurisprudence and Atlantic Legal Foundation filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jul 13 2018	Brief amicus curiae of Lawyers for Civil Justice filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 13 2018	Brief amicus curiae of Former Professor Roy A. Katriel in support of neither party filed.

	Main Document **Other** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amicus curiae of Center for Individual Rights filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amicus curiae of Manhattan Institute for Policy Research filed. **Main Document** **Certificate of Word Count** **Certificate of Word Count**
Jul 16 2018	Amicus brief of American Bar Association not accepted for filing. (July 17, 2018 - Brief does not comply with Rules 33 & 34. To be reprinted.)
Jul 16 2018	Brief amicus curiae of New Jersey Civil Justice Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amici curiae of David Lowrey, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amicus curiae of Electronic Privacy Information Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amicus curiae of Chamber of Commerce of the United States of America in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 16 2018	Brief amicus curiae of United States in support of neither party filed. **Proof of Service** **Main Document**
Jul 16 2018	Brief amici curiae of Attorneys General of Arizona, et al. filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Jul 16 2018	Brief amicus curiae of American Bar Association in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 20 2018	SET FOR ARGUMENT on Wednesday, October 31, 2018
Aug 29 2018	Brief of respondents Paloma Gaos, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 29 2018	Brief of respondent Google LLC filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 04 2018	Motion for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument filed by Former Professor Roy A. Katriel.

	Main Document **Proof of Service**
Sep 05 2018	Amicus brief of Professor William B. Rubenstein not accepted for filing. (Resubmitted with all required documentation - September 05, 2018)
Sep 05 2018	Brief amicus curiae of Professor William B. Rubenstein filed. **Certificate of Word Count** **Main Document** **Proof of Service**
Sep 05 2018	Brief amicus curiae of Spectrum Settlement Recovery, LLC filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Brief amicus curiae of Center for Workplace Compliance filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Brief amici curiae of The Center for Democracy and Technology, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Brief amici curiae of Law Professors filed. **Proof of Service** **Main Document** **Certificate of Word Count**
Sep 05 2018	Brief amici curiae of Public Citizen, Inc. and Public Citizen Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Brief amici curiae of States of Oregon, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Brief amicus curiae of American Association for Justice filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Joint motion for divided argument filed by respondents. **Main Document** **Proof of Service**
Sep 05 2018	Brief amici curiae of Legal Aid Organizations filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Brief amici curiae of Computer & Communications Industry Association and TechNet filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 05 2018	Amicus brief of National Consumer Law Center, et al. not accepted for filing. (Corrected brief to be resubmitted - September 10, 2018)
Sep 05 2018	Brief amicus curiae of Civil Justice Research Initiative filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**

Sep 05 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Sep 05 2018	Brief amici curiae of The New York Bar Foundation and The New York State Bar Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 05 2018	Brief amici curiae of National Consumer Law Center, et al. filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 07 2018	Opposition of petitioners to motion of Former Professor Roy A. Katriel for enlargement of time for oral argument, for leave to participate in oral argument as amicus curiae and for divided argument filed. **Main Document** **Proof of Service**
Sep 07 2018	Application (18A242) to file a reply brief on the merits in excess of the word limit, submitted to The Chief Justice. **Main Document** **Proof of Service**
Sep 10 2018	Record requested from the U.S.C.A. 9th Circuit.
Sep 11 2018	Application (18A242) to file a reply brief on the merits in excess of the word limit granted in part by The Chief Justice. Petitioners' reply brief on the merits may not exceed 7,000 words.
Sep 12 2018	CIRCULATED
Sep 28 2018	Reply of petitioners Theodore H. Frank, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 01 2018	Joint motion for divided argument filed by respondents GRANTED.
Oct 01 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 01 2018	Motion for leave to participate in oral argument as amicus curiae and for divided argument filed by Former Professor Roy A. Katriel DENIED.
Oct 23 2018	Supplemental brief of petitioners Theodore H. Frank, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 29 2018	Supplemental brief of respondents Paloma Gaos, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

Oct 31 2018	Argued. For petitioners: Theodore H. Frank, Washington, D. C. For United States, as amicus curiae: Jeffrey B. Wall, Principal Deputy Solicitor General, Department of Justice, Washington, D. C. For respondent Google LLC: Andrew J. Pincus, Washington, D. C. For respondents Gaos, et al.; Jeffrey A. Lamken, Washington, D. C.
Nov 06 2018	The parties and the Solicitor General are directed to file supplemental briefs addressing whether any named plaintiff has standing such that the federal courts have Article III jurisdiction over this dispute. The briefs, not to exceed 6,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, November 30, 2018. Reply briefs, not to exceed 3,000 words, are to be filed simultaneously with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 21, 2018.
Nov 19 2018	Motion for an extension of time to file the supplemental briefs and replies filed. **Main Document** **Proof of Service**
Nov 20 2018	Motion to extend the time to file the supplemental briefs and replies denied
Nov 29 2018	Supplemental brief of petitioners filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 30 2018	Supplemental brief of respondent Google LLC filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 30 2018	Supplemental brief of respondents Paloma Gaos, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 30 2018	Supplemental brief of United States as amicus curiae in support of neither party filed. (Distributed) **Proof of Service** **Main Document**
Dec 21 2018	Supplemental reply brief of respondents Paloma Gaos, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 21 2018	Supplemental reply brief of respondent Google LLC filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 21 2018	Supplemental reply brief of United States as amicus curiae supporting neither party filed. (Distributed) **Proof of Service** **Main Document**
Dec 21 2018	Supplemental reply brief of petitioners filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**

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No. ____

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(b)(3) permits representatives to maintain a class action where so doing "is superior to other available methods for fairly and efficiently adjudicating the controversy," and Rule 23(e)(2) requires that a settlement that binds class members must be "fair, reasonable, and adequate." In this case, the Ninth Circuit upheld approval of an $8.5 million settlement that disposed of absent class members' claims while providing them zero monetary relief. Breaking with decisions of the Third Circuit, Fifth Circuit, Seventh Circuit, and Eighth Circuit that require compensating class members before putting class action proceeds to other uses, the Ninth Circuit held that the settlement's award of all net proceeds to third-party organizations selected by the defendant and class counsel was a fair and adequate remedy under the trust-law doctrine of *cy pres*. The question presented is:

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Theodore H. Frank and Melissa Ann Holyoak were objectors in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Paloma Gaos, Anthony Italiano, and Gabriel Priyev were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondent Google, Inc. was the defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

An $8.5 million class action settlement that awards absent class members no relief at all in exchange for their claims—no money, no alteration of the defendant's allegedly injurious conduct, not even coupons—is not "fair, reasonable, and adequate" by any measure. Yet the Ninth Circuit upheld such a settlement because class counsel and the defendant agreed to award $5.3 million to third parties, including class counsel's *alma maters* and nonprofits already funded by the defendant, for unspecified "uses consistent with the nature of the underlying action." (Most of the remainder of the settlement proceeds, of course, went to class counsel as fees.) The court held that, even in cases where it is "possible" to make payments to class members, a district court may nonetheless approve a "*cy pres*-only settlement" that gives them nothing in exchange for their claims. App. 8–9.

For good reason, every other court of appeals to consider the issue has disagreed. *See generally* Sylvia Hsieh, Class Action Settlements Face Growing Scrutiny by Objectors, Courts, Lawyers USA, Mar. 31, 2013 (noting circuit split). Those courts' decisions have recognized that *cy pres* awards require special scrutiny because they can facilitate tacit or explicit collusion between defendants, who are eager to settle at the lowest price and with a minimum of fuss, and class counsel, who are seeking to maximize their fees and may be willing to accommodate defendants' interests in exchange for a "clear sailing" agreement not to challenge the fee request. They recognize that, in this

way, *cy pres* awards present a heightened risk of conflict between class counsel and their putative clients, the members of the class. They recognize that *cy pres* awards may provide little or no benefit to class members. And above all else, they recognize that *cy pres* awards to third parties are not appropriate when any reasonable opportunity exists to compensate class members directly for their injuries—always the first-best use of settlement funds that, after all, are the property of the class.

By contrast, the Ninth Circuit's opinion in this case paves the way to divert that class property to third parties in just about every instance. In the Ninth Circuit's view, so long as the district court determines that it would be "infeasible" to make payments to *every single class member*—something that never happens in consumer class actions, where claims rates are often in the single digits—it has "discharged its obligation." App. 9–10. It therefore need not consider alternatives to a *cy pres*-only settlement, such as funding a claims process, nor second-guess the propriety of class certification. *Id.* Thus, by defining a plaintiff class broadly enough, class counsel can grease the skids for a quick and easy *cy pres* deal with defendants that sells class members "down the river." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

In this way, the decision below deepened a circuit split that already created an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to bring and settle nationwide class actions like this one.

Bringing suit within the Ninth Circuit's footprint guarantees that minor things like compensating class members for their injuries, holding defendants liable to the extent the law allows, and preventing defendants from injuring class members in the exact same manner will not stand in the way of reaching a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class counsel's putative clients. This has not gone unnoticed among the plaintiffs' bar, judging by the explosion in consumer class action settlements featuring *cy pres* awards within the Ninth Circuit.

The Chief Justice correctly observed that this Court has yet to address the "fundamental concerns" raised by *cy pres* relief, including "when, if ever, such relief should be considered" and "how to assess its fairness as a general matter." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). He suggested that, "[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies." *Id.* This is that case, and the need for clarification is acute.

The Court should grant certiorari to resolve the circuit conflict, provide guidance to the lower courts on when (if ever) *cy pres* remedies are permissible, and correct a serious abuse of the class action mechanism that puts the interests of those it is intended to protect, class members, dead last.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 869 F.3d 737 and reproduced at App. 1. The opinions of the District Court for the Northern District of California are unpublished and reproduced at App. 31 and App. 62.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2017. A timely petition for rehearing *en banc* was denied on October 5, 2017. App. 67. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). As class members who objected to the settlement, Petitioners have standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

RULE INVOLVED

Federal Rule of Civil Procedure 23(b)(3) provides that a class action may be maintained if, *inter alia*,

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Rule 23(e)(2) provides, with respect to a proposed settlement of a class action:

> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

STATEMENT OF THE CASE

A. The *Cy Pres* Doctrine in Class Action Settlements

The *cy pres* doctrine originated in trust law. Short for the French "*cy près comme possible*," or "as near as possible," *cy pres* referred to a court's power, typically under statute, to reform a trust or charitable gift that has become impossible to administer according to its terms. *See generally* Martin H. Redish *et al.*, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617, 625 (2010) [hereinafter "Redish"]. For example, a 19th-century court applied the doctrine to repurpose a trust that had been created to support the abolition movement to instead provide assistance to poor African Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867).

The application of the *cy pres* doctrine, or something resembling it, to class action settlements is a more recent phenomenon. The "most adventuresome" of the 1966 amendments to Federal Rules of Civil Procedure was the addition of Rule 23(b)(3)'s provision for "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614–15 (1997). That provision empowered attorneys, armed with a few representative plaintiffs, to file actions on behalf of large and diffuse classes, aggregating members' paltry claims into litigation well worth an attorney's time. When these suits prevail, often through settlement, the proceeds

typically flow into a fund out of which disbursements to individual class members are made.

It is a unique feature of opt-out class actions that, unlike in other civil litigation, funds often remain unclaimed, particularly where class members' claims are small or the claims process is burdensome. "Traditionally, such funds would revert to a defendant—often an unpopular result because reversion of the funds undermines the deterrent effect of the suit and leaves the defendant largely with the benefit of his illegal activity." Redish at 631. In the 1970s, the *cy pres* doctrine was proposed as a solution for this "problem" of unclaimed settlement funds that could achieve the "next best" result to compensation by indirectly compensating absent class members, without undermining the deterrent effect of liability. *Id.* at 631–34.

The use of *cy pres* awards in class actions quickly moved beyond these modest origins to become an integral component of many settlements. In these cases, settlement agreements expressly provide for awards to charities or foundations in addition to, or in place of, funds earmarked for distribution to class members. Used in this fashion, *cy pres* awards facilitate the filing, certification, and settlement of class actions that would otherwise be infeasible to litigate due to unmanageability or questionable merit. Redish at 639–40; *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 184–85 (2d Cir. 1987) (discussing *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973)).

As critics have documented, these types of *cy pres* awards "create the potential for conflicts of interest by ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." John Beisner, Jessica Miller & Jordan Schwartz, Cy Pres: A Not So Charitable Contribution to Class Action Practice 13 (2010) [hereinafter "Beisner"]. "Indeed, in many class actions it is solely the use of cy pres that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys' fees and to make the entire class proceeding seemingly worthwhile." Redish at 621. Despite these concerns, the use of *cy pres* awards in class action settlements has grown quickly since the 1980s, accelerating sharply over the past decade. *Id.* at 653.

This Court "has not previously addressed" the propriety of *cy pres* relief, but the Chief Justice has recognized that it is "a growing feature of class action settlements" that raises "fundamental concerns." *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). Those include "when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a cy pres remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on." *Id.* "In a suitable case," the Chief

Justice suggested, "this Court may need to clarify the limits on the use of such remedies." *Id.*

B. Plaintiffs Launch a Privacy Class Action Against Google After Their Own Web Browsers Disclose Their Google Searches to Third-Party Websites

Google operates the eponymous search engine that Internet users query billions of times each day. When a user enters search terms into Google, the service returns a search-results page listing relevant websites. Each results page has a unique address—known as a "Uniform Resource Locator," or "URL"—that contains the user's search terms.[1] And when a user clicks on a search result, the user's web browser (Chrome, Internet Explorer, etc.) typically transmits a "referral header" containing the URL of the referring search-results page, including the user's search terms, to the destination website. This is not unique to Google; clicking any links on the Web will cause referral headers to be sent, unless the user has disabled them. Websites, in turn, use this referral information to inform their editorial decisions and marketing efforts.

In October 2010, Paloma Gaos filed a putative class action in the United States District Court for the Northern District of California against Google, seeking damages for the disclosure of her search terms to third-party websites through referral headers sent

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[1] For example, the results page for the search "Supreme Court" is available at the URL https://www.google.com/search?q=Supreme+Court.

when she conducted "vanity searches" for her own name and other personal information and then clicked on results links. The complaint alleged claims for fraud, invasion of privacy, breach of contract, breach of the covenant of good faith and fair dealing, breach of implied contract, and unjust enrichment under California law and for violation of the federal Stored Communications Act, which provides for statutory damages of at least $1,000 per violation. 18 U.S.C. § 2707(c). It sought certification and money damages for a class of United States-based Google users. App. 4, 32–33.

C. Class Counsel and Google Propose an $8.5 Million *Cy Pres*-Only Settlement That Awards Class Members Nothing

Gaos's claims were initially dismissed for failure to plead an injury that would support Article III standing. After Gaos amended her complaint, the parties stipulated to consolidate her action with a similar one filed by Gabriel Priyev for purposes of settlement proceedings and then filed a proposed settlement for the district court's approval. App. 34.

Under the settlement, Google would obtain a release of any and all privacy-related claims of the estimated 129 million people who used Google's search engine in the United States between 2006 and the date the class would be given notice of the settlement in 2014. App. 5. In exchange, the company would pay a total of $8.5 million into a settlement fund and revise its "Frequently Asked Questions" webpages to add an explanation of referral headers, a well-known

feature of the Web since at least 1996, two years before Google's founding.[2] App. 5, 82. The settlement specifically provided that Google "will not be required or requested to make any changes to...the practices or functionality of Google Search" or other services. App. 82.

Class counsel and Google agreed that attorneys' fees would be drawn out of the settlement fund, defeating any incentive Google might have to challenge the fee request. App. 92. Ultimately, class counsel sought, and was awarded in full, $2.125 million in fees, 25 percent of the settlement fund and more than double counsel's asserted lodestar. App. 54–55.

The settlement was less generous to class members. Other than "incentive awards" of a few thousand apiece to the named plaintiffs, class members would receive no compensation at all. Instead, their money would be awarded to organizations that "agree to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." App. 84. Class counsel and Google selected six recipients: World Privacy Forum; Carnegie Mellon University; the Center for Information, Society and Policy at Chicago-Kent College of Law; the Berkman Center for Internet and Society at Harvard University; the Stanford Center for Internet and Society; and

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[2] *See* Internet Engineering Task Force, Hypertext Transfer Protocol HTTP/1.0, RFC No. 1945 (May 1996), https://tools.ietf.org/html/rfc1945#section-10.13.

AARP, Inc. (formerly known as the "American Association of Retired Persons"). App. 5.

Petitioners Theodore H. Frank and Melissa Ann Holyoak objected to approval of the settlement, class certification, and class counsel's fee request. App. 112 *et seq.* They argued that the *cy pres*-only settlement was not "fair, reasonable, and adequate," as required by Rule 23(e)(2), because it awarded class members nothing at all while providing millions in dubious *cy pres* "relief" and millions in attorneys' fees. App. 117–25. Citing undisputed evidence that claims rates for class action payments of around $15 are typically well below 1 percent, they argued that a standard claims process was in fact a feasible means of compensating class members. App. 120–23 (discussing *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d. 939 (N.D. Cal. 2013) (approving settlement in 150-million-member privacy class action providing for $15 payments to those class members who filed claims)). At a minimum, they argued, it would be preferable to compensate identified class members chosen by lottery than to direct the class's money to third parties. App. 123. And if the court were to find that any distribution to class members was infeasible, then that should call into question class certification, because it would not be, as Rule 23(b)(3) requires, "superior to other available methods for fairly and efficiently adjudicating the controversy." App. 131–34.

Frank and Holyoak also objected to the parties' selection of *cy pres* recipients that had preexisting relationships with Google and class counsel. App. 125–31.

Prior to the settlement, Google was already a donor to the Berkman Center for Internet and Society at Harvard University, the Stanford Center for Internet and Society, AARP, and Chicago-Kent, raising concerns that any settlement proceeds directed to those entities would be chiefly to Google's benefit or, at the least, displace Google's regular donations and therefore provide no incremental benefit to the class. Likewise, three of the *cy pres* recipients—Harvard, Stanford, and Chicago-Kent—were *alma maters* of class attorneys who signed the settlement, raising a potential (and quite common) conflict of interest.[3] Frank also objected to being compelled as a class member to subsidize the AARP's advocacy and lobbying on controversial policy issues, which he often opposes. App. 131.

Finally, Frank and Holyoak objected to the $2.125 million fee request, on the basis that it assumed that the district court should treat *cy pres* funds as equally valuable to the class as actual monetary compensation. App. 134–39.

D. Relying on Ninth Circuit Precedent, the District Court Overrules Petitioners' Objections to the Settlement

Although the district court at the fairness hearing criticized the parties' conflicts of interest and "lack of

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[3] Frank and Holyoak discovered these preexisting relationships from public materials; it may well be that Google or class counsel has preexisting relationships with other of the *cy pres* recipients, as well.

transparency" in selecting *cy pres* recipients, it ultimately overruled all of Frank and Holyoak's objections. Their objections to the approval of a *cy pres*-only settlement, it stated, were inconsistent with "the law of this circuit which permits cy pres settlements such as this one." App. 58 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)). As for the selection of the *cy pres* recipients, it was enough their activities were "related" to "the subject matter of this case," and any potential conflict was negated by the fact that their identity "was a negotiated term included in the Settlement Agreement." App. 59–60. Finally, as for the fee award, the court stated simply that it disagreed with the objection and believed the amounts approved were consistent with Ninth Circuit authority. App. 60.

E. A Split Panel of the Ninth Circuit Affirms

In affirming approval of the settlement, the Ninth Circuit agreed with the district court that its own precedents disposed of all objections.

On the use of *cy pres* in general, it found that the court's "prior endorsement of *cy pres* awards that go to uses consistent with the nature of the underlying action" carried the day. App. 10. Whether or not there are "'possible' alternatives" that compensate class members, a district court may approve a "*cy pres*-only settlement" that it finds to be "fair, adequate, and free from collusion." App. 9–10 (quoting *Lane*, 696 F.3d at 819). And the district court satisfied that standard when it found that dividing $5.3 million in net settlement proceeds among all of the estimated 129 million

class members would be "infeasible." *Id.* "[T]he fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them." App. 10 n.2.

The court likewise made quick work of the objection that a class action is not "superior" to other means of adjudication, and that class certification is therefore improper, when a money-damages class is structured so as to preclude actually compensating class members. To the contrary, it explained, the very same features that can make individual litigation "economically infeasible" and thereby support class adjudication also provide "the rationale for the *cy pres*-only settlement." App. 11.

As to the particular *cy pres* recipients, the panel majority was untroubled by the appearance of a conflict of interest based on their prior relationships with class counsel and the defendant. That Google was already funding and working with four of them was of no moment "without something more, such as fraud or collusion." App. 17. And the panel categorically "reject[ed] the proposition that the link between the *cy pres* recipients and class counsel's alma maters raises a significant question about whether the recipients were selected on the merits." App. 18. Echoing Ninth Circuit precedent, the panel explained that any closer scrutiny of the settling parties' selection of *cy pres* recipients would be "an intrusion into the private parties' negotiations" and therefore "improper and disruptive to the settlement process." App. 15 (quoting *Lane*, 696 F.3d at 820–21). Instead, it is enough that

an award to a given *cy pres* recipient "be[] tethered to the objectives of the underlying statute and the interests of the silent class members," a standard that it found easily satisfied here. App. 12.

Finally, the panel summarily rejected the objection "that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*-only." App. 21. A fee equal to 25 percent of the settlement fund, it held, was generally permissible as a "benchmark" whether or not class counsel obtains any actual compensation for its putative clients, class members. App. 22.

Judge Wallace dissented in part. He took no issue with the panel majority's application of circuit precedent to resolve the challenges to the use of *cy pres* relief and the fee award, but was troubled by the district court's failure to probe the preexisting relationships between class counsel and the *cy pres* recipients. App. 23. The fact that class counsel and the defendant struck a *cy pres*-only settlement, he wrote, "raises a yellow flag," and the allocation of almost half the settlement fund to class counsel's *alma maters*, including one with only a brief history of work on Internet privacy issues, "raises a red flag." App. 28. In these circumstances, "the burden should be on class counsel to show...that the prior affiliation played *no role* in the negotiations, that other institutions were sincerely considered, and that the participant's alma mater is the proper *cy pres* recipient." App. 27. As it was, the record evidence—"one-line declarations from class

counsel stating 'I have no affiliation' with the subject"—addressed none of these things. App. 28–29.

The court subsequently denied rehearing and rehearing en banc. App. 67–68.

REASONS FOR GRANTING THE PETITION

This petition presents an ideal and timely opportunity for the Court to resolve a deep circuit split over the use of *cy pres* awards in class action settlements and provide much-needed guidance to the lower courts on a recurring issue of substantial importance.

I. The Ninth Circuit Is Out of Step with Other Circuits that Limit *Cy Pres* Remedies To Cases Where Compensating Class Members Is Impossible

The Ninth Circuit's decision conflicts with decisions of the Third, Fifth, Seventh, and Eighth Circuits—and arguably the Second Circuit, as well—on the fundamental question of when it is "fair, reasonable, and adequate" for a class action settlement to award money not to class members but to third parties unconnected to the litigation. This Court's intervention is warranted to establish a nationwide standard for the use of *cy pres* awards in class action settlements and thereby prevent counsel bringing nationwide class actions from flocking to the Ninth Circuit because it provides their putative clients the weakest protections against collusive settlements facilitated by *cy pres* awards.

The decision below permits a *cy pres*-only settlement in nearly any consumer class action. Under the standard set by the Ninth Circuit, it is not considered "feasible" to provide any compensation to class members when it would be infeasible to compensate *all of them*. The result is that, by defining a sufficiently large class, class counsel can ensure that direct compensation is *never* required, opening the door to a *cy pres*-only settlement that denies class members any real relief.

Contrast the Ninth Circuit's standard with that applied by the Seventh Circuit in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), a consumer class action challenging allegedly false representations regarding the efficacy of a dietary supplement. The settlement there set aside $2 million for awards to the 12 million class members, with any unclaimed funds going to a nonprofit as a *cy pres* award. *Id.* at 780. Only 30,245 claims were submitted, due to limited notice and a convoluted claims process. *Id.* That left $1.13 million unclaimed—just under 10 cents per class member. Nevertheless, *Pearson* held that a *cy pres* award of that money was impermissible as a matter of law because the funds could have "feasibly be[en] awarded to the intended beneficiaries," class members, by providing broader notice, simplifying the claims process, or simply mailing checks to people known to have purchased the supplements. *Id.* at 784. Although it clearly was not feasible to compensate all 12 million class members—the Ninth Circuit's standard—the

Seventh Circuit appropriately recognized that providing even incomplete compensation to class members necessarily takes precedence over awarding the funds to a third party.[4]

The Eighth Circuit took the same approach in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), a massive shareholder class action. After a series of distributions to class members over the course of a decade, the district court ordered a *cy pres* distribution of the $2.5 million remaining in the settlement fund, citing the difficulty and expense of identifying additional class members. *Id.* at 1062, 1065. Criticizing "the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases," the appeals court reversed and ordered the funds distributed to those class members who had already been identified. *Id.* at 1064. It held that, "[b]ecause the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members" who have not yet

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[4] *See also Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785–86 (7th Cir. 2004) (holding that a settlement that denies all direct relief to class members, in favor of a *cy pres* remedy, can be justified only if "careful scrutiny indicated that the class had no realistic prospect of sufficient success to enable an actual distribution to the class members"); *Mace v. Van Ru Credit Corp.*, 109 F. 3d 338, 345 (7th Cir. 1997) ("[T]here is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of [*cy pres*].").

been fully compensated. *Id.* (quotation marks and alteration omitted). A further distribution was feasible because the claims administrator could simply mail another check to each class member who had already received one. *Id.* Like the Seventh Circuit, the Eighth refused to allow the infeasibility of compensating *all* class members justify handing over the class's money to a third party.

That is also the rule in the Fifth Circuit. In *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011), the court rejected a *cy pres* award of unclaimed funds from the settlement of a class action over exposure to toxic chemicals. It held that, so long as it is "logistically feasible and economically viable to make additional pro rata distributions to class members, the district court should do so" until those members are fully compensated. *Id.* at 475. A *cy pres* award is permissible "only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Id.*

The Ninth Circuit standard also conflicts, or at least is in tension, with that of the Third Circuit. *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013), vacated district court approval of a class action settlement that, due to a low claims rate, would have distributed the bulk of the settlement fund to *cy pres* recipients. "Cy pres distributions," the court stressed, "are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action-to compensate class members." *Id.* at 169. Although declining to hold that *cy*

pres is permissible only where individual distributions to class members are impossible, it instructed the district court to place greater emphasis on "the degree of direct benefit provided to the class" by the settlement, including "the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards." *Id.* at 174. "Barring sufficient justification," it concluded, "cy pres awards should generally represent a small percentage of total settlement funds." *Id.* The decision below of the Ninth Circuit, by contrast, broadly sanctions "*cy pres*-only settlements."[5]

Similarly in tension with the Ninth Circuit standard is the Second Circuit's decision in *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007), which vacated district court approval of a settlement containing a *cy pres* component, directing the district court to ensure that class members "have been compensated for their actual losses" before even considering a *cy pres* award.

The Ninth Circuit's outlier approach to *cy pres* remedies has also pushed its treatment of attorneys' fee

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[5] *See also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 354-55 (3d Cir. 2010) (vacating and remanding approval of a class action settlement involving a *cy pres* award of excess funds because the district court had no factual basis to determine whether a cap on individual awards to class members was reasonable based on class members' likely recovery in litigation).

awards in settlements involving *cy pres* components out of step with other circuits. The decision below upheld a fee award of 25 percent of the settlement fund on the basis that it "hewed closely to that awarded in similar Internet privacy actions," refusing to account for the fact that the settlement provided no direct benefit to class members. App. 22. The Seventh Circuit, by contrast, holds that the "ratio that is relevant" when assessing a fee award "is the ratio of (1) the fee to (2) the fee plus what the class members received." *Pearson*, 772 F.3d at 781 (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014)). That approach excludes settlement funds dissipated through *cy pres* awards from the calculation, and thereby "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class." *Id.* The Third Circuit has similarly recognized a distinction between direct compensation and *cy pres* relief, instructing district courts that, where "counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class," it is "appropriate...to decrease the fee award." *Baby Products*, 708 F.3d at 108. And so has Congress. 28 U.S.C. § 1712(e) (providing that coupons provided to charitable organization as part of settlement "shall not be used to calculate attorneys' fees"). The Ninth Circuit, meanwhile, refuses to recognize any distinction.

In sum, the Court's intervention is necessary to resolve a deep and growing split between the Ninth Circuit and other circuits on the use of *cy pres* remedies in class action settlements that raises serious forum-shopping concerns. This case is an ideal vehicle for it to do so.

II. The Question Presented Is Important and Frequently Recurring

Having long recognized that Rule 23(b)(3) opt-out class actions are an "adventuresome" innovation fraught with potential conflicts, *e.g.*, *Amchem*, 521 U.S. at 614, 625–26, in recent terms the Court has policed abuses of this procedural mechanism to skirt the limitations of substantive law, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), and to undermine class members' rights, *e.g.*, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013). The availability of *cy pres* relief only accentuates these pathologies of the class action procedure by facilitating settlements that provide substantial benefits to defendants and class counsel, at the expense of class members. Not only does this case present the Court with an opportunity to resolve a circuit split with nationwide implications, it would also further the Court's efforts to ensure that the lower courts appropriately enforce the requirements of Rule 23.

A. As the Chief Justice Recognized, *Cy Pres* Settlements Raise "Substantial Concerns"

The unfettered use of *cy pres* awards has been subject to substantial criticism by courts and scholars alike. They have identified at least five specific concerns regarding the type of *cy pres* award upheld in this case.

1. As in this case, *cy pres* awards typically fail to redress class members' alleged injuries. The Seventh Circuit stated the problem plainly: "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi*, 356 F.3d at 784. Yet settlements that do just that are disturbingly routine. For example, a settlement of securities litigation proposed giving shareholder class members' money to a charity that sues banks over foreclosures. *In re Citigroup Sec. Litig.*, 199 F. Supp. 3d 845, 852–53 (S.D.N.Y. 2016). Similarly, a settlement over Pfizer's marketing of the diabetes drug Rezulin donated $2 million to Lubavitch Chabad of Illinois. Ameet Sachdev, Charities Reaping Lawsuit Dividends, Chi. Tribune (Sep. 9, 2007). And, in a settlement of claims that major music labels engaged in unlawful price-fixing, class members received coupons for discounts on further CD purchases, while all settlement funds went to pay attorneys' fees and to make a *cy pres* award to the National Guild of Community Schools of the Arts to develop an arts-related website. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 2:00MD1361-PH, 2005 WL 1923446,

at *3 (D. Me. Aug. 9, 2005). According to the district court, this award actually benefitted class members by promoting the "development of future musical artists." *Id.*

Even worse was a settlement resolving challenges to Google's unauthorized disclosure of its users' email contacts when it launched its "Buzz" social network. Class members—some of whom had suffered disclosures that aided stalkers, jeopardized confidential journalist sources, or hinted at affairs—received no part of the $8.5 million settlement, while class counsel received over $2 million and the remainder was divided among fourteen charities, including the local YMCA and the Brookings Institution—and, by the *sua sponte* order of the district court, a center at a university where the district court judge taught as a visiting professor at its law school.[6] *In re Google Buzz*

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[6] While not present in this case, the problem of *cy pres* being designated for local charities at the expense of a national class is also a persistent one. *Compare Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (rejecting *cy pres* designated for local law schools and remanding for "broader nationwide use"), *with, e.g., Perkins, infra, and In re Easysaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013) ($3 million to local San Diego schools including *alma mater* of counsel for both parties), *rev'd on other grounds*, 599 Fed. App'x. 274 (9th Cir. 2015); *see generally* Sam Yospe, Note, Cy Pres Distributions in Class Action Settlements, 2009 Colum. Bus. L. Rev. 1014, 1030–31; Examination of Litigation Abuse: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. (Mar. 13, 2013) (written testimony of Theodore H. Frank).

Privacy Litig., No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011); Pamela A. MacLean, Competing for Leftovers, California Lawyer (Sept. 2011);[7] *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 687 F. Supp. 2d 1 (D.P.R. 2010) (proceeds from hotel fire litigation paid as *cy pres* to Animal Legal Defense Fund); *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414–15 (S.D.N.Y. 2009) (collecting numerous cases where *cy pres* awards in class action settlements "stray[ed] far from the 'next best use'").

If "funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members," American Law Institute, Principles of The Law of Aggregate Litigation § 3.07 cmt. (b) (2010)—something that would unquestionably be the case had class members pursued individual litigation under the same substantive law—it is at the least troubling that some lower courts claim the discretion to distribute that property to third parties before class members have been compensated and, more generally, to certify classes structured so as to stymie or preclude class members' recovery.

2. *Cy pres* awards drive a wedge between the interests of class counsel and their putative clients. The chief problem is that, when attorneys settle a class action, they are negotiating both their own fees and class recovery. But *cy pres* awards divorce attorneys'

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[7] Available at https://www.dailyjournal.com/articles/264819-competing-for-leftovers.

fees (typically based on the total value of the settlement) from their clients' recovery, "ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." Beisner at 13; *see also Baby Products*, 708 F.3d at 178. As a result, class counsel are financially indifferent as to whether a settlement is structured to compensate their clients or direct settlement proceeds to third parties. Where *cy pres* can be used to facilitate an early settlement, with a full fee award, class counsel have every incentive to sell their putative clients down the river.

Class counsel can take advantage of *cy pres* awards in other ways, also at the expense of class members. For example, class counsel have used *cy pres* awards to fund the development of future litigation and to make sizable donations to their *alma mater*. *See, e.g.*, Ashley Roberts, Law School Gets $5.1 Million to Fund New Center, GW Hatchet, Dec. 3, 2007 (describing $5.1 million *cy pres* award to George Washington University School of Law to create a "Center for Competition Law"); *see also* Andrews Osborne gets $50,000 in Cy Pres funds, The News-Herald (Jun. 3, 2012) (newspaper report identifying law firm as source of *cy pres* award to private boarding school, with picture of attorney handing over an oversized check).[8]

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[8] Available at http://www.news-herald.com/article/HR/20120603/NEWS/306039972.

Arguably, "[b]y disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members." Redish at 650 (citing *Hansberry v. Lee*, 311 U.S. 32, 45–46 (1940), and Fed. R. Civ. P. 23(a)(4) (requiring adequacy of representation)).

3. Defendants, facing no resistance from class counsel, use *cy pres* awards to structure settlements to minimize costs or even benefit themselves. Such awards create the illusion of relief that can "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." Redish at 661.

Google and Facebook, for example, have directed *cy pres* awards in privacy-breach cases to the Electronic Frontier Foundation, a nonprofit that "is often an ally of Google and Facebook when it comes to staving off liability to rights holders over user-generated infringing content" and on other public policy issues. Roger Parloff, Google and Facebook's new tactic in the tech wars, Fortune (Jul. 30, 2012) (noting criticism in *Google Buzz* case that *cy pres* awards were steered to organizations that are currently paid by Google to lobby for or to consult for the company). At the same time, those companies have apparently vetoed awards to privacy-focused nonprofits that they view as "too aggressively devoted to combatting the wrongs that allegedly harmed the class." Parloff, *supra*. And Google, in particular, has been sharply criticized for using its funding decisions to influence the research

and advocacy of nonprofits. *See* Kenneth P. Vogel, Google Critic Ousted From Think Tank Funded by the Tech Giant, N.Y. Times (Aug. 30, 2017).

Even if class action defendants like Google and Facebook ultimately receive no direct benefit from *cy pres* awards, they still are able to take credit for their charity. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (observing that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"); *Dennis v. Kellogg Co.*, 697 F.3d 858, 867–68 (9th Cir. 2012) (noting that *cy pres* awards that overlap with charitable gifts to which the defendant has already committed are a "paper tiger," in terms of deterrence).

And, in some cases, a *cy pres* award may simply redirect money that the defendant would have given to a charity anyway, creating the illusion of relief when all that the settlement changes is the labeling of accounting entries. One *cy pres* recipient here, for example, is the Stanford Center for Internet and Society, to which Google has contributed millions of dollars in donations and whose scholars regularly support Google's positions on a variety of policy issues, including privacy litigation. *See* Jeffrey Toobin, The Solace of Oblivion, The New Yorker (Sep. 29, 2014); John Hechinger and Rebecca Buckman, The Golden Touch of Stanford's President, Wall St. J. (Feb. 25, 2007) ("It might as well be the Google Center.").

4. The Second Circuit has expressed concern that the availability of *cy pres* relief "would have allowed

plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not." *Agent Orange*, 818 F.2d at 185. This, in turn, "would have induced plaintiffs to pursue 'doubtful' class claims for 'astronomical amounts' and thereby 'generate...leverage and pressure on defendants to settle.'" *Id.* (alteration in original) (quoting *Eisen*, 479 F.2d at 1019); *see also Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125, 1129 (9th Cir. 2017) (holding that, because *cy pres* remedies are available, class proponents are not required "to demonstrate that there is administratively feasible way to determine who is in the class"). In this way, *cy pres* incentivizes both the bringing of "strike suits" and their settlement on terms mutually agreeable to class counsel and the defendant. *Cf. Amchem*, 521 U.S. at 620 (stating that the Rule 23 prerequisites "demand undiluted, even heightened, attention in the settlement context").

5. Finally, *cy pres* awards often create the appearance or reality of judicial conflicts of interest. New York University's Samuel Issacharoff, Reporter for ALI's Principles of the Law of Aggregate Litigation, has described *cy pres* relief as "an invitation to wild corruption of the judicial process." Adam Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007. As the *New York Times* has documented, charities are increasingly lobbying judges for a cut of the proceeds in class action settlements. *Id.* And "[a]s part of their effort to secure judicial approval of proposed settlements, the parties often include a *cy pres* award

that benefits a charity with which the judge or his or her family is affiliated." Beisner at 13.

While greasing the wheels of justice, these tactics can create a conflict between the interests of the presiding judge and those of class members, who may be better served by direct compensation or some other mode of relief. *See Klier*, 658 F.3d at 482 (Jones, C.J., concurring) ("[D]istrict courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations."); *Bear, Stearns*, 626 F. Supp. 2d at 415 ("[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety."); *see, e.g., Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788 (M.D. Ga. July 10, 2012) (approving $1.5 million *cy pres* award to the presiding judge's *alma mater*).

Indeed, it is even conceivable that "parties can effectively judge-shop by selecting *cy pres* recipients that would force recusal." Theodore H. Frank, Fraley v. Facebook update, Point of Law (July 12, 2012) (noting district judge recusal for unspecified reasons after parties proposed *cy pres* settlement that named charitable beneficiaries affiliated with judge and her husband);[9] *but see Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (permitting parties to select

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[9] Available at http://www.pointoflaw.com/archives/2012/07/fraley-v-facebook-update.php.

judge's spouse's charity as *cy pres* recipient without requiring recusal).

A more fundamental problem is that an open-ended *cy pres* doctrine is incompatible with the judicial role. "Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and we do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions we or the settlement agreements set." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006). Yet those things are exactly what federal judges are asked to do with increasing frequency.

B. *Cy Pres* Settlements Are Increasingly Prevalent

Given the convenience of *cy pres* awards to defendants and class counsel, it should not be surprising that their use in class action settlements is growing at a rapid clip. A paper surveying *cy pres* awards in federal court cases from 1974 through 2008 reports the following empirical findings:

> First, the prevalence of class action cy pres awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000. Second, since 2000, the majority of class action cy pres awards are associated with cases that were certified solely for the purposes of

> settlement, over one-third of class action cy pres awards are associated with faux class actions, and approximately two-thirds of class action cy pres awards are associated with either settlement or faux class actions. Third, in a quarter of cy pres class actions, the amount and recipient of the cy pres award was determined *ex ante*, or prior to giving absent class members the opportunity to make claims on the fund. Fourth, the average cy pres award was $5.8 million and accounted on average for 30.8% of total compensatory damages.

Redish at 661.

A more recent survey concluded that the use of *cy pres* awards in class action settlements skyrocketed after "the Class Action Fairness Act of 2005 took a hammer to so-called coupon settlements," leaving plaintiffs' attorneys to seek out an alternative means of facilitating quick settlements. Natalie Rodriguez, Era of Mammoth Cases Test Remedy of Last Resort, Law360, May 2, 2017.[10] According to the survey, *cy pres* settlements were at their highest levels ever in 2015 and 2016, the most recent years covered. *Id.*

The question presented by this petition is therefore both important and frequently recurring.

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[10] Available at https://www.law360.com/in-depth/articles/918296.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION

PALOMA GAOS; ANTHONY ITALIANO; GABRIEL PRIYEV, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

MELISSA ANN HOLYOAK; THEODORE H. FRANK,

Objectors-Appellants,

v.

GOOGLE, INC., a Delaware corporation,

Defendant-Appellee.

No. 15-15858

D.C. No. 5:10-cv-04809-EJD

OPINION

App. 2

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted March 13, 2017
San Francisco, California

Filed August 22, 2017

Before: J. Clifford Wallace, M. Margaret McKeown, and Jay S. Bybee, Circuit Judges.

Opinion by Judge McKeown;
Partial Concurrence and Partial Dissent by Judge Wallace

COUNSEL

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OPINION

McKEOWN, Circuit Judge

Google's free Internet search engine ("Google Search") processes more than one billion user-generated search requests every day. This case arises from class action claims that Google violated users' privacy by disclosing their Internet search terms to owners of third-party websites. We consider whether the district court abused its discretion in approving the $8.5 million *cy pres*–only settlement and conclude that it did not.

BACKGROUND

In these consolidated class actions, three Google Search users—Paloma Gaos, Anthony Italiano, and Gabriel Priyev (collectively "plaintiffs")—asserted claims for violation of the Stored Communications Act, 18 U.S.C. § 2701 et seq.; breach of contract; breach of the covenant of good faith and fair dealing; breach of implied contract; and unjust enrichment. The plaintiffs sought statutory and punitive damages and declaratory and injunctive relief for the alleged privacy violations.

The claimed privacy violations are the consequence of the browser architecture. Once users submit search terms to Google Search, it returns a list of relevant websites in a new webpage, the "search results page." Users can then visit any website listed in the search results page by clicking on the provided link.

When a user visits a website via Google Search, that website is allegedly privy to the search terms the user originally submitted to Google Search. This occurs because, for each search results page, Google Search generates a unique "Uniform Resource Locator" ("URL") that includes the user's search terms. In turn, every major desktop and mobile web browser (including Internet Explorer, Firefox, Chrome, and Safari) by default reports the URL of the last webpage that the user viewed before clicking on the link to the current page as part of "referrer header" information. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how "referrer headers" operate).[1]

The genesis of the plaintiffs' complaints is the application of the search protocol, coupled with Google's "Web History" service, which tracks and stores account holders' browsing activity on Google's servers.

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[1] For instance, if a user enters "2016 presidential election" into Google Search and clicks on a link to www.cnn.com/election on the search results page, the "referrer header" would tell CNN that the user found her way there via "http://www.google.com/search?q=2016+presidential+election."

Following mediation, the parties reached a settlement, which they submitted to the district court for preliminary approval in July 2013. The settlement provided that Google would pay a total of $8.5 million and provide information on its website disclosing how users' search terms are shared with third parties, in exchange for a release of the claims of the approximately 129 million people who used Google Search in the United States between October 25, 2006 and April 25, 2014 (the date the class was given notice of the settlement).

Of the $8.5 million settlement fund, approximately $3.2 million was set aside for attorneys' fees, administration costs, and incentive payments to the named plaintiffs. The remaining $5.3 million or so was allocated to six cy pres recipients, each of which would receive anywhere from 15 to 21% of the money, provided that they agreed "to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." The six recipients were AARP, Inc.; the Berkman Center for Internet and Society at Harvard University; Carnegie Mellon University; the Illinois Institute of Technology Chicago-Kent College of Law Center for Information, Society and Policy; the Stanford Center for Internet and Society; and the World Privacy Forum. Each of the recipients submitted a detailed proposal for how the funds would be used to promote Internet privacy.

After a hearing, the district court certified the class for settlement purposes and preliminarily approved the settlement. Notice was given to the class on April 25, 2014, via a website, toll-free telephone number, paid banner ads, and press articles. Thirteen class members opted out of the settlement, and five class members, including Melissa Ann Holyoak and Theodore H. Frank (collectively "Objectors"), filed objections.

Following a final settlement approval hearing at which the district court heard from both the parties and Objectors, the district court granted final approval of the settlement on March 31, 2015. With respect to the objections, the district court found that: (1) a cy pres–only settlement was appropriate because the settlement fund was non-distributable; (2) whether or not the settlement was cy pres–only had no bearing on whether Rule 23(b)(3)'s superiority requirement was met; (3) the cy pres recipients had a substantial nexus to the interests of the class members, and there was no evidence that the parties' preexisting relationships with the recipients factored into the selection process; and (4) the attorneys' fees were commensurate with the benefit to the class. The district court awarded $2.125 million in fees to class counsel and $15,000 in incentive awards to the three named plaintiffs. Objectors appealed.

ANALYSIS

The settlement at issue involves a *cy pres*–only distribution of the $5.3 million or so that remains in the settlement fund after attorneys' fees, administration costs, and incentive awards for the named plaintiffs are accounted for. *Cy pres*, which takes its name from the Norman French expression *cy pres comme possible* (or "as near as possible"), is an equitable doctrine that originated in trusts and estates law as a way to effectuate the testator's intent in making charitable gifts. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). In the class action settlement context, the *cy pres* doctrine permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class. *Id.*

Here, the cy pres recipients were six organizations that have pledged to use the settlement funds to promote the protection of Internet privacy. We review for abuse of discretion the district court's approval of the proposed class action settlement. *Id.* In addition, because the settlement took place before formal class certification, settlement approval requires a "higher standard of fairness." *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)), *cert. denied sub nom. Marek v. Lane*, 134 S. Ct. 8 (2013). Recognizing that, at this early stage of litigation, the district court cannot as effectively monitor for collusion and other abuses, we scrutinize the proceedings to discern whether the court sufficiently "account[ed] for

the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit." *Id.*

I. Appropriateness of the *Cy Pres*–Only Settlement

As an initial matter, we quickly dispose of the argument that the district court erred by approving a *cy pres*–only settlement. Notably, Objectors do not contest the value of the settlement nor do they plead monetary injury. To be sure, *cy pres*–only settlements are considered the exception, not the rule. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (explaining that direct distributions to class members are preferable because "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims," are "the property of the class"); *accord* William B. Rubenstein, Newberg on Class Actions § 12:26 (5th ed. 2017). However, they are appropriate where the settlement fund is "non-distributable" because "the proof of individual claims would be burdensome or distribution of damages costly." *Lane*, 696 F.3d at 819 (quoting *Nachshin*, 663 F.3d at 1038). We have never imposed a categorical ban on a settlement that does not include direct payments to class members.

The district court's finding that the settlement fund was non-distributable accords with our precedent. In *Lane*, we deemed direct monetary payments

"infeasible" where each class member's individual recovery would have been "*de minimis*" because the remaining settlement fund was approximately $6.5 million and there were over 3.6 million class members. *Id.* at 817–18, 820–21. The gap between the fund and a miniscule award is even more dramatic here. The remaining settlement fund was approximately $5.3 million, but there were an estimated 129 million class members, so each class member was entitled to a paltry 4 cents in recovery—a *de minimis* amount if ever there was one. The district court found that the cost of verifying and "sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class."

To begin, the district court found that the amount of the fund was appropriate given the shakiness of the plaintiffs' claims. Objectors do not contend that it would have been feasible to make a 4-cent distribution to every class member. Instead, they ask us to impose a mechanism that would permit a miniscule portion of the class to receive direct payments, eschewing a class settlement that benefits members through programs on privacy and data protection instituted by the *cy pres* recipients. Objectors suggest, for example, that "it is possible to compensate an oversized class with a small settlement fund by random lottery distribution," or by offering "$5 to $10 per claimant" on the assumption that few class members will make claims. Our review of the district court's settlement approval is not predicated simply on whether there may be "possible" alternatives; rather,

we benchmark whether the district court discharged its obligation to assure that the settlement is "fair, adequate, and free from collusion." *Lane*, 696 F.3d at 819 (quoting *Hanlon*, 150 F.3d at 1027). If we took their objections at face value, Objectors would have us jettison the teachings of *Lane*. Objectors would also have us ignore our prior endorsement of *cy pres* awards that go to uses consistent with the nature of the underlying action. *Nachshin*, 663 F.3d at 1039–40.[2]

Likewise, we easily reject Objectors' argument that if the settlement fund *was* non-distributable, then a class action cannot be the superior means of adjudicating this controversy under Rule 23(b)(3). "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (alteration in original) (quoting 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1779 (3d ed. 2005)). Not surprisingly, there is a relationship between the superiority requirement and the appropriateness of a *cy pres*–only settlement.

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[2] It bears noting, of course, that district courts are not precluded from approving other distribution methods that might benefit the class more directly under certain circumstances. However, the fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them. *See Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) (per curiam) (holding that "[t]he abuse of discretion standard requires us to uphold a district court determination that falls within a broad range of permissible conclusions").

The two concepts are not mutually exclusive, since "[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Id.* The district court did not abuse its discretion in finding the superiority requirement was met because the litigation would otherwise be economically infeasible. This finding dovetails with the rationale for the *cy pres*–only settlement.[3]

II. The *Cy Pres* Recipients

We now turn to the crux of this appeal: whether approval of the settlement was an abuse of discretion due to claimed relationships between counsel or the parties and some of the *cy pres* recipients. We have long recognized that the *cy pres* doctrine, when "unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries[,] poses many nascent dangers to the fairness of the distribution process," because the selection process may then "answer to the

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[3] Objectors point to *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974), as an example of a case where we found the superiority requirement not met because "the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members." But *In re Hotel* did not involve a *cy pres* distribution or even a settlement. *See id.* Instead, we held that a class action was not the superior means of resolving the controversy because the class members' antitrust claims involved a "great variety" of individualized determinations. *Id.* at 90–91; *see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305–06 (9th Cir. 1990) (distinguishing *In re Hotel* on the basis that the case raised concerns regarding "individual proof of damages").

whims and self interests of the parties, their counsel, or the court." *Nachshin*, 663 F.3d at 1038–39; *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308–39 (9th Cir. 1990). Due to these dangers, we require *cy pres* awards to meet a "nexus" requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members. *Nachshin*, 663 F.3d at 1039.

Objectors suggest that the district court rubberstamped the settlement, by "simply h[olding] that the Ninth Circuit and district courts have approved other all–*cy–pres* settlements and class members effectively had no right to complain about the parties' choice of compromise." That characterization is unfair and untrue. And oddly, despite this claim, Objectors do not dispute that the nexus requirement is satisfied here.

The district court found that the six *cy pres* recipients are "established organizations," that they were selected because they are "independent," have a nationwide reach and "a record of promoting privacy protection on the Internet," and "are capable of using the funds to educate the class about online privacy risks." Although the district court expressed some disappointment that the recipients were the "usual suspects," it recognized that "failure to diversify the list of distributees is not a basis to reject the settlement . . . when the proposed recipients otherwise qualify under the applicable standard." Accordingly, the district court appropriately found that the *cy pres* distribution

addressed the objectives of the Stored Communications Act and furthered the interests of the class members. Previous *cy pres* distributions rest on this same understanding of the nexus requirement. *See, e.g.*, *Dennis*, 697 F.3d at 866–67 (no nexus between false advertising claims relating to the nutritional value of Frosted Mini-Wheats® and charities providing food for the indigent); *Lane*, 696 F.3d at 817, 820–22 (nexus between Facebook privacy claims and charity giving grants promoting online privacy and security); *Nachshin*, 663 F.3d at 1039–41 (no nexus between breach of privacy, unjust enrichment, and breach of contract claims relating to AOL's provision of commercial e-mail services and the Legal Aid Foundation of Los Angeles, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center Foundation); *Six (6) Mexican Workers*, 904 F.2d at 1307–09 (no nexus between Farm Labor Contractor Registration Act claims and foundation operating human assistance projects in areas where plaintiffs resided).

Nonetheless, Objectors take issue with the choice of *cy pres* recipients because Google has in the past donated to at least some of the *cy pres* recipients, three of the *cy pres* recipients previously received Google settlement funds, and three of the *cy pres* recipients are organizations housed at class counsel's *alma maters*. *See In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011). The Objectors point to a comment from the American Law Institute's ("ALI") Principles of the

Law of Aggregate Litigation which suggests that "[a] *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." Principles of the Law of Aggregate Litig. § 3.07 cmt. b (Am. Law Inst. 2010) (emphasis added).[4]

The benchmark for "significant prior affiliation" is left undefined. *Id.* Of course it makes sense that the district court should examine any claimed relationship between the *cy pres* recipient and the parties or their counsel. But a prior relationship or connection between the two, without more, is not an absolute disqualifier. Rather, a number of factors, such as the nature of the relationship, the timing and recency of the relationship, the significance of dealings between the recipient and the party or counsel, the circumstances of the selection process, and the merits of the recipient play into the analysis. The district court explicitly or implicitly addressed this range of considerations.

We do not need to explore the contours of the "significant prior affiliation" comment because in the context of this settlement, the claimed relationships do not "raise substantial questions about whether the selection of the recipient was made on the merits." *See*

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[4] This statement is found in a comment that is unsupported by any illustration, case law, or other authority. *Id.* § 3.07 cmt. b.

id. § 3.07 cmt. b.[5] As a starting premise, Google's role as a party in reviewing the *cy pres* recipients does not cast doubt on the settlement. In *Lane*, we approved a *cy pres*–only settlement in which the distributor of the settlement fund was a newly-created entity run by a three-member board of directors, one of whom was defendant Facebook's Director of Public Policy. 696 F.3d at 817. We rejected the claim that this structure created an "unacceptable conflict of interest," explaining that "[w]e do not require . . . that settling parties select a *cy pres* recipient that the court or class members would find ideal" since "such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process." *Id.* at 820–21. Instead, we recognized that, as the "'offspring of compromise,'" settlement agreements "necessarily reflect the interests of both parties to the settlement." *Id.* at 821 (quoting *Hanlon*, 150 F.3d at 1027). Thus, we concluded that Facebook's ability to have "its say" in the distribution of *cy pres* funds was "the unremarkable result of the parties' give-and-take negotiations" and acceptable so long as the nexus requirement was satisfied. *Id.* at 821–22.

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[5] Other circuits have endorsed § 3.07's preference for direct distribution to class members over the use of *cy pres* awards where practicable. *See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064–65 (8th Cir. 2015); *Klier*, 658 F.3d at 475 n.16. And though we have not adopted § 3.07, we too have expressed a similar preference. *See Nachshin*, 663 F.3d at 1036. However, no circuit has yet adopted § 3.07 comment b's "significant prior affiliation" reference.

Given the burgeoning importance of Internet privacy, it is no surprise that Google has chosen to support the programs and research of recognized academic institutes and nonprofit organizations. Google has donated to hundreds of third-party organizations whose work implicates technology and Internet policy issues, including university research centers, think tanks, advocacy groups, and trade organizations.[6] These earlier donations do not undermine the selection process employed to vet the *cy pres* recipients in this litigation. The district court conducted a "careful[] review" of the recipient's "detailed proposals" and found a "substantial nexus" between the recipients and the interests of the class members. Notably, some of the recipient organizations have challenged Google's Internet privacy policies in the past.[7] Most

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[6] *See Transparency – U.S. Public Policy – Google*, Google.com, https://www.google.com/publicpolicy/transparency.html (last visited July 21, 2017) (listing third-party organizations Google has supported in the past).

[7] At least one of the recipients, World Privacy Forum, has publicly criticized Google's lack of transparency regarding its privacy policies. *See* Joseph Menn, *Privacy Advocates Target Google*, L.A. Times (June 4, 2008), http://articles.latimes.com/2008/jun/04/business/fi-google4. And a complaint filed by the World Privacy Forum and a Stanford Center for Internet and Society study played a key role in the $17 million fine Google paid to the Federal Trade Commission for circumventing user's privacy choices in Apple's Safari Internet browser. *See* Kukil Bora, *FTC Appears Ready to Fine Google Millions Over Apple Safari Privacy Breach*, Int'l Bus. Times (May 5, 2012), http://www.ibtimes.com/ftc-appears-ready-fine-google-millions-over-apple-safari-privacy-breach-report-696537; Claire

importantly, there was transparency in this process, with the proposed recipients disclosing donations received from Google. Each recipient's *cy pres* proposal identified the scope of Google's previous contributions to that organization, and, unlike in *Lane*, explained how the *cy pres* funds were distinct from Google's general donations. *See Dennis*, 697 F.3d at 867–68 (casting doubt on the value of *cy pres* funds that a defendant "has already obligated itself to donate"). Citing *Lane*, the district court found that "[t]he chosen recipients and their respective proposals are sufficiently related so as to warrant approval; they do not have to be the recipients that objectors or the court consider ideal."

The objection that three of the *cy pres* recipients had previously received *cy pres* funds from Google does not impugn the settlement without something more, such as fraud or collusion. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). That "something more" is missing here. Indeed, the proposition that *cy pres* funds should not be awarded to previous recipients would be in some tension with our nexus requirements. As we have recognized, it is often beneficial for a *cy pres* recipient to have a "'substantial

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Cain Miller, *Google to Pay $17 Million to Settle Privacy Case*, N.Y. Times (Nov. 18, 2013), http://www.nytimes.com/2013/11/19/technology/google-to-pay-17-million-to-settle-privacy-case.html; Elinor Mills, *Privacy Brouhaha Reveals Google's Split Personality*, CNET (Feb. 17, 2012), http://www.cnet.com/news/privacy-brouhaha-reveals-googles-split-personality/. Both organizations are *cy pres* recipients here.

record of service,'" because such a record inspires confidence that the recipient will use the funds to the benefit of class members. *See Dennis*, 697 F.3d at 865 (quoting *Six (6) Mexican Workers*, 904 F.2d at 1308); *Lane*, 696 F.3d at 822. But in emerging areas such as Internet and data privacy, expertise in the subject matter may limit the universe of qualified organizations that can meet the strong nexus requirements we impose upon *cy pres* recipients. Given that, over time, major players such as Google may be involved in more than one *cy pres* settlement, it is not an abuse of discretion for a court to bless a strong nexus between the *cy pres* recipient and the interests of the class over a desire to diversify the pick via novel beneficiaries that are less relevant or less qualified. *See Nachshin*, 663 F.3d at 1040 (considering whether the *cy pres* distribution "provide[s] reasonable certainty that any member will be benefitted").

Finally, we reject the proposition that the link between the *cy pres* recipients and class counsel's *alma maters* raises a significant question about whether the recipients were selected on the merits. There may be occasions where the nature of the alumni connections between the parties and the recipients could cast doubt on the propriety of the selection process. But here, we have nothing more than a barebones allegation that class counsel graduated from schools that house the Internet research centers that will receive funds.

The claim that counsel's receipt of a degree from one of these schools taints the settlement can't be entertained with a straight face. Each of these schools graduates thousands of students each year. Objectors have never disputed that class counsel have no ongoing or recent relationships with their *alma maters* and have no affiliations with the specific research centers. Nor did the district court simply accept this concession or put the burden on the Objectors. The district court appropriately considered the substance of the objections and explained why those challenges did not undermine the overall fairness of the settlement. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995). The court affirmatively analyzed the issue and was cognizant of the claim of a potential conflict. All class counsel swore that they have no affiliations with the specific research centers. Class counsel repeated that attestation at the final settlement approval hearing and added that they sit on no boards for any of the proposed recipients. As one class counsel put it, "I simply got my law degree [at Harvard], and that's simply the end of it."[8] The recipients are well-recognized centers focusing on the Internet and data privacy, and the district court conducted a "careful[] review" of the recipients' "detailed proposals" and found a "substantial nexus" between the recipients

[8] The dissent's suggestion that what is needed is a hearing with sworn testimony seems superfluous in view of the extensive hearing held by the district court, the specific queries to counsel about the *cy pres* recipients, and the submission of sworn declarations.

and the interests of the class members.[9] No one suggested that any of the centers acted with any impropriety, and the Objectors provided no alternative suggestions for other law schools with more qualified centers or institutes. The district court found "no indication that counsel's allegiance to a particular alma mater factored into the selection process," particularly since the identity of the recipients "was a negotiated term included in the Settlement Agreement and therefore not chosen solely by . . . alumni." Thus, the district court gave a "sufficient[ly] reasoned" response

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[9] The dissent challenges the inclusion of the Chicago-Kent College of Law Center for Information, Society and Policy ("CISP") as a recipient, noting that the center was only inaugurated in 2012. *See* CHICAGO-KENT MAG., Summer 2012, at 8, *available at* https://issuu.com/chicagokentlaw/docs/chicago-kent-magazine-2012. This judicial second-guessing does not bear scrutiny, particularly in a field that is developing quickly and where the record reveals a different story. CISP's *cy pres* proposal, which outlines a "privacy preparedness" project that would develop interactive materials to educate the public about ways to protect their Internet and data privacy, notes that the five faculty involved in the proposed project are respected leaders in the field of Internet and privacy law, that CISP has received other *cy pres* awards and grants, and that CISP has hosted five conferences on Internet and data privacy issues that have attracted hundreds of attendees and trained over a hundred journalists on data privacy. In addition, CISP conducts research in such areas as data aggregation, social networks and health information, and children and internet privacy; engages in policy advocacy, community outreach, and public education; and holds seminars on Internet and data privacy issues for law students. *See Center for Information, Society and Policy*, Kentlaw.iit.edu, https://www.kentlaw.iit.edu/institutes-centers/center-for-information-society-and-policy (last visited July 24, 2017).

to the objections as to the claimed preexisting relationships. *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 377. We can hardly say that the alumni connections cloud the fairness of the settlement.

As an overarching matter, nothing in this record "raise[s] substantial questions about whether the selection of the recipient was made on the merits." *See* Principles of the Law of Aggregate Litig. § 3.07 cmt. b. We do not suggest, however, that a party's prior relationship with a *cy pres* recipient could not be a stumbling block to approval of a settlement. *Cf. Marek*, 134 S. Ct. at 9 (mem.) (statement of Roberts, C.J., respecting the denial of certiorari) (recognizing that given the "fundamental concerns surrounding" *cy pres* awards and their increasing prevalence, the Court "may need to clarify the limits on the use of such remedies" in the future). We hold merely that, under the circumstances here, the district court did not abuse its discretion in approving the *cy pres* recipients.

III. Attorneys' Fees

Turning to the issue of attorneys' fees, the district court did not abuse its discretion by approving $2.125 million in fees and $21,643.16 in costs. As an initial matter, there is no support for Objectors' view that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*–only. *See generally Lane*, 696 F.3d at 818 (acknowledging a 25% fee award that also involved a *cy pres*–only settlement).

Rather, the question is whether the amount of attorneys' fees was reasonable. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

In a settlement that produces a common fund for the benefit of the entire class, a court has discretion to employ either the "percentage-of-recovery" method or the "lodestar" method to calculate appropriate attorneys' fees, so long as its discretion is exercised so as to achieve a reasonable result. *See id.* at 942. Here, the district court found that the requested fees were appropriate under either metric.

Under the percentage-of-recovery method, the requested fee was equal to 25% of the settlement fund. According to the district court, this percentage was commensurate with the risk posed by the action and the time and skill required to secure a successful result for the class, given that class counsel faced three motions to dismiss and participated in extensive settlement negotiations. The district court also found that this percentage hewed closely to that awarded in similar Internet privacy actions. *See, e.g., In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *9–10 (N.D. Cal. Mar. 18, 2013); *see also In re Bluetooth*, 654 F.3d at 942 (noting that 25% is our "benchmark" for a reasonable fee award).

Although not required to do so, the district court took an extra step, cross-checking this result by using the lodestar method. *See In re Bluetooth*, 654 F.3d at

941–44 (checking the district court's percentage-of-recovery fees calculation against the lodestar method, which is "calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation . . . by a reasonable hourly rate for the region and the experience of the lawyer"). The district court found that class counsel provided sufficient support for its lodestar calculation that fees totaled $2,126,517.25.

AFFIRMED.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I concur in Sections I and III of the majority opinion. I agree that a *cy pres*-only settlement was appropriate in this case and do not contend that the district court abused its discretion in calculating class counsel's fees.

I dissent, however, from Section II of the opinion, in which the majority blesses the district court's approval of the settlement, despite the preexisting relationships between class counsel and the *cy pres* recipients. To me, the fact alone that 47% of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further in a case such as

this. The district court made no serious inquiry to alleviate that concern. Accordingly, I would vacate the district court's approval of the class settlement, and remand with instructions to hold an evidentiary hearing, examine class counsel under oath, and determine whether class counsel's prior affiliation with the *cy pres* recipients played *any* role in their selection as beneficiaries.

I.

As the majority opinion outlines, plaintiffs in this case alleged that Google violated class members' privacy rights by disclosing personal information (such as search terms) to unauthorized third parties. Google's practice allegedly violated the federal Stored Communications Act, along with various state laws. After several rounds at the motion to dismiss stage, the parties agreed to a class-wide settlement (before formal class certification by the district court). The parties estimated the size of the class to be 129 million people.

The settlement contained the following key terms: (1) Google agreed to pay $8.5 million into a settlement fund; (2) Google would provide notice of the settlement on its website; (3) each class representative would receive $5,000, claims administration costs would be $1 million, and attorney's fees would be $2.125 million (25% of the settlement fund); and (4) the remainder of the settlement fund (about $5 million) would go to six *cy pres* recipients. The six *cy pres*

recipients were to be Carnegie Mellon University (21% of the remainder), the World Privacy Forum (17%), Chicago-Kent College of Law Center for Information, Society and Policy (16%), the Stanford Center for Internet and Society (16%), the Berkman Center for Internet and Society at Harvard University (15%), and that the AARP Foundation (15%).

II.

We review a district court's approval of a class action settlement for an abuse of discretion. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). Here, however, the parties reached the settlement before the class certification stage. "Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

As stated above, three of the *cy pres* distribution payments in our case are to Chicago-Kent College of Law (16%), Stanford (16%), and Harvard (15%). Attorneys for the class attended all three of these institutions. We, along with other courts and observers, have pointed out the unseemly occurrence of *cy pres* funds being doled out to interested parties' alma maters. *See, e.g., Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011); *Securities & Exchange Comm'n*

v. Bear, Stearns & Co., Inc., 626 F.Supp.2d 402, 414–16 (S.D.N.Y. 2009); Adam Liptak, *Doling out Other People's Money*, N.Y. Times, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like").

In response to this all-too-common development, the American Law Institute has set forth, in its Principles of the Law of Aggregate Litigation, that "[a] *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." American Law Institute (ALI), Principles of the Law of Aggregate Litigation § 3.07 comment b (2010) (emphasis added). Although the majority tells us correctly that no circuit has adopted the specific "prior affiliation" language, circuits have endorsed § 3.07's guidance regarding scrutinizing *cy pres* disbursements. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064–65 (8th Cir. 2015) (vacating a *cy pres* settlement because "class counsel and the district court entirely ignored this now-published ALI authority"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (quoting ALI § 3.07, comment a (2010)); *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012) (citing to ALI § 3.07 and asserting that "[c]ourts have generally agreed with the ALI Principles").

I conclude that our circuit should adopt the ALI's guidance as set forth in § 3.07. District courts should be required to scrutinize *cy pres* settlements when the proffered recipients of the funds have a "prior affiliation" with counsel, a party, or even the judge, especially when one of those players is a loyal alumni of a *cy pres* recipient. I do not mean to suggest that class counsel's alma mater can never be a *cy pres* beneficiary. Rather, I propose that the burden should be on class counsel to show through sworn testimony, in an on-the-record hearing, that the prior affiliation played *no role* in the negotiations, that other institutions were sincerely considered, and that the participant's alma mater is the proper *cy pres* recipient.

The majority responds to this line of argument by asserting that "here, we have nothing more than a barebones allegation that class counsel graduated from schools that house the Internet research centers that will receive funds." The majority then salutes the district court's conclusion that there is "no indication that counsel's allegiance to a particular alma mater factored into the selection process," and stresses that the *cy pres* recipients were a negotiated term, not chosen solely by alumni. In essence, the majority holds that despite the nascent dangers posed by apportioning *cy pres* funds to the distributing parties' alma maters, the burden is entirely on the objectors to show that the settlement might be tainted.

I disagree fundamentally with this analysis. Our precedent requires that district courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947. In our case, we have a *cy pres*-only settlement. That alone raises a yellow flag. Furthermore, we have a class settlement before formal class certification. That raises another yellow flag. Lastly, we have almost half of the settlement fund, several million dollars, being given to class counsel's alma maters. To me, that raises a red flag. I am especially dubious of the inclusion of the Center for Information, Society and Policy at Chicago-Kent Law School (a law school attended by class counsel), which center appears to have inaugurated only a year before the parties herein agreed to their settlement. Even with these red and yellow flags, under the majority's holding, the burden is still on the objectors to prove more, despite the objectors' lack of access to virtually any relevant evidence that would do so.

I would hold that the combination of a *cy pres*-only award, a pre-certification settlement, and the fact that almost half the *cy pres* fund is going to class counsel's alma maters, is sufficient to shift the burden to the proponents of the settlement to show, on a sworn record, that nothing in the acknowledged relationship was a factor in the ultimate choice. Here, the only sworn-to items in the record on this issue are boiler plate, one-line declarations from class counsel stating

"I have no affiliation" with the subject institutions. While the majority asserts that the district court conducted a "careful review," these terse declarations are the only shred of sworn-to evidence in the record. There was essentially nothing for the district court to review—carefully or not. Although there was some discussion between counsel and the district court during the hearings on the settlement, this was nothing more than unsworn lawyer talk during an oral argument.[1]

I still have many questions surrounding how these universities were chosen, such as: What other institutions were considered? Why were the non-alma mater institutions rejected? What relationship have counsel had with these universities? Have counsel donated funds to their alma maters in the past? Do counsel serve on any alma mater committees or boards? Do counsel's family members? How often do counsel visit their alma maters? There are many questions still lingering that have not been answered under oath. Here, as we have directed before, "the district court should have pressed the parties to substantiate their bald assertions with corroborating evidence." *Id.* at 948.

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[1] I disagree with the majority's assertion that "sworn testimony seems superfluous" because counsel submitted one-line boilerplate declarations and the district court heard some unsworn argument from the lawyers. My experience as a trial judge taught me to be skeptical of unsworn statements from lawyers, especially when it comes to conflict of interest issues. To me, there is a significant difference between sworn and unsworn testimony.

Although I would vacate the parties' settlement, I express no opinion on the definitive fairness of the parties' agreement. It is not the province of appellate judges to "substitute our notions of fairness for those of the district judge." *Officers for Justice v. Civ. Serv. Commission of the City and County of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982) (internal citations omitted). Instead, I would remand the case to the district court for further fact finding in accordance with the concerns I have expressed.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION	Case No. 5:10-cv-04809-EJD **ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING MOTION FOR ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS** Re: Dkt. Nos. 65, 66

This consolidated internet privacy litigation against Defendant Google Inc. ("Google") returns for final approval of a class action settlement. *See* Docket Item No. 65. Representative Plaintiffs Paloma Gaos, Anthony Italiano and Gabriel Priyev ("Plaintiffs") also seek an order approving their request for attorneys fees, costs and incentive awards. *See* Docket Item No. 66.

Federal jurisdiction arises pursuant to 28 U.S.C. § 1331. Having carefully considered the written brief-

ing along with the arguments of counsel at the hearing on this matter, the court has determined the motions should be granted for the reasons explained below.

I. FACTUAL AND PROCEDURAL BACKGROUND

The court previously described the factual allegations underlying this lawsuit and repeats them again here. According to the Consolidated Class Action Complaint ("CCAC"), "searching" is one of the "most basic activities performed in the Internet," and Google's website offers "the most-used search engine in the world." *See* CCAC, Docket Item No. 50, at ¶¶ 15, 16. This case focuses on that proprietary search engine. Plaintiffs allege Google operated its search engine in a manner that violated their Internet privacy rights by disclosing personal information to third parties.

Specifically, Plaintiffs allege that Google's search engine intentionally and by default included the user's search terms in the resulting URL of the search results page. *Id.* at ¶ 56. Thus, when a user of Google's search engine clicked on a link from the search results page, the owner of the website subject to the click receives the user's search terms in the "referrer header" from Google. *Id.* at ¶ 57. This information is then disseminated further, since several web analytics services parse search query information from web server logs, or otherwise collect the search query from the

referrer header transmitted by each user's web browser. *Id.* at ¶ 58. Indeed, Google's own analytics product provides webmasters with this information in the aggregate. *Id.*

According to Plaintiffs, the problem with Google's disclosure of users' search information to the third parties is that the referrer header - which displays the user's search terms - can sometimes contain certain personal information often subject to search queries, including "users' real names, street addresses, phone numbers, credit card numbers, social security numbers, financial account numbers and more, all of which increases the risk of identity theft." *Id.* at ¶ 3. "User search queries can also contain highly-personal and sensitive issues, such as confidential medical information, racial or ethnic origins, political or religious beliefs or sexuality, which are often tied to the user's personal information. *Id.* at ¶ 3.

Based on these allegations, Plaintiffs assert the following causes of action against Google: (1) violation of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) breach of implied contract; (5) unjust enrichment; and (6) declaratory and injunctive relief.

Gaos initiated an action in this court on October 25, 2010, and Priyev filed an action on February 29, 2012, in the Northern District of Illinois. On April 30,

2013, the cases were consolidated after the Priyev action was transferred to this court. On March 26, 2014, the court granted the parties motion for preliminary approval of the settlement, certified a settlement class and appointed counsel. These motions were filed upon completion of the notice plan.

The court received four written objections to the settlement from Kim Morrison, David Weiner, Melissa Holyoak, Theodore H. Frank, and Cameron Jan. A hearing addressing final approval was held on August 29, 2014.

II. LEGAL STANDARD

A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties to a putative class action reach a settlement agreement prior to class certification, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

"Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage,

the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Having already completed an preliminary examination of the agreement, the court reviews it again, mindful that the law favors the compromise and settlement of class action suits. *See, e.g.*, *Churchill Village, LLC. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Ultimately, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof." *Hanlon*, 150 F.3d at 1026.

III. DISCUSSION

A. Continuing Certification of Settlement Class

This analysis begins with an examination of whether class treatment remains appropriate. The court found at the preliminary approval stage that Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequate protection by the named representatives were satisfied. As to those issues, Plaintiffs anticipated a class comprised of approximately 129 million individuals who all share a common injury. The existence of this injury for each class

member could be determined by resolving one question: whether Google's system-wide practice and policy of storage and disclosure of their search query information was unlawful. Plaintiffs' claims were also typical, if not identical, to that of other class members. For that reason, there was no indication that Plaintiffs' interest would conflict with that of the class, and Plaintiffs and their counsel had proven a desire to vigorously pursue class claims as evidenced by prior motion practice.

As to Rule 23(b), the court found that common questions predominate and that the class action mechanism was a superior process for this litigation. The alternatives to class certification - millions of separate, individual and time-consuming proceedings or a complete abandonment of claims by a majority of class members - were not preferable. Moreover, class treatment was appropriate because Defendant's policy was directed at all of its users as whole rather than at particular users of its search engine. Since an adequate showing was made as to all of the Rule 23 factors, the court conditionally certified the class for settlement purposes.

The filings related to this motion do not compel an alteration to the prior findings under Rule 23. Although Objectors Frank and Holyoak argue the class should be decertified unless the class members receive direct payments from the settlement fund, such an argument is unpersuasive under these circum-

stances. Frank and Holyoak appear to generally contend that the only acceptable benefit is some form of monetary compensation. If it is too costly to distribute settlement funds to class members, then Frank and Holyoak believe the class action mechanism is an inferior method of resolution under Rule 23(b).

This argument directed at the superiority element of Rule 23(b) is misplaced. Within the context of a class action settlement, the superiority inquiry focuses on "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. Here, the primary objective of the class action procedure - to enable litigation where it would otherwise be economically infeasible - is achieved in this case. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). As noted, the alternatives to a class action are not preferable since they involve either thousands of individual cases or a complete abandonment of millions of claims. *Hanlon*, 150 F.3d at 1023 (holding that a superiority determination "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution.").

Moreover, a class-wide resolution is not rendered inferior simply because the settlement agreement calls for an indirect rather than a direct benefit to the

class. Assuming the circumstances support it, a settlement calling for a cy pres remedy can be approved. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (recognizing that federal courts frequently use the cy pres doctrine where proof of individual claims would be overly-burdensome or distribution of damages too costly.); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (affirming approval of class action settlement providing for $6.5 million distribution of funds to cy pres recipients where direct monetary payments to class members would be de minimis). This case is distinguishable from the one relied upon by Frank and Holyoak, *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), because, while the Court discussed the issue of de minimis recovery versus extraordinary costs of administration, the possibility of a cy pres distribution in place of direct payments to the class was not considered.

Accordingly, the objection of Frank of Holyoak on this topic is overruled. The class shall remain certified for settlement purposes.

B. Appropriateness of the Notice Plan

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." However, individual notice is not always practical. When that is the case, publication or some similar mechanism can be sufficient to provide notice to the individuals that will be

bound by the class action judgment. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

On the issue of appropriate notice, the court previously recognized the uniqueness of the class asserted in this case, since it could potentially cover most internet users in the United States. On that ground, the court approved the proposed notice plan involving four media channels: (1) internet-based notice using paid banner ads targeted at potential class members (in English and in Spanish on Spanish-language websites); (2) notice via "earned media" or, in other words, through articles in the press; (3) a website decided solely to the settlement (in English and Spanish versions); and (4) a toll-free telephone number where class members can obtain additional information and request a class notice. In addition, the court approved the content and appearance of the class notice and related forms as consistent with Rule 23(c)(2)(B).

The court again finds that the notice plan and class notices are consistent with Rule 23, and that the plan has been fully and properly implemented by the parties and the class administrator.

C. Fairness of the Settlement

The court now reexamines the fairness of the proposed settlement, this time with the benefit of notice having been provided to the class. The settlement agreement contains the following major components:

- Google will pay a total amount of $8.5 million, which will constitute the entirety of the settlement fund. All payments will be made from this fund, including: (1) distributions to cy pres recipients, (2) attorneys fees and costs awards, (3) incentive awards to named plaintiffs, and (4) administration costs, including the costs due to the claims administrator. Funds that remain after all payments are made will not revert to Google.

- Google will maintain information on its website under the "FAQ," "Key Terms," and "Privacy FAQ for Google Web History" webpages which discloses how information concerning users' search queries are shared with third parties. Specifically, the "FAQ" webpage will include an answer to the question "Are my search queries sent to websites when I click on Google Search results?" which notifies users that search terms may be disclosed to the destination webpage in the referrer header. In conjunction, the "Key Terms" webpage will include a definition of "HTTP Referrer," and the "Privacy FAQ for Google Web History" webpage will direct users to the Privacy Policy FAQ for more information on how Google handles search queries generally. Importantly, however, Google is not required to make changes to its homepage, www.google.com, or to practices or functionality of Google Search, Google AdWords, Google Analytics or Google Web History.

- As to particular payments to be made from the settlement fund, Plaintiffs request that each of the three representative plaintiffs receive incentive awards $5,000, and anticipate up to $1 million in claims administration costs. They also request the court approve their counsel's request for $2.125 million in fees and $21,643.16 in costs.

- After all contemplated payments are made from the fund, the balance will be distributed to the cy pres recipients previously approved by the court. To that end, Plaintiffs propose that Carnegie Mellon University receive 21% of the remainder, that the World Privacy Forum receive 17%, that Chicago-Kent College of Law Center for Information, Society and Policy receive 16%, that the Stanford Center for Internet and Society receive 16%, that the Berkman Center for Internet and Society at Harvard University receive 15%, and that the AARP Foundation receive 15%.

To determine whether a class action settlement is fair, adequate and reasonable, the court must balance a series of factors, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experi-

ence and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.*

When, as here, settlement occurs before formal class certification, approval requires a higher standard of fairness in order to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. *Lane*, 696 F.3d at 819.

i. Strength of Plaintiffs' Case

To assess strength of the case, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). There is no "particular formula by which that outcome must be tested," (*Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)), and the district court is not required to render specific findings on the strength of all claims. *Lane*, 696 F.3d at 823. Instead, the court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm Mutual Auto. Ins. Co.*, No. 08-CV-1365-CW, 2010 U.S. Dist. LEXIS 49477, at *24, 2010 WL 1687832 (N.D. Cal. April 22, 2010).

Here, Plaintiffs readily state that the alleged privacy violation underlying all of their claims is novel and was potentially one of first impression in this circuit. Thus, from the outset, there was no guarantee that any claims would survive pre-trial challenges if adversarial litigation had continued. Indeed, by the time the parties reached a settlement, some of the claims were facing a third motion to dismiss and the one claim that had survived the second dismissal motion, the SCA claim, was subsequently invalidated by the Ninth Circuit in a case presenting a similar theory. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1107 (9th Cir. 2014) (rejecting a claim under the SCA based on webpage disclosures in a referrer header).

Plaintiff also faced challenges had the case proceeded to trial. In light of the technology involved, the jury would have been required to review complex technical evidence about the inner-workings of Google's search engine, leaving significant opportunity for misunderstanding. Furthermore, success at trial would not have equated to an ultimate success for the class. This is because the calculation of damages based on a potentially unquantifiable privacy injury would have posed a serious challenge to Plaintiffs in obtaining some type of valuable relief, and any meaningful monetary amount awarded to each class member would have resulted in an astronomical judgment far exceeding the value of Google, given the size of the class. For that reason, the judgment would undoubtedly have been met with a remittitur motion and an appeal.

This factor weighs strongly in favor of the settlement. Without a compromise, there was little guarantee of any benefit to the class without a substantial amount of further litigation.

ii. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

This case was a particularly risky one for counsel because the type of privacy injury asserted by Plaintiffs renders it legally unproven, technically complex and potentially of little value. It also would have been expensive to litigate and try since expert testimony would be necessary to explain the referrer header technology and establish a basis for damages in an untested area.

Moreover, Google's denial of liability means Plaintiffs would continue to face "serious hurdles," including a motion for summary judgment, *Daubert* challenges, and inevitable appeals that would "likely prolong the litigation, and any recovery by class members, for years." *Rodriguez*, 563 F.3d at 966. Because a negotiated resolution provides for a certain recovery in the face of an uncertain legal theory, this factor favors the settlement. *Curtis-Bauer v. Morgan Stanley & Co.*, Inc., No. 06-C-3903 TEH, 2008 U.S. Dist. LEXIS 85028, at *13, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.").

iii. The Risk of Maintaining Class Action Status

Although a class can be certified for settlement purposes, the notion that a district court could decertify a class at any time is an inescapable and weighty risk that weighs in favor of a settlement. *See Rodriguez*, 563 F.3d at 966 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). Here, there is little doubt that Google would have vigorously opposed class certification at every opportunity before the district and appellate courts. In addition, the sheer size of the class - essentially covering all persons in the United States who submitted a search query to Google for a period of years - all but invites challenges to class certification based on overbreadth or management difficulties, some of which could be considered meritorious. Thus, the very real risk of never obtaining or losing class status in the absence of settlement weighs in favor of approval.

iv. The Amount Offered in Settlement

This settlement has a monetary component requiring Google to pay $8.5 million into a common fund and an injunctive component obligating certain disclosures on the Google website. After court-approved payments, the remainder of the fund will be distributed to identified cy pres recipients in proportions designated by Plaintiffs' counsel.

In support of final approval, Plaintiffs point out that the amount of the agreed-upon settlement fund

compares favorably to that of other similar class actions. *See, e.g., In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *3-4 (N.D. Cal. June 2, 2011) (approving $8.5 million settlement fund for unauthorized disclosure of email contact lists; *Lane*, 696 F.3d at 818 (approving $9.5 million settlement fund for unauthorized disclosure of online behavior); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 372862013, at *16-18, WL 1120801 (N.D. Cal. March 18, 2013) (approving $ 9 million settlement fund for unauthorized storage of personal information). This comparison is instructive because, like those cases, the potential value of this case far exceeds that of the settlement fund. But also like those cases, a theoretical value in the trillions of dollars does not preclude approval here since a fund of $8.5 million is significant given the substantial legal obstacles to a recovery through litigation.

Plaintiffs also believe that a distribution of the settlement funds to cy pres recipients is appropriate in this case. Cy pres payments like those proposed for this case can be approved when actual funds are "non-distributable," or "'where the proof of individual claims would be burdensome or distribution of damages costly.'" *Nachshin*, 663 F.3d at 1038 (quoting *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)). But due to a heightened potential for collusion at the expense of absent class members, this form of settlement must be examined to ensure it is the "next best" remedy to direct payments to the class. *See id.*; *see also Lane*, 696 F.3d at

819 (holding that a class settlement should not be approved unless it was evaluated "to account for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit."). A district court should not approve a cy pres distribution "unless it bears a substantial nexus to the interests of the class members" such that it accounts for the nature of the lawsuit, the objectives of the underlying statutes, and the interests of the non-appearing class members. *Lane*, 696 F.3d at 821.

On this issue, the court echoes the comments it made at preliminary approval describing why a cy pres remedy is the "next best" result here. First, the settlement fund, while sizeable, is "non-distributable." Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, review [illegible] then verify. Similarly, the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.

Second, the cy pres distribution accounts for the nature of this suit, meets the objectives of the SCA, and furthers the interests of class members. The recipients are established organizations chosen by Plaintiffs' counsel after considering whether they are independent and free from conflict, have a record of promoting privacy protection on the Internet, reach

and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online privacy risks.[1] Having carefully reviewed the proposals submitted by counsel, the court is satisfied that the proposed cy pres distribution "bears a substantial nexus to the interests of the class

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[1] Some of the proposed cy pres recipients are "usual suspects," or organizations that routinely receive distributions from class action settlements. At the two approval hearings held in this case, the court expressed a concern with using the same list of cy pres recipients in every internet privacy class action and observed that this practice discourages the development of other worthy organizations. This practice also raises questions about the effectiveness of those organizations that have received prior distributions. The court was somewhat surprised at the final list of distributees, since Plaintiffs' counsel suggested the selection process would potentially cast a wider net. *See* Tr. of Proceedings on Aug. 23, 2013, Docket Item No. 57, at p. 14:25-15:4 ("We are raising the bar, and I think raising the bar for all cy pres settlements like this to follow. We're treating the cy pres allocation more like a grant making organization would treat grant - prospective grant recipients.").

Despite this concern, the court recognizes that failure to diversify the list of distributees is not a basis to reject the settlement, particularly when the proposed recipients otherwise qualify under the applicable standard. *See Lane*, 696 F.3d at 820-21 ("We do not require... that settling parties select a cy pres recipient that the court or class members would find ideal ....such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process."). However, if class action counsel truly seeks to raise the bar for cy pres settlements, they should consider contributing to organizations other than the same typical few.

members," as required by the Ninth Circuit. *Id.* at 821.

Aside from the cy pres portion of the settlement, the court must also comment on the fact that Google's allegedly unlawful practice will not change as a result of this case. Instead, Google will be obligated to make certain "agreed-upon disclosures," or changes to certain portions of its website, the purpose of which is to better inform users how their search terms could be disclosed to third parties through a referrer header. It was noted previously that this relief is not the best result when compared to that sought in the CCAC, since the order contemplated by that pleading would have required Google to stop disclosing search queries altogether.

At the same time, a class action settlement does not need to embody the best possible result to be approved. The court's role is not to advocate for any particular relief, but instead to determine whether the settlement terms fall within a reasonable range of possible settlements, giving "proper deference to the private consensual decision of the parties" to reach an agreement rather than to continue litigating. *Hanlon*, 150 F.3d at 1027; *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Considering all of the circumstances which led to a compromise here, the relief obtained for the class falls within a reasonable range of possible settlements since it was entirely possible that nothing would be obtained if the case were to proceed further. Under

the terms of the parties' agreement, and contrary to what the objectors argue, future users of Google's website will receive something from the injunctive relief: the capability to better understand Google's disclosure practices before conducting a search on its website, and the ability to make a better informed choice based on that information.

In sum, this factor favors settlement.

v. The Extent of Discovery Completed and the Stage of the Proceedings

Prior to reaching a settlement, the parties had engaged in extensive document exchange and had fully briefed three motions to dismiss. They also met in person numerous times and engaged an experienced neutral to assist them in reaching a negotiated resolution. The extent of Plaintiffs' counsel factual investigation and the amount of pre-compromise litigation shows they "had a good grasp on the merits of their case before settlement talks began." *Rodriguez*, 563 F.3d at 967. As such, this factor weighs in favor of the settlement.

vi. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Id.* Consequently, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *In re Omnivision Techns., Inc.*, 559

F. Supp. 2d 1036, 1043 (N.D. Cal. 2009) (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Given the extensive experience of Plaintiffs' counsel with complex class action lawsuits of a similar size to the instant case, this factor favors approval of the settlement.

vii. The Presence of a Governmental Participant

The Class Action Fairness Act, or "CAFA," requires that notice of a settlement be given to state and federal officials and provides those officials a window of time to comment. 28 U.S.C. § 1715(b). "Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." *Garner*, 2010 U.S. Dist. LEXIS 49477, at *37. Here, the Class Administrator complied with the CAFA notice requirement on August 8, 2013. No objections from a government official have been received. Thus, this factor favors the settlement.

viii. The Reaction of Class Members

A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval. *See Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the

class presents at least some objective positive commentary as to its fairness."); *see also Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). Here, out of a class of more than 100 million individuals, the Class Administrator received thirteen requests for exclusion and four written objections from five class members. These low rates of exclusion and objection can be characterized as, at most, a favorable reaction by the class, or at least, as an absence of an overwhelming negative reaction. This factor does weigh in favor of approval, albeit without significant force.

In sum, all of the applicable factors weigh in favor of finally approving the settlement.

IV. ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS

When attorneys fees and costs are requested by counsel for the class, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

"Where a settlement produces a common fund for the benefit of the entire class, courts have discretion

to employ either the lodestar method or the percentage-of-recovery method." *Id.* at 942. The former method is routinely used when "the relief sought - and obtained - is often primarily injunctive in nature and thus not easily monetized." *Id.* The figure is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* The court can "adjust [the figure] upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* at 941-42 (internal quotations omitted). "Foremost among these considerations, however, is the benefit obtained for the class." *Id.* at 942.

Under the latter method, the court awards as fees a percentage of the common fund in lieu of the lodestar amount. *Id.* "[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *Id.* Relevant factors to a determination of the percentage ultimately awarded include: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *Tarlecki v. bebe Stores, Inc.*, No. C 05-1777 MHP, 2009

U.S. Dist. LEXIS 102531, at *10, 2009 WL 3720872 (N.D. Cal. Nov. 3, 2009).

"Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *Id.*

A. Percentage of the Fund

Plaintiffs' counsel seek a fee award of $2.125 million, which is equal to 25% of the settlement fund. According to counsel, the combination of monetary distributions and injunctive relief obtained in the settlement is an excellent result for the class because they "work in concert . . . reshape the landscape of Internet privacy protections" and "enact a regime of informed consent for Google Search users, who can now access complete and truthful information about the ways Google handles user search queries before deciding whether to use Google Search, Google Encrypted Search, or a competing search engine."

Plaintiffs' counsel also believe they undertook substantial risk by agreeing to litigate this case on a purely contingent basis given the unsettled legal issues, and, for that reason, spent considerable time and money with no guarantee of payment. In addition, they assert the novel nature of this case coupled with an opponent armed with substantial defenses and resources required sophisticated litigation and negotiation skills. Finally, counsel points out that the award requested is consistent with that awarded in other similar cases.

Having considered the relevant factors, the court agrees with Plaintiffs' counsel that this action posed a substantial risk and required significant time and skill to obtain a result for the class. This case was not one where settlement was easily secured; to the contrary, Plaintiffs' counsel was required to defend their claims against three motions to dismiss. An agreement only materialized after extensive in-person negotiations, first without and then including a professional neutral. Moreover, counsel's request is not disproportionate to the class benefit and is comparable to awards approved in other similar internet privacy class actions, including one previously approved by this court. *See In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 372862013, at *29 (approving benchmark award of $2.25 million). Accordingly, a benchmark fee award of amounting to 25% of the settlement fund is appropriate.

B. Lodestar Comparison

The Ninth Circuit encourages district courts "to guard against an unreasonable result" by cross-checking attorneys fees calculations against a second method. *In re Bluetooth*, 654 F.3d at 944. Since a 25% benchmark award might be reasonable in some cases but arbitrary in cases involving an extremely large settlement fund, the purpose of the comparison is to ensure counsel is not overcompensated. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 103 F.3d 602, 607 (9th Cir. 1997).

Here, Plaintiffs' counsel calculates a lodestar figure of $966,598.75 for 2085.6 billing hours from four law firms, to which they apply a 2.2 multiplier for a total amount of $2,126,517.25. They also seek compensation for total costs of $21,643.16. These amounts are attributable to each firm as follows:

Firm	Fees	Expenses	Total Cost
Aschenbrener Law, P.C.	$321,184.00	$5,844.54	$327,028.54
Nassiri & Jung LLP	$253,776.50	$4,464.95	$258,241.45
Progressive Law Group	$331,967.25	$7,551.27 (+ $22.40)	$339,540.92
Edelson PC	$59,671.00	$3,760.00	$63,431.00
Totals	$966,598.75	$21,643.16	$988,241.91

Among the participating law firms, the hourly rates charged by attorneys range from $300 to $685. The hourly rate for law clerks is $75, and for paralegals is $125. Altogether, the average hourly rate for all work performed is $463.

Plaintiff's counsel has provided sufficient support for its proposed lodestar calculation. The amount of hours and other costs attributed to this case are reasonable in light of the efforts required to litigate and ultimately engage in a lengthy settlement process. In

addition, the hourly rates charged fall within the range of those approved in other similar cases, and the suggested lodestar multiplier of 2.2 is comparable to that previously permitted by other courts in similar internet privacy cases. Accordingly, the lodestar cross-check confirms the reasonableness of the percentage-based calculation.

C. Incentive Awards

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. To determine the appropriateness of incentive awards a district court should use "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation." *Id.* (internal quotation marks omitted).

The Settlement Agreement provides that the named Plaintiffs may receive incentive awards of up to $5,000 each. In this district, that amount is presumptively reasonable. *Jacobs v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, No. C 07-00362 MHP, 2009 U.S. Dist. LEXIS 101586, at *13-14, 2009 WL 3562871 (N.D. Cal. Oct. 27, 2009). Since the named plaintiffs assumed the responsibilities and burdens of acting as representatives in this lawsuit, including

providing documents, verifying allegations, and consulting with counsel, the court finds the incentive awards reasonable in light of the eligibility factors set forth in *Staton*.

V. OBJECTIONS

The court now addresses the points raised in the four written objections, keeping in mind that objectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990).

The objectors have not satisfied this burden. To begin, all four objectors take issue with the cy pres character of this settlement, or with cy pres settlements in general. These arguments overlook both the law of this circuit which permits cy pres settlements such as this one, and the indirect benefit provided by a cy pres settlements. *See Lane*, 696 F.3d at 819. In addition, the court has explained why Plaintiffs made a sufficient showing that the cost of distributing this or really any settlement fund to the class members would be prohibitive.

The objectors similarly argue that the size of the settlement fund is insufficient in comparison to the value of the case, and believe that a fair settlement would have resulted in an end to Google's "unlawful" practices. This contention is misguided, however, because the objectors do not account for the significant and potentially case-ending weakness in the SCA

claim brought about by the Ninth Circuit's decision in *Zynga Privacy Litigation*. In light of this development, whether or not Google's practice of disclosing search queries can actually be characterized as unlawful is questionable. In the end, the parties fashioned a settlement in consideration of the favorable and unfavorable aspects of each side's case. And it is the parties themselves, as opposed to the court or the objectors, who are in the best position to assess whether a settlement "fairly reflects" their "expected outcome in litigation." *In re Pac. Ents. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Just because a settlement could be improved does not mean it is not fair, reasonable or adequate. *Hanlon*, 150 F.3d at 1027. Here, there is no reason to believe the settlement is inadequate when viewed against the diminished strength of the claims.

Objectors also argue that the cy pres recipients are unrelated to the subject matter of this case, and one claims there is a conflict of interest because some of the attorneys representing Plaintiffs attended Harvard University. The court rejects these arguments. The chosen recipients and their respective proposals are sufficiently related so as to warrant approval; they do not have to be the recipients that objectors or the court consider ideal. *Lane*, 696 F.3d at 820-21. Additionally, while the potential for a conflict of interest is noted, there is no indication that counsel's allegiance to a particular alma mater factored into the selection process. Indeed, the identity of potential cy pres recipients was a negotiated term included in the

Settlement Agreement and therefore not chosen solely by Harvard alumni.

Some objections challenge the notice plan or the contents of the notice and describe alternative ways that notice could have been provided to the class. It may be true that other methods of notice exist. But here, the court approved one specific plan that satisfied the standard Rule 23(c)(2)(B) standard. Although the plan did not call for individual notice, that type of notice is not required in all cases. *See Mullane*, 339 U.S. at 315.

Finally, the objectors challenge the provisions of the Settlement Agreement which provide for attorney's fees and incentive awards. The court does not agree that the fees and incentive awards are inconsistent with the value of the class benefit, and notes that the approved amounts are consistent with the relevant Ninth Circuit authority on this topic.

For these reasons, the court is unpersuaded by the objections. They are each overruled.

VI. CONCLUSION AND ORDER

Based on the preceding discussion, the court finds that the terms of the settlement, including the awards of attorneys fees, costs, and incentive awards, is fair, adequate, and reasonable; that it satisfies Federal Rule of Civil Procedure 23(e) and the fairness and adequacy factors; and that it should be approved and implemented.

The Motion for Final Approval (Docket Item No. 65) and the Motion for Attorneys Fees and Costs (Docket Item No. 66) are therefore GRANTED. The Clerk shall close this file upon entry of Judgment.

IT IS SO ORDERED.

Dated: March 31, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PALOMA GAOS, ANTHONY ITALIANO, AND GABRIEL PRIYEV individually and on behalf of others similarly situated, Plaintiffs, v. GOOGLE, INC., a Delaware corporation, Defendant.	CASE No. 5:10-cv-04809-EJD CLASS ACTION ~~[PROPOSED]~~ **FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE** Judge: Edward J. Davila

Pending before the Court is Plaintiffs' Motion for Final Approval of the Class Action Settlement (Dkt. 65) and Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Awards (Dkt. 66). Having reviewed the papers filed in support of the Motion, heard argument of counsel, and good cause appearing therein, Plaintiffs' Motions are hereby GRANTED and it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Any terms and phrases in this Order shall have the same meaning as the Settlement Agreement reached by the Parties.

2. This Court has appropriate subject matter jurisdiction over this action and over all Parties to the Action, including all Settlement Class Members.

3. The Court affirms certification of the Class and gives final approval to the Settlement and finds the Settlement is fair, adequate, and reasonable, and in the best interests of the Class. The Settlement Agreement is the result of arms-length negotiations and was overseen by a neutral mediator. The Class Representatives and Class Counsel appropriately represented the Settlement Class for purposes of entering into and implementing the Settlement. Accordingly, the Settlement Agreement is finally approved in all respects, and the Parties are directed to perform its terms.

4. The Court-approved Notice Plan to the Class was the best practicable under the circumstances and included substantial Internet advertising and a website comprehensively detailing the terms of the Settlement. The Notice Plan was successfully implemented and satisfies the requirements of Due Process and Federal Rule of Civil Procedure 23.

5. The Court finds that the Parties properly and timely notified the appropriate state and federal officials to alert them to the Settlement, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1714 ("CAFA"). The Court reviewed the substance of this notice and accompanying materials and finds that they complied with all necessary CAFA requirements.

6. Subject to the terms and conditions of the Settlement, this Court dismisses the action on the merits and with prejudice.

7. Twelve individuals timely and validly excluded themselves from the Settlement.

8. Plaintiffs and each member of the Class, fully, finally, completely, and forever release, acquit, and discharge Google from any and all claims that were raised in this litigation, as further described in the Settlement Agreement.

9. This release of claims and the Settlement Agreement will be binding on and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and all other Class Members, and their heirs, executors, and administrators, successors, and assigns. All Class Members who have not been properly excluded from the Settlement are hereby permanently barred and enjoined from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on or arising out of the released claims.

10. The Court awards $2,125,000 in fees to Class Counsel and $21,643.16 in expenses for costs incurred.

11. The Court will distribute the awarded fees according to the following formula:

a. 39% of fees awarded to Nassiri & Jung LLP;

b. 39% of fees awarded to Aschenbrener Law, P.C.; and

c. 22% of fees awarded to Progressive Law Group, LLC.

12. Costs and expenses awarded to Class Counsel shall be distributed as follows: Aschenbrener Law is entitled to $5,844.54; Nassiri & Jung is entitled to $4,464.95; and Progressive Law Group is entitled to $7,551.27; Edelson PC is entitled to $3,760.00; and Diemer, Whitman & Cardosi LLP is entitled to $22.40.

13. The Court awards $5,000 to each of the three Class Representatives (Plaintiff Gaos, Plaintiff Italiano, and Plaintiff Priyev) for a total of $15,000 in incentive awards.

14. Defendant shall pay the Fee Award and Incentive Award pursuant to and in the manner provided by in the terms of the Settlement Agreement.

15. The Court directs entry of final judgment based on the Court's finding that there is no just reason for delay of enforcement or appeal of this judgment, notwithstanding the Court's retention of jurisdiction to oversee the implementation and enforcement of the Settlement.

16. Without affecting the finality of this judgment, the Court shall continue to have jurisdiction over (a)

the implementation, enforcement, and administration of the Settlement; (b) the resolution of any disputes concerning class membership or entitlement to benefits under the terms of the Settlement; and (c) all Parties, for the purpose of enforcing and administering the Settlement and this litigation until each act agreed upon amongst the Parties is performed pursuant to the Settlement.

IT IS SO ORDERED.

Dated: April 2, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GOOGLE REFERRER HEADER PRIVACY LITIGATION PALOMA GAOS; et al., Plaintiffs-Appellees, v. MELISSA ANN HOLYOAK; THEODORE H. FRANK, Objectors-Appellants, v. GOOGLE, INC., a Delaware corporation, Defendant-Appellee.	No. 15-15858 D.C. No. 5:10-cv-04809-EJD Northern District of California, San Jose ORDER

Before: WALLACE, McKEOWN, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

Judge McKeown and Judge Bybee vote to deny the petition for rehearing en banc. Judge Wallace recommends granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release ("Agreement") is made by and between Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev (the "Class Representatives" or the "Plaintiffs"), on behalf of themselves and others similarly situated (collectively, the "Class"), on the one hand, and Google Inc. ("Google" or "Defendant," and together with Plaintiffs, the "Parties"), on the other hand. The Parties intend this Agreement to fully, finally, and forever resolve, discharge, and settle the Released Claims (as the term is defined below), subject to the terms and conditions of this Agreement, and subject to final approval of the Court.

WHEREAS, on October 25, 2010, Plaintiff Gaos brought a putative class action against Google in the Northern District of California, captioned *Gaos v. Google Inc.*, Case No. 5-10-CV-04809, that was initially assigned to Chief Judge Ware (the "Gaos Action"), alleging violations of certain federal and state laws;

WHEREAS, following the April 7, 2011 dismissal of that initial complaint, Plaintiff Gaos filed the First Amended Complaint on May 2, 2011, alleging similar claims;

WHEREAS, the case was re-assigned from Chief Judge Ware to Judge Davila;

WHEREAS, following the March 29, 2012 dismissal of the First Amended Complaint's state-law claims for lack of standing, Plaintiff Gaos, together with Plaintiff Italiano (the "Gaos Plaintiffs"), filed the operative Second Amended Complaint ("Gaos Complaint") alleging (i) violations of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*; (ii) breach of contract; (iii) violations of California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200; and (iv) unjust enrichment;

WHEREAS, Google's motion to dismiss the Gaos Complaint is still pending before this Court;

WHEREAS, on February 29, 2012, Plaintiff Priyev brought a putative class action in the United States District Court, Northern District of Illinois, Eastern Division, against Google, formerly captioned *Priyev v. Google Inc.*, Case No. 12-CV-01467 (the "Priyev Action" and, together with the Gaos Action, the "Actions"), alleging violations of certain federal and state laws;

WHEREAS, following Google's April 30, 2012 motion to dismiss the Priyev Action, Plaintiff Priyev twice sought and obtained leave to amend his initial complaint, and on August 10, 2012 filed the operative Second Amended Class Action Complaint ("Priyev Complaint") alleging (i) breach of contract; (ii) breach of contract by breach of covenant of good faith and fair dealing; (iii) breach of contract implied in law; (iv) violations of the Electronic Communications Privacy

Act; (v) violations of California's Unfair Competition Law; and (vi) seeking declaratory judgment and corresponding injunctive relief;

WHEREAS, on August 28, 2012, the Priyev Action was transferred from the Northern District of Illinois to the Northern District of California and is now docketed as Case No. 5-13-00093, and, after Plaintiff Priyev declined consent to assignment to Magistrate Judge Grewal, the case has been assigned to Judge Koh;

WHEREAS, Priyev intends to file a notice of related case to the Gaos Action to seek transfer of the Priyev Action to Judge Davila, and both Google and the Gaos Plaintiffs intend to support the transfer request;

WHEREAS, the Parties engaged in direct negotiations during 2012 in each of the Actions and participated in an all-day mediation before Randall Wulff of Wulff, Quinby & Sochynsky on January 28, 2013;

WHEREAS, Plaintiffs have conducted meaningful investigation and analyzed and evaluated the merits of the claims made to date against Google in the Actions, and the impact of this Agreement on Plaintiffs and the Class, and based upon that analysis and the evaluation of a number of factors, and recognizing the substantial risks of continued litigation, including the possibility that the Actions, if not settled now, might not result in any recovery whatsoever for the Class,

or might result in a recovery that is less favorable to the Class, and that any such recovery would not occur for several years, Plaintiffs are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate, and that this Agreement is in the best interest of the Class; and

WHEREAS, Google has denied and continues to deny each allegation and all charges of wrongdoing or liability of any kind whatsoever asserted or that could have been asserted in the Actions; and

WHEREAS, while Plaintiffs believe these claims possess substantial merit and while Google vigorously disputes such claims, without in any way agreeing as to any fault or liability, the Parties have agreed to enter into this Agreement as an appropriate compromise of the Class claims to put to rest all controversy and to avoid the uncertainty, risk, expense, and burdensome, protracted, and costly litigation that would be involved in prosecuting and defending the Actions;

NOW, THEREFORE, it is hereby agreed by the Parties that, in consideration for the undertakings, promises, and payments set forth in this Agreement and upon the entry by the Court of a Final Order and Judgment approving and directing the implementation of the terms and conditions of this Agreement, the Actions shall be settled and compromised upon the terms and conditions set forth below.

1. DEFINITIONS

Whenever the following capitalized terms are used in this Agreement and in the attached exhibits (in addition to any definitions elsewhere in this Agreement), they shall have the following meanings:

1.1 "Actions" means both the Priyev Action and the Gaos Action, as those terms are defined below.

1.2 "Agreed-Upon Disclosures" means the additional disclosures that Google has agreed to make to its "FAQs" webpage currently located at http://www.google.com/policies/privacy/faq/, the "Key Terms" webpage currently located at http://www.google.com/policies/privacy/key-terms/, and the "Privacy FAQ for Google Web History" web page currently located at https://support.google.com/accounts/bin/answer.py?hl=en&answer=54050, pursuant to Paragraph 3.1.

1.3 "Agreement" means this Settlement Agreement and Release, including all exhibits.

1.4 "Class" means all Persons in the United States who submitted a search query to Google at any time during the period commencing on October 25, 2006, up to and including the date of the Notice of Proposed Class Action Settlement pursuant to the Notice Plan. This term wholly encompasses, but is not limited to, the Classes set forth in Paragraph 72 of the

Priyev Complaint and in Paragraphs 97, 98, and 99 of the Gaos Complaint, respectively.

1.5 "Class Administrator" means a third-party class action settlement administrator to be selected by the Parties' mutual agreement and whose responsibilities will include overseeing and implementing the Notice Plan and managing the dissemination of funds from the Common Fund until all financial obligations under this Agreement have been satisfied and no funds remain in the Common Fund.

1.6 "Class Counsel" means Kassra Nassiri of Nassiri & Jung LLP, Michael Aschenbrener of Aschenbrener Law, P.C., and Ilan Chorowsky of Progressive Law Group, LLC.

1.7 "Class Member" means any person who qualifies under the definition of "Class," excluding: (i) Google, its subsidiaries and affiliates, officers, and directors; (ii) the judge(s) to whom these cases are assigned and any member of the judge's or judges' immediate family; (iii) Persons who have settled with and released Google from individual claims substantially similar to those alleged in the Gaos Complaint and the Priyev Complaint; and (iv) Persons who submit a valid and timely Request for Exclusion pursuant to Paragraph 6.1.

1.8 "Class Representatives" or "Plaintiffs" means named Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev, acting either individually or through Class Counsel.

1.9 "Combined Action" means the action consolidating the Gaos Action and the Priyev Action, as set forth in Paragraph 2.3.

1.10 "Court" means the United States District Court for the Northern District of California.

1.11 "*Cy Pres* Recipients" means any of the following entities (and any other mutually-agreed upon entity) that is approved by the Court for a *cy pres* distribution pursuant to Paragraph 3.3: Berkman Center for Internet and Society (Harvard Law School), Center for Internet and Society (Stanford Law School), MacArthur Foundation, and AARP, Inc.

1.12 "Day" or "days" refers to calendar days.

1.13 "Effective Date" means the first date after a Final Order and Judgment is entered in the Action granting approval to the terms of this Agreement without modification (unless any modification is accepted by all Parties to this Agreement, pursuant to Paragraph 13.3) *and* either of the following events also has occurred (i) the date upon which the time to appeal the Final Order and Judgment expires with no appeal having been filed; or (ii) the date upon which any such appeal of the Final Order and Judgment is

successfully resolved such that, in either case, the Final Order and Judgment approving this Agreement is no longer subject to any challenge on direct appeal.

1.14 "Fee Award" means any attorneys' fees, reimbursement of expenses, and other costs awarded by the Court to Class Counsel.

1.15 "Final Approval Hearing" means the hearing before the Court where (i) the Parties request that the Court approve this Agreement as fair, reasonable, and adequate; (ii) the Parties request that the Court enter its Final Order and Judgment in accordance with this Agreement; and (iii) Class Counsel request approval of their petition for reasonable attorneys' fees and expenses, as well as any requested incentive award to the Class Representatives.

1.16 "Final Order and Judgment" means the order entered by the Court, in a form that is mutually agreeable to the Parties, approving this Agreement as fair, reasonable, adequate, and in the best interest of the Class as a whole, and making such other findings and determinations as the Court deems necessary and appropriate to effectuate the terms of this Agreement, without modifying any terms of this Agreement that either Party deems material.

1.17 "Gaos Action" means *Gaos v. Google Inc.*, No. 5-10-CV-04809, filed on October 25, 2010 in the United States District Court for the Northern District of California.

1.18 "Gaos Complaint" means the Second Amended Complaint filed in the Gaos Action on May 1, 2012 and available on the online docket at ECF No. 39.

1.19 "Google" means Google Inc. and its affiliates, agents, assigns, attorneys, directors, divisions, employees, officers, or other representatives.

1.20 "Google AdWords" means Google's advertising service currently described at http://adwords.google.com.

1.21 "Google Analytics" means Google's web analytics service currently described at http://www.google.com/analytics/.

1.22 "Google Releasees" means Google and any of Google's current or former administrators, affiliates, agents, assigns, attorneys, beneficiaries, branches, contractors, directors, divisions, employee benefit plans, employees, insurers, investors, joint venturers, members, officers, parents, predecessors, related entities, representatives, servants, shareholders, subsidiaries, successors, trustees, units, and all other individuals and entities acting on Google's behalf.

1.23 "Google Search" means the search engine accessible at www.google.com.

1.24 "Google Web History" means a product available to Google account holders, currently described at http://support.google.com/accounts/bin/topic.py?hl=en&topic= 14148.

1.25 "Incentive Award" means any amount awarded by the Court to the Class Representatives for their time and effort in bringing these Actions and for serving as Class Representatives.

1.26 "Notice Plan" means the content of the notice of this Agreement and the agreed upon program by which that notice will be disseminated.

1.27 "Notice of Proposed Class Action Settlement" means the notice as described in the Notice Plan.

1.28 "Opt-Out Deadline" means the deadline for a Class Member to properly submit a Request for Exclusion as set forth in Paragraph 6.1 of this Agreement and in the Preliminary Approval Order and which shall be no more than sixty (60) days from the completion date of the Notice of Proposed Class Action Settlement.

1.29 "Party" means any one of the Plaintiffs or Google, and "Parties" means Plaintiffs and Google.

1.30 "Person" means an individual or legal entity, including an association, or his, her, or its respective successors or assigns.

1.31 "Preliminary Approval Order" means the order issued by this Court (i) granting preliminary approval of this Agreement; (ii) provisionally certifying the Class for settlement purposes; (iii) appointing Plaintiffs as Class Representatives and their counsel as Class Counsel; (iv) approving the form and manner of the Notice Plan and appointing a Class Administrator; (v) approving the proposed *Cy Pres* Recipients; (vi) establishing deadlines for Requests for Exclusion and the filing of objections to the proposed settlement contemplated by this Agreement; (vii) finding that Google has complied with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715; and (viii) scheduling the Final Approval Hearing.

1.32 "Priyev Action" means *Priyev v. Google Inc.*, No. 12-CV-01467, initially filed on February 29, 2012 in the United States District Court for the Northern District of Illinois and now transferred to the United States District Court for the Northern District of California.

1.33 "Priyev Complaint" means the Second Amended Class Action Complaint filed in the Priyev Action on August 10, 2012 and available on the online docket at ECF No. 40.

1.34 "Released Claims" means any and all claims that any Class Member may now or at any time have up to the date of preliminary approval of this Agreement, whether or not known or existing at

the time of this Agreement, arising out of the subject matter giving rise to the claims in the Actions.

1.35 "Releasing Party" means Plaintiffs and all Class Members.

1.36 "Request for Exclusion" means the form attached as Exhibit B to this Agreement which must be completed and returned in the manner and within the time period specified in Paragraph 6.1.

1.37 "Settlement Amount" means the total sum that Google will pay in connection with this Agreement, as described in Paragraph 3.2.

1.38 "Settlement Website" means the third-party website, referred to in Paragraph 5.5, created and maintained by the Class Administrator to provide, among other things, Notice of Proposed Class Action Settlement and containing the operative complaint(s), and neutral information about this Agreement and the Notice of Proposed Class Action Settlement.

2. SETTLEMENT PURPOSES ONLY

2.1 This Agreement is for settlement purposes only, and to the fullest extent permitted by law, neither the fact or content of this Agreement or its attachments, nor any action based on it, shall constitute, be construed as, or be admissible in evidence as an admission of the validity of any claim, of any fact

alleged by Plaintiffs in the Actions or in any other pending or subsequently filed action, or of any wrongdoing, fault, violation of law, or liability of Google. Likewise, neither the fact or content of this Agreement, nor any action based on it, shall constitute, be construed as, or be admissible in evidence as an admission by any of the Parties of the validity or lack thereof of any claim, allegation, or defense asserted in these Actions, the Combined Action, or in any other action.

2.2 Subject to approval by the Court, Google conditionally agrees and consents to certification of the Class for settlement purposes only and within the context of this Agreement only. If this Agreement, for any reason, is not approved or is otherwise terminated, Google reserves the right to assert any and all objections and defenses to certification of a class, and neither this Agreement nor any order or other action relating to this Agreement shall be offered as evidence in support of a motion to certify a class for a purpose other than settlement pursuant to this Agreement.

2.3 The Parties agree that, within ten (10) days of all Parties signing this Agreement, Plaintiffs in the Gaos Action and the Priyev Action will seek to consolidate the Actions into a single Combined Action, with Plaintiffs filing a consolidated complaint to the extent appropriate to encompass the definition of the Class (and not reducing the scope of the substantive allegations from those set forth in the Actions).

3. RELIEF

3.1 Google agrees to make certain Agreed-Upon Disclosures concerning search queries on or before the date of Notice of Proposed Class Action Settlement pursuant to the Notice Plan. These Agreed-Upon Disclosures will appear on Google's "FAQs" webpage currently located at http://www.google.com/policies/privacy/faq/, "Key Terms" webpage currently located at http://www.google.com/policies/privacy/key-terms/, and the "Privacy FAQ for Google Web History" webpage currently located at https://support.google.com/accounts/bin/answer.py?hl=en&answer=54050, as further described in Exhibit A. If a subsequent change to Google's services renders the Agreed-Upon Disclosures inaccurate, Google may make future changes to its disclosures to ensure continued accuracy. Likewise, Google may change the form or placement of the disclosures as part of future changes to its privacy policies, provided that the substance remains substantially the same and that it is incorporated into the applicable terms of service or privacy policy and is reasonably accessible to the user. Google will not be required or requested to make any changes to its homepage www.google.com or to the practices or functionality of Google Search, Google Ad Words, Google Analytics or Google Web History.

3.2 Google agrees to and shall deposit in an interest-bearing bank account designated and controlled by the Class Administrator (the "Common

Fund") the total sum of eight million five hundred thousand dollars ($8,500,000.00) (the "Settlement Amount"). That Settlement Amount will represent the full payment to be made by Google under this Agreement, and the Class Administrator will draw from the Common Fund to cover all obligations with respect to costs related to this Agreement, including the expenses of the Class Administrator, the Notice Plan, payments to *Cy Pres* Recipients, any Incentive Awards, the Fee Award, and any other administrative fees and expenses in connection with this Agreement; provided, however, that the Parties must approve any payments to the Class Administrator. The first installment, of one million dollars ($ 1,000,000.00) shall be deposited within fourteen (14) business days of entry of the Preliminary Approval Order. The remainder shall be deposited within twenty-one (21) days of the Effective Date. If this Agreement is terminated pursuant to Section 11, the Class Administrator shall return all funds to Google within ten (10) days of the termination date; provided, however, that the Class Administrator need not return any funds already spent on notice and on reasonable Class Administrator expenses before the termination date. Other than the Settlement Amount, Google shall have no financial obligations to Plaintiffs, the Class, the *Cy Pres* Recipients, or the Class Administrator under this Agreement.

3.3 The *cy pres* amount will consist of the Settlement Amount, including any accrued interest, and minus any expenses for the Class Administrator, the

Notice Plan, the Fee Award, any Incentive Award, and any other administrative and notice costs or other expenses in connection with this Agreement. As a condition to receiving the payment, each *Cy Pres* Recipient must agree to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet. If any *Cy Pres* Recipient does not agree to these conditions, then its portion will be distributed pro rata to the other identified recipients; if no recipient agrees to the conditions, or if the Court so requires, the Parties shall meet and confer to identify other appropriate recipients. The Class Administrator shall make payments to the *Cy Pres* Recipients within sixty (60) days after the Effective Date.

3.4 Because the *Cy Pres* Recipients will receive the remaining amounts due after all other payment obligations listed in Paragraph 3.2 are met, no portion of the Settlement Amount or interest thereon will revert to Google.

3.5 Under no circumstances will Google have any liability for taxes or the tax expenses of any Person that receives a portion of the Settlement Amount under this Agreement to the extent permitted by applicable law.

4. SUBMISSION FOR PRELIMINARY APPROVAL

4.1 Within the later of thirty (30) days of the execution of this Agreement by both Parties and ten (10) days after an order consolidating the Actions, Class Counsel shall submit this Agreement to the Court and request that the Court enter the Preliminary Approval Order in a form mutually agreed to by all parties.

4.2 Class Counsel will take any acts reasonably necessary to carry out this Settlement Agreement's expressed intent.

5. NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

5.1 The Class Administrator will be allocated up to one million dollars ($1,000,000.00) out of the Settlement Amount to implement a Notice Plan, subject to the Parties' agreement in consultation with the Class Administrator and further subject to Court approval as part of the Preliminary Approval Order and consistent with the requirements of due process. The Parties shall agree to the Notice Plan before submission of this Agreement for preliminary approval. The Notice Plan will not take the form of a bulk email message to Class Members.

5.2 The specific text and content of the Notice Plan and Notice of Proposed Class Action Settlement

will be mutually agreed upon by the Parties, subject to Court approval.

5.3 The Class Administrator will oversee and implement the Notice Plan. Although the Class Administrator may purchase commercial services at standard rates from Google as part of the Notice Plan, Google has no obligation to otherwise facilitate delivery of the Notice of Proposed Class Action Settlement. For example, Google will have no obligation to send bulk email messages to any Person or group of Persons. All costs associated with the Notice Plan and Class Administrator will be paid by Google as part of the overall payment obligation in Paragraph 3.2.

5.4 The Notice Plan will be implemented, and all announcements at least initially posted on the Settlement Website, within thirty (30) days of entry of the Preliminary Approval Order.

5.5 The Settlement Website shall (i) post, without limitation, the operative complaint(s), this Settlement Agreement, and Long Form Notice and Opt-Out Form; (ii) notify Class Members of their rights to object or opt out; (iii) inform Class Members that they should monitor the Settlement Website for developments; and (iv) notify Class Members that no further notice will be provided to them once the Court enters the Final Order and Judgment, other than through updates on the Settlement Website. The Settlement Website will remain active until at least thirty (30)

days after the Final Settlement Date. The Class Administrator will establish an email account and P.O. Box to which Class Members may submit questions regarding the Settlement. The Class Administrator will monitor the email account and P.O. Box and respond promptly to administrative inquiries received from Class Members and may direct substantive inquiries to Class Counsel.

5.6 Within ten (10) days after filing of this Settlement Agreement with the Court, the Class Administrator shall notify the appropriate state and federal officials of this Agreement pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

6. CLASS MEMBERS' RIGHT OF EXCLUSION/INCLUSION

6.1 A Class Member may request exclusion from the Class up until the Opt-Out Deadline. To request exclusion, the Class Member must complete, sign, and mail to the Class Administrator a Request for Exclusion, using the form attached as Exhibit B. The Request for Exclusion must be signed by the Class Member seeking exclusion under penalty of perjury. The Request for Exclusion must be postmarked on or before the Opt-Out Deadline. Any Person who submits a valid and timely Request for Exclusion shall not be entitled to relief under, and shall not be affected by, this Agreement or any relief provided by this Agreement.

6.2 The Parties shall have the right to challenge the timeliness and validity of any Request for Exclusion. The Court shall determine whether any contested exclusion request is valid.

6.3 Within ten (10) days after the Opt-Out Deadline, the Class Administrator will provide the Parties a list of all Persons who opted out by validly requesting exclusion.

7. OBJECTIONS

7.1 Any Class Member who does not submit a valid and timely Request for Exclusion may object to the fairness, reasonableness, or adequacy of this Agreement. Class Members may not seek to exclude themselves from the Class ***and*** submit an objection to this Agreement.

7.2 No later than twenty-one (21) days before the Final Approval Hearing, any Class Member who wishes to object to any aspect of this Agreement must send to the Class Administrator, Class Counsel and Google's counsel, and file with the Court, a written statement of the objection(s). The written statement of the objection(s) must include (i) a detailed statement of the Class Member's objection(s), as well as the specific reasons, if any, for each objection, including any evidence and legal authority the Class Member wishes to bring to the Court's attention and any evidence the Class Member wishes to introduce in support of his/her objection(s); (ii) the Class Member's full

name, address and telephone number; and (iii) information demonstrating that the Class Member is entitled to be included as a member of the Class.

7.3 Class Members may raise an objection either on their own or through an attorney hired at their own expense. If a Class Member hires an attorney other than Class Counsel to represent him or her, the attorney must (i) file a notice of appearance with the Court no later than twenty-one (21) days before the Final Approval Hearing or as the Court otherwise may direct, and (ii) deliver a copy of the notice of appearance on Class Counsel and Google's counsel, no later than twenty-one (21) days before the Final Approval Hearing. Class Members, or their attorneys, intending to make an appearance at any hearing relating to this Agreement, including the Final Approval Hearing, must deliver to Class Counsel and Google's counsel, and file with the Court, no later than twenty-one (21) days before the date of the hearing at which they plan to appear, or as the Court otherwise may direct, a notice of their intention to appear at that hearing.

7.4 Any Class Member who fails to comply with the provisions of the preceding subsections shall waive and forfeit any and all rights he or she may have to appear separately and/or object, and shall be bound by all the terms of this Agreement and by all proceedings, orders, and judgments in the Actions.

8. EXCLUSIVE REMEDY; DISMISSAL OF ACTIONS; JURISDICTION OF COURT

8.1 This Agreement shall be the sole and exclusive remedy for any and all Released Claims. Upon entry of the Final Order and Judgment, each Class Member shall be barred from initiating, asserting, or prosecuting any Released Claims against Google. If any Class Member attempts to prosecute an action in contravention of the Final Order and Judgment and this Agreement, counsel for any of the Parties may forward this Agreement and the Final Order and Judgment to such Class Member and advise him, her, or it of the releases provided pursuant to this Agreement.

8.2 Upon entry of Final Order and Judgment, the Combined Action shall be dismissed with prejudice.

8.3 The Court retains exclusive and continuing jurisdiction over the Combined Action and all Parties and Class Members to interpret and enforce the terms, conditions, and obligations of this Agreement.

9. RELEASES

9.1 Upon entry of the Final Order and Judgment, and regardless of whether any Class Member executes and delivers a written release, each Plaintiff and each Class Member (each of whom is a Releasing

Party) shall be deemed to waive, release and forever discharge Google and the Google Releasees from all Released Claims, whether or not known. Each Releasing Party is deemed to provide the waiver, release and discharge on his, her, or its own behalf, as well as on behalf of any administrators, affiliates, agents, assigns, attorneys, beneficiaries, contractors, dependents, descendants, directors, employees, executors, heirs, insurers, investors, joint venturers, members, officers, parents, predecessors, related entities, representatives, servants, shareholders, subsidiaries, successors, underwriters, units, and anyone else who could bring any Released Claim on his, her, or its behalf or based on a transfer of rights—by law, contract, or otherwise—from any Releasing Party.

9.2 The release described in Paragraph 9.1 is, and shall remain, a full and complete release, notwithstanding the discovery or existence of any additional or different facts or claims existing before the Effective Date. The Releasing Parties shall, by operation of the Final Order and Judgment, expressly waive the provisions of California Civil Code § 1542 (and all other similar provisions of law) to the full extent that these provisions may be applicable to this release. California Civil Code § 1542 provides:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,**

WHICH IF KNOWN TO HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Releasing Parties shall, by operation of the Final Order and Judgment, be deemed to assume the risk that facts additional, different, or contrary to the facts which each believes or understands to exist, may now exist or may be discovered after the release set forth in this Agreement becomes effective, and the Releasing Parties shall, by operation of the Final Order and Judgment, be deemed to have agreed that any such additional, different, or contrary facts shall in no way limit, waive, or reduce the foregoing releases, which shall remain in full force and effect.

9.3 Nothing in this Agreement shall be construed in any way to prejudice or interfere with any Releasing Party's ability to pursue his, her, or its rights under any applicable insurance policies.

10. CLASS COUNSEL FEES AND COSTS AND INCENTIVE AWARDS

10.1 Plaintiffs may apply to the Court seeking a reasonable proportion of the Settlement Amount as payment of any reasonable attorneys' fees and costs ("Fee Award"). The Fee Award will be paid as part of the Settlement Amount specified in Paragraph 3.2. It is not a condition of this Settlement that any particu-

lar amount of attorneys' fees, costs or expenses or incentive awards be approved by the Court, or that such fees, costs, expenses or awards be approved at all. Any order or proceeding relating to the amount of any award of attorneys' fees, costs, or expenses or inventive awards, or any appeal from any order relating thereto, or reversal or modification thereof, shall not operate to modify, terminate or cancel this Settlement Agreement, or affect or delay the finality of the Final Order and Judgment, except that any modification, order or judgment cannot result in Google's overall obligation exceeding the Settlement Amount specified in Paragraph 3.2. The Class Administrator will distribute from the Common Fund any Fee Award approved by the Court within thirty-one (31) days of the Effective Date. The Class Administrator shall wire the amount awarded in the Fee Award to the trust account of Nassiri & Jung LLP, on behalf of all Class Counsel; Nassiri & Jung LLP shall be responsible for distributing the Fee Award among Class Counsel.

10.2 In recognition of Plaintiffs' efforts on behalf of the Class, and subject to Court approval, Class Counsel may apply to the Court for an award for each Plaintiff of up to $5,000 each, as appropriate compensation for their time and effort expended in serving as Class Representatives. The Incentive Award will be paid as part of the Settlement Amount specified in Paragraph 3.2. It shall be paid contemporaneously and in the same manner as any Fee Award, as specified in § 10.1.

10.3 Except as otherwise provided in this section, each Party will bear its own costs, including attorneys' fees, incurred in connection with the Actions.

11. TERMINATION OF THE AGREEMENT

11.1 The performance of this Agreement is expressly contingent upon achieving the Effective Date. This includes both (i) the entry of the Preliminary Approval Order approving this Agreement, including the Notice Plan and the selection of the *Cy Pres* Recipients, and the Final Order and Judgment approving this Agreement and the expiration of all appeal periods and appeal rights without modification to the Final Order and Judgment that any Party deems material. If the Court fails to issue either (i) the Preliminary Approval Order or (ii) the Final Order and Judgment approving this Agreement without modification that any Party deems material following conclusion of the Final Approval Hearing, or if the circumstances in Paragraph 11.2 are met, this Agreement will be deemed terminated.

11.2 If the Final Order and Judgment is vacated, modified in a manner deemed material by any Party, or reversed, in whole or in part, this Agreement will be deemed terminated (except with respect to rulings on any Fee Award), unless all Parties who are adversely affected thereby, in their sole discretion within thirty (30) days of receipt of such ruling, provide written notice through counsel to Class Counsel

and Defendant of their intent to proceed with this Agreement as modified by the Court or on appeal.

11.3 If this Agreement is deemed terminated pursuant to any provision in Paragraph 11, it will have no force or effect whatsoever, shall be null and void, and will not be admissible as evidence for any purpose in any pending or future litigation in any jurisdiction.

12. CONFIDENTIALITY

12.1 Other than responses to inquiries from governmental entities or as necessary to comply with federal and state tax and securities laws, no Party shall initiate any publicity relating to or make any public comment regarding this Agreement until a motion seeking the Preliminary Approval Order is filed with the Court.

12.2 Unless and until all Parties execute this Agreement and present it to the Court in a motion seeking the Preliminary Approval Order, the Parties agree that all terms of this Agreement will remain confidential and subject to Federal Rule of Evidence 408.

13. MISCELLANEOUS PROVISIONS

13.1 Google will provide Plaintiffs with confirmatory discovery no later than thirty (30) days after Preliminary Approval. The confirmatory discovery

shall consist of a declaration from the appropriate Google personnel consisting of an explanation of when search queries are transmitted to third parties via referrer headers, any differences for users signed in to a Google account or using SSL, and when those differences arose.

13.2 This Agreement, including all attached exhibits, shall constitute the entire agreement among the Parties (and covering the Parties and the Class) with regard to the subject matter of this Agreement and shall supersede any previous agreements and understandings between the Parties.

13.3 This Agreement may not be changed, modified or amended except in writing signed by Class Counsel and Google's counsel, subject to Court approval if required.

13.4 Each Party represents and warrants that it enters into this Agreement of his, her, or its own free will. Each Party is relying solely on its own judgment and knowledge and is not relying on any statement or representation made by any other Party or any other Party's agents or attorneys concerning the subject matter, basis, or effect of this Agreement.

13.5 This Agreement has been negotiated at arm's length by Class Counsel and Google's counsel. In the event of any dispute arising out of this Agreement, or in any proceeding to enforce any of the terms of this Agreement, no Party shall be deemed to be the

drafter of this Agreement or of any particular provision or provisions, and no part of this Agreement shall be construed against any Party on the basis of that Party's identity as the drafter of any part of this Agreement.

13.6 The Parties agree to cooperate fully and to take all additional action that may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

13.7 This Agreement shall be binding upon and inure to the benefit of all the Parties and Class Members, and their respective representatives, heirs, successors, and assigns.

13.8 The headings of the sections of this Agreement are included for convenience only and shall not be deemed to constitute part of this Agreement or to affect its construction.

13.9 The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to this Agreement.

13.10 Prior to pursuing relief or submitting any dispute relating to this Agreement or the Actions to the Court, the Parties and Class Counsel agree to mediate the dispute before Randall Wulff of Wulff, Quinby & Sochynsky, located at 1901 Harrison Street, Suite 1420, Oakland, California, 94612.

13.11 All claims arising out of or relating to this Agreement will be litigated exclusively in the federal or state courts of Santa Clara County, California, U.S.A. The Parties (i) irrevocably submit to the personal jurisdiction of; (ii) waive any objection to venue in; and (iii) waive any objection to the convenience of litigating in the above courts in any claim arising out of or related to this Agreement.

13.12 Any notice, instruction, court filing, or other document to be given by any Party to any other Party shall be in writing and delivered personally or sent by registered or certified mail, postage prepaid, or overnight delivery service to the respective representatives identified below or to other recipients as the Court may specify. As of the date of this Agreement, these respective representatives are as follows:

For the Class:

NASSIRI & JUNG LLP
c/o Kassra P. Nassiri
47 Kearny Street, Suite 700
San Francisco, CA 94108

For Google:

MAYER BROWN LLP
c/o Edward D. Johnson
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112

13.13 The Parties agree to work in good faith to effectuate the settlement proposed in this Agreement. This Agreement shall be dissolved and shall be null and void, if the Parties do not execute this Agreement, if the Court does not preliminarily or finally approve this Agreement, or if this Agreement does not become final and effective due to any ruling on any appeals or remand from any appeals. If the Court does not approve this Agreement in its entirety (except as provided in Paragraph 10.1), or if the approval is not upheld in its entirety on any appeals and remand from any appeals, this Agreement cannot be enforced against either Party; in other words, this Agreement's terms are not separable unless otherwise subsequently agreed in writing or except as provided in Paragraph 10.1.

13.14 The Parties each represent and warrant that they have not sold, assigned, transferred, conveyed, subrogated, or otherwise disposed of any claim or demand covered by this Agreement. If a Class Member has sold, assigned, transferred, conveyed, subrogated or otherwise disposed of any claim or demand, the Person that acquired such claim or demand is bound by the terms of this Agreement to the same extent as the Class Member would have been but for the sale, assignment, transfer, conveyance, or other disposition.

13.15 The signatories to this Agreement represent that they have been duly authorized to execute this Agreement on behalf of the Parties they purport

to represent. This Agreement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Dated: March 16, 2013 Plaintiff Paloma Gaos

/s/ Paloma Gaos
Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

Individually and in his representative capacity

Dated: March 15, 2013 NASSIRI & JUNG LLP

/s/ Kassra Nassiri
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano.

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

_____

Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____

Individually and in her representative capacity

Dated: March 15, 2013 Plaintiff Anthony Italiano

/s/ Anthony Italiano
Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____

Individually and in his representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

Kassra Nassiri
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

Individually and in her
representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

Individually and in his
representative capacity

Dated: March 16, 2013 Plaintiff Gabriel Priyev

/s/ Gabriel Priyev
Individually and in his representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

_____
Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____
Individually and in his representative capacity

Dated: March 15, 2013 NASSIRI & JUNG LLP

/s/ Kassra Nassiri
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

_____
Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____

Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

_____

Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____

Individually and in his representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

_____

Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March 15, 2013 ASCHENBRENER LAW, P.C.

/s/ Michael Aschenbrener
Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony Italiano

Dated: March 15, 2013 PROGRESSIVE LAW GROUP, LLC.

/s/ Ilan Chorowsky
Ilan Chorowsky
on behalf of Plaintiff Gabriel Priyev

Dated: March __, 2013 GOOGLE, INC.

Kent Walker
SVP and General Counsel

Dated: March __, 2013 PROGRESSIVE LAW GROUP, LLC.

/s/ Ilan Chorowsky
Ilan Chorowsky
on behalf of Plaintiff Gabriel Priyev

Dated: March 15, 2013 GOOGLE, INC.

/s/ Kent Walker
Kent Walker
SVP and General Counsel

EXHIBIT A TO SETTLEMENT AGREEMENT

1. Content for Disclosure on Google's "FAQ" webpage:

A disclosure in substantially the same content and form as the following shall be included on Google's "FAQ" webpage currently located at https://www.google.com/policies/privacy/faq/:

"Are my search queries sent to websites when I click on Google Search results?

In some cases, yes. When you click on a search result in Google Search, your web browser also may send the Internet address, or URL, of the search results page to the destination webpage as the HTIP Referrer [preceding term will be a hyperlink to the Key Terms page, located at https://www.google.com/intl/en/policies/privacy/key-terms/]. The URL of the search results page will sometimes contain the search query you entered. If you are using SSL Search (Google's encrypted search functionality) or if you are logged in to your Google Account, under most circumstances your search terms will not be sent as part of the URL in the HTTP Referrer. There are some exceptions to this behavior. For example, if you click on an ad appearing on the search results page, your browser will continue to send the search terms in the HTIP Referrer to help advertisers to improve the relevancy of the ads they present to you. More information on SSL Search can be found

here [preceding term will be a hyperlink to: http://suppo1t.google.com/websearch/bin/answer.py?hl=en&answe1= 173733]. Google may provide Google Analytics users with the search query or with the information contained in the HTTP Referrer."

2. Content for Disclosure on Google's "Key Terms" webpage:

A disclosure in substantially the same content and form as the following shall be included on Google's "Key Terms" webpage currently located at https://www.google.com/intl/en/policies/privacy/key-terms/:

"HTTP Referrer"

An HTTP Referrer is information transmitted to a destination webpage by a web browser, typically when you click a link to that webpage. The HTTP Referrer contains the URL of the last webpage the browser visited."

3. Content for Disclosure on Google's "Privacy FAQ for Google Web History" webpage:

A disclosure in substantially the same content and form as the following shall be included on the "Privacy FAQ for Google Web History" webpage currently located at https://support.google.com/accounts/bin/an-

swer.py?hl=en&answet=54050 in a separate paragraph set off from the existing answer to the FAQ: "How do you use the information you collect when I use Google Web History":

"For more information on how Google handles search queries generally, see the Privacy Policy FAQ." [preceding term will be a hyperlink to the Privacy Policy FAQ (available at available at https://www.google.com/policies/privacy/faq/)].

Theodore H. Frank (SBN 196332)
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW
No. 236
Washington, DC 20036
Voice: (703) 203-3848
Email: tfrank@gmail.com

Attorneys for Objectors Melissa Holyoak and Theodore H. Frank

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION	Case No. 5:10-cv-04809-EJD
	OBJECTION OF MELISSA HOLYOAK AND THEODORE H. FRANK
MELISSA HOLYOAK and THEODORE H. FRANK,	Date: August 29, 2014
Objectors.	Time: 9:00 a.m.
	Courtroom: 4
	Judge: Hon. Edward J. Davila

INTRODUCTION

Plaintiffs filed a complaint alleging trillions of dollars in statutory damages on behalf of a class consisting of more than one hundred million people, and then settled it for $8.5 million, of which the class members will see not one penny. Instead, the entire net settlement fund will go third-party "*cy pres*" recipients, even though it would be practicable to allow class members to recover through a claims-made process and/or a sampling lottery method. Moreover, several of the proposed *cy pres* recipients have prior relationships with class counsel or defendants. Preexisting relationships with the defendant undermine the value of the settlement to the class. Preexisting relationships with class counsel qualify as improper conflicts of interest. These defects render the settlement substantively unfair. *See infra* §§ III-IV.

Procedurally, notice to the class is inadequate under this proposed settlement because it fails to directly notify those class members for whom the defendant has contact information, thus depriving them of due process. The settlement makes objecting or opting out of the settlement artificially and needlessly burdensome by requiring paper-mail printouts from a class of internet users. *See infra* §§ VII-VIII.

The proposed settlement structure suggests that class certification is untenable. If in fact distributions to class members are impossible, then a class action

is not superior to other methods of adjudicating the dispute. *See infra* § V.

Finally, in the alternative, if the Court overrules all the above objections, the Rule 23(h) request is excessive and should be reduced. *See infra* § VI.

I. The objectors are members of the class.

Objectors Theodore H. Frank and Melissa Holyoak are United States residents who have submitted at least one search query to Google between October 26, 2006 and the present. *See* Declaration of Theodore H. Frank ¶3; Declaration of Melissa Holyoak ¶3. They are therefore members of the settlement class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5).

Frank's mailing address is 1718 M Street NW, #236, Washington DC 20036, his phone number is (703) 203-3848, and his email address is tfrank@gmail.com. Frank Decl. ¶2. Holyoak's mailing address is 1718 M Street NW, #236, Washington DC 20036, her phone number is (573) 823-5377, and her email address is melissaholyoak@gmail.com. Holyoak Decl. ¶2. Frank represents Holyoak, and himself *in pro per*. As discussed in their contemporaneously-filed Notice of Intent to Appear, Frank plans to attend the fairness hearing in this case, where he wishes to discuss matters raised in this objection. Objectors do not intend to call any witnesses at the fairness hearing,

but reserve the right to make use of all documents entered on to the docket by any settling party or objector. Objectors reserve the right to cross-examine any witnesses who testify at the hearing in support of final approval. Objectors join the objections of any other objectors or *amici* to the extent those objections are not inconsistent with this one.

II. The court has a fiduciary duty to the unnamed members of this class.

A district court must act as a "fiduciary for the class," "with a jealous regard" for the rights and interests of absent class members. *In re Mercury Interactive Corp.*, 618 F.3d 988, 994–95 (9th Cir. 2010) (internal quotation and citation omitted); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 623 (1997) ("Rule 23(e) protects unnamed class members from 'unjust or unfair settlements' agreed to by 'faint-hearted' or self-interested class 'representatives.'")). "Both the class representative and the courts have a duty to protect the interests of absent class members." *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). *Accord Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) ("The district court must ensure that the representative plaintiff fulfills his fiduciary duty toward the absent class members").

There should be no presumption in favor of settlement approval: "[t]he proponents of a settlement bear the burden of proving its fairness." *True v. American Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal.

2010) (*citing* 4 Newberg on Class Actions § 11:42 (4th ed. 2009)). *Accord* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05(c) (2010) ("*ALI Principles*") ("In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.").

"[W]here the court is '[c]onfronted with a request for settlement-only class certification,' the court must look to the factors 'designed to protect absentees.'" *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (*quoting Amchem*, 521 U.S. at 620). "[S]ettlements that take place prior to formal class certification require a higher standard of fairness." *Molski*, 318 F.3d at 953. "[P]re-certification settlement agreements require that we carefully review the entire settlement, paying special attention to 'terms of the agreement contain[ing] convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of the negotiations.'" *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (*quoting Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003)). Where the Court confronts a pre-certification settlement, consideration of the eight *Churchill*[1] factors "alone is not enough to survive appellate review." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

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[1] *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

It is insufficient that the settlement happened to be at "arm's length" without express collusion between the settling parties. Because of the danger of conflicts of interest endemic to class action procedure, third parties must monitor the reasonableness of the settlement as well. *Bluetooth*, 654 F.3d at 948 (*quoting Staton*, 327 F.3d at 960). Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests ... to infect the negotiations." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (quoting *Dennis*, 697 F.3d at 864).

III. The settlement improperly favors third party charities over class members through its *cy pres* provision.

It is a foundational premise that the plaintiff-class itself as a legal entity "is not the client. [Rather,] the class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement." *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 834-35 (9th Cir. 1976).

The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). Imported

to the class action context, it has become an increasingly popular method of distributing settlement funds to non-class third parties. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari) ("*Cy pres* remedies...are a growing feature of class action settlements" that raise "fundamental concerns"); *Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing en banc).

Despite its growing popularity among some members of the class action bar, *cy pres* distributions are non-compensatory, disfavored among both courts and commentators alike, and remain an inferior avenue of last resort. *See e.g., Klier*, 658 F.3d at 475 ("[The *cy pres*] option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly."); *Dennis*, 697 F.3d at 868 (*cy pres* settlement can easily become "a paper tiger"); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) ("[A] growing number of scholars and courts have observed, the *cy pres* doctrine...poses many nascent dangers to the fairness of the distribution process") (citing authorities); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) ("*Cy pres* distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory"); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else."); Martin H. Redish, Peter Julian, & Samantha

Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

One variety of class action *cy pres* is *ex ante cy pres*. It can be defined as an award "that was designated as part of a settlement agreement or judgment where: (1) an amount *and* at least one charity was named as a recipient of part of the fund from the outset and the charity's receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one charity with no attempt to compensate the absent class. Redish et al., *Cy Pres Relief and Pathologies*, 62 FLA. L. REV. 617, 657 n.171. The relief here is a clear example of (2). Settlement Agreement (Dkt. 52-3) § 3. It provides that the entire $8.5 million settlement fund will be disbursed to non-class member charities, with no payments to the vast majority of class members who are not stakeholders in those charities.

As compared with *ex post cy pres*—third-party awards made only after class members fail to cash checks that are distributed—*ex ante cy pres* stands on even shakier footing. *See Molski*, 318 F.3d at 954-55 (rejecting all *cy pres* settlement as inadequate substitute to individual compensation); *Fraley v. Facebook*, No. C 11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at *4-*7 (N.D. Cal. Aug. 17, 2012) ("*Fraley I*") (questioning propriety of an all *cy pres* settlement); *Zapeda v. Paypal*, No. C 10-2500 SBA, 2014 U.S. Dist LEXIS

24388, at *21 (N.D. Cal. Feb. 24, 2014) (expressing concern "that the only persons receiving any funds are persons *other than* class members" and denying settlement approval) (emphasis in original). "This form of *cy pres* stands on the weakest ground because *cy pres* is no longer a last-resort solution for a problem of claims administration. The concern for compensating victims is ignored (at least unless the indirect benefits of the *cy pres* award flow primarily to the victims)." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 770-71 (2013).

Cy pres is improper when it is feasible to make distributions to class members, at least where there is no other compelling reason for preferring non-class members. This "last-resort rule" is a well-recognized principle of law. §3.07(a) of the *ALI Principles* succinctly states the limitation: "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members."[2] The last-resort rule follows from the

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[2] Numerous other courts have also endorsed §3.07 to a greater or lesser degree. *Nachshin*, 663 F.3d at 1039 n.2; *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 689-690 (7th Cir. 2013); *In re Lupron Mktg and Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012); *Klier*, 658 F.3d at 474-75 & nn. 14-16; *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citing draft version); *Baby Prods.*, 708 F.3d at 173 (agreeing in part); *Better v. YRC Worldwide Inc.*, No. 11-cv-2072- KHV, 2013

precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (5th Cir. 2011) (citing *ALI Principles* §3.07 cmt. (b)).

While it may be true that the full statutory damages that would be owed to every class member in the event that plaintiffs were to prevail at trial would be greater than the market capitalization of Google, that is not the relevant question. The relevant question is whether it would be practicable to distribute the available $8.5 million settlement fund to class members through a lottery or claims-made process. The answer is yes. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d. 939 (N.D. Cal. 2013) ("*Fraley II*"). In *Fraley*, the class of Facebook users numbered in the hundreds of millions, and the parties proposed a *cy pres*-only settlement to the court alleging that class distributions "[are] simply not practicable in this case, given the size of the class." *Fraley I.*, 2012 U.S. Dist. LEXIS 116526, at *6. Judge Seeborg refused to accept the proposal because "[m]erely pointing to the infeasibility of dividing up the agreed-to $10 million recovery...is insufficient...to justify resort to purely cy pres payments." 2012 U.S. Dist. LEXIS 116526, at *5. After the court denied approval, the agreement was

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U.S. Dist. LEXIS 163569, at *19-*21 (D. Kan. Nov. 18, 2013) (rejecting settlement for non-compliance with §3.07); *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087 BTM (KSC), 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (same).

then restructured as a claims-made settlement disbursing cash directly to class members. *See Fraley II*. Claimants under the amended agreement were so few in fact that the court would have been able to double the baseline $10 awards and did actually augment the awards by 50%. *Id*. at 944. Here too, the percentage of the 100+ million person class that will submit claims is likely low enough that a claims-made settlement would not be impracticable.

Recently, a well-respected settlement administration company conducted a wide-ranging survey that concluded "settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%)." *Poertner v. The Gillette Co.*, No. 6:12-v-00803-GAP-DAB, Declaration of Deborah McComb re Settlement Claims (Dkt. 156) ¶5. Recent data points reveal that this is true in low-stakes settlements with or without direct notice. *In re Livingsocial Mktg. and Sales Practices Litig.*, 298 F.R.D. 1, 19 (D.D.C. 2013) (0.25% claims rate with direct email notice); *Spillman v. RPM Pizza, LLC*, No. 10-349-BAJ-SCR, 2013 U.S. Dist. LEXIS 72947, at *8 (M.D. La. May 23, 2013) (0.27% claims rate for $15 max claim); *Lagarde v. Support.com, Inc.*, No. 12-0609 JSC, 2013 U.S. Dist. LEXIS 67875, at *7 (N.D. Cal. May 13, 2013) ("[A] mere 1,259 timely claims were submitted for the $10 refund, which represents 0.17% of the total number of class members and 0.18% of the total number of class members who received notice."); *Pearson v. Nbty, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *22 (N.D. Ill. Jan. 3, 2014) (0.25%

claims rate overall where maximum claim was $12 without proof of purchase and $50 with proof of purchase). *Fraley* is the proof; even where a class numbers over one-hundred million, that a claims-made device can be feasible.

Even if it were not possible to distribute $8.5 million through a claims-made process, there is no legitimate reason why the parties should not randomly sample the class and/or accept claims submission, and then make payouts on a lottery basis. *See* Shay Levie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011).

Which alternate method the parties elect is not crucial; what matters is that non-compensatory *cy pres* remains the last resort. As discussed thoroughly in the Third Circuit's *Baby Products* opinion, for individual class members, direct payment matters. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." 708 F.3d at 178; *id.* at 178-79 (counsel has "responsibility to seek an award that adequately prioritizes direct benefit to the class" and fees should reflect that fact). "Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174. If *cy pres* is an excessive share of the total relative to direct class recovery, a district court should consider whether to

> urge the parties to implement a settlement structure that attempts to maintain an appropriate balance between payments to the class and *cy pres* awards. For instance, it could condition approval of a settlement on the inclusion of a mechanism for additional payouts to individual class members if the number of claimants turns out to be insufficient to deplete a significant portion of the total settlement fund.

Id.

Furthermore, it is perhaps the case that some of the *cy pres* recipients are class members. There is no reason to favor those recipients in an uncertified subclass over other class members, and even less reason to favor non-class members over the actual class members.

Where there is a will, there is a way. But class counsel did not negotiate for using the fund to compensate class members, either on a claims-made, lottery, or some combination thereof basis. Rather, in dereliction of their fiduciary obligations, class counsel proposes to give that money away to non-class entities.[3] The bare legitimacy of *cy pres* in the class action

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[3] If it was apathy toward class members or—worse yet—preference for non-class third-parties that drove the decision to prioritize *cy pres* distributions, that casts even further doubt on the

context is controvertible with good reason. *See Klier*, 658 F.3d at 480-82 (Jones J., concurring); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 358 (3d Cir. 2010) (Weis, J., concurring and dissenting); *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (collecting sources); Redish et al., *supra*. Although *cy pres* has been given a narrow berth in the Ninth Circuit, settled law requires that this application of *cy pres* be rejected for the foregoing reasons.

IV. The Court must consider the pre-existing relationships between the cy pres recipients, class counsel and the defendant.

The proposed *cy pres* recipients include institutions with prior relationships with both the defendant and class counsel. "A *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits." *ALI Principles* §3.07 cmt. (b). Where, as here, class counsel are the alumni of several of the *cy pres* recipients, there is the appearance of divided loyalties of class counsel. And where

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adequacy of class representation. *See Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members.").

the defendant is already an established donor to certain of the *cy pres* recipients, there is the significant risk that the value of the settlement will be less beneficial to the class than it would appear.

A. Cy pres beneficiaries should not have a pre-existing relationship with class counsel.

"The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) (internal quotation omitted). "Cy pres distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations." *Dennis*, 858 F.3d at 867.

Yet undisclosed to the class is the fact that two of the three class attorneys who signed the settlement agreement, Kassra Powell Nassiri and Michael Aschenbrener, are alumni of three of the *cy pres* recipients. Settlement 16-17. Nassiri has a master's degree from Stanford and a juris doctorate from Harvard. Nassiri and Jung, LLP, http://njfirm.com/kassra-nassiri/ (last visited July 23, 2014). Aschenbrener received his juris doctorate from the Chicago-Kent College of Law. Aschenbrener Law, http://aschenbrenerlaw.com/michael-aschenbrener/ (last visited July 23, 2014). Harvard, Stanford, and

Chicago-Kent are three of the four proposed university recipients. Preliminary Approval Order (Dkt. 63) ("PAO") at 8. These are not recipients that are "independent and free from conflict." *Id.* at 11 n.7; Motion for Final Approval (Dkt. 65) at 14 n.2.

In *Nachshin*, the Ninth Circuit criticized *alma mater cy pres* distributions, suggesting that such dispensations present exactly the sort of conflicts of interest that are problematic. 663 F.3d at 1039. Other commentators are in accord, specifically identifying the *alma mater* problem as the type of conflict that is objectionable. *E.g.*, George Krueger & Judd Serotta, Op-Ed, *Our Class-Action System is Unconstitutional*, WALL ST. J., Aug. 6, 2008 ("Judges...have occasionally been known to order a distribution to some place like their own alma mater ..."); Adam Liptak, *Doling out Other People's Money*, N.Y. TIMES, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like."). In *Nachshin*, the court cited each of these three sources approvingly. 663 F.3d at 1039, 1039 n.2.

"Courts are wary of distributing cy pres funds to organizations that have a close relationship with class counsel given the appearance of a conflict of interest." *Weeks v. Kellogg Co.*, No. CV-0908102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *69 n.102 (C.D. Cal. Nov. 23, 2011); *see also Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 577 n.2 (E.D.

Pa. 2005) (noting the appearance of impropriety in selecting a beneficiary (the University of Pennsylvania) with long established ties to the Eastern District bench). *Weeks* properly refused to ratify such a conflict. 2011 U.S. Dist. LEXIS 155472, at *70-*71. *Accord In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 U.S. Dist. LEXIS 77739, at *14-*15 (E.D. Pa. Oct. 3, 2008) (rebuffing proposed *cy pres* awards to institutions with preexisting relationships to class counsel); *but see In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1050-51 (S.D. Cal. 2013), *appeal pending* No. 13-55373 (9th Cir.) (overruling objection where one of three university *cy pres* recipients had *alma mater* affiliation with class counsel). This objection may have only scratched the surface; who knows what conflicts lurk deeper? Before the Court approves any award, it should require the parties to certify that the beneficiaries have no ties to the parties or the lawyers. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 1361, 2005 U.S. Dist. LEXIS 11332, at *4 (D. Me. June 10, 2005). This Court should not approve any settlement afflicted by such a conflict of interest.[4]

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[4] An all too rare best practice that mitigates this problem is to poll class members— efficiently done through the settlement website—as to which charities should be designated *cy pres* beneficiaries. *See, e.g., In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1197 (N.D. Cal. 1998) (Walker, J.) ("The fact remains that this money belongs to class members, and it is they who should decide whether and to whom to donate it."); *see generally* Alexandra Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1961-63 (2011) (recommending polling the class as a "modest proposal" to increase class members' voice).

B. Pre-existing relationships between the defendant and the cy pres recipients undermine the value of the settlement.

As the Ninth Circuit has warned, "[t]he issue of the valuation of [the *cy pres*] aspect of a settlement must be examined with great care to eliminate the possibility that it serves only the "self-interests" of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis*, 697 F.3d at 868. Google is already a donor to Berkman Center for Internet and Society at Harvard University; Stanford Center for Internet and Society; AARP; and Chicago-Kent. *See* http://cyber.law.harvard.edu/about/support (last visited July 23, 2014); http://cyberlaw.stanford.edu/about-us (last visited July 23, 2014). http://www.google.com/publicpolicy/transparency.html (AARP) (last visited August 8, 2014); http://www.alumni.kentlaw.edu/s/815/index.aspx?sid=815&gid=1&pgid=773 (last visited August 8, 2014). When the defendant is already a regular contributor to the proposed *cy pres* recipient, there is no demonstrable value added by the defendant's agreement to give money to that institution. *See Dennis*, 697 F.3d at 867-68. Google is agreeing to do something that it was in all likelihood going to do anyway. Such an agreement is of little or no incremental value to the class. *See Reynolds v. Beneficial Nat'l*

Bank, 288 F.3d 277, 286 (7th Cir. 2002) (it is the "*incremental* benefits" that matter, not the "total benefits") (emphasis in original)); *see also In re Hydroxycut Mktg. and Sales Practices Litig.*, No. 09-md-2087 BTM (KSC), 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (rejecting *cy pres* that provided not additional benefit to class members beyond the status quo); American Law Institute, Principles of the Law of Aggregate Litig. § 3.13 (settlement benefit does not include gratuitous inclusion of actions that defendant was conducting pre-settlement). This Court should require additional disclosures from Google, as they are likely to have preexisting relationships with the other two *cy pres* recipients that are not readily publicly available.

Recently, a divided panel of the Ninth Circuit affirmed a *cy pres* distribution over an objector's challenge to the fact that the beneficiary was closely affiliated with the defendant. *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), *rehearing en banc den'd*, 709 F.3d 791 (2013), *cert den'd sub nom* 134 S. Ct. 8 (2013). In that case, however, the objectors argued that there was a per se conflict of interest when the defendant had a pre-existing relationship with a *cy pres* recipient. The rationale by which the *Lane* court sanctioned the *cy pres* award—that the terms of the settlement are "the offspring of compromise" that "necessarily reflect the interest of **both** parties"—has no application to this objection, where the assertion is that Google's promise to give money to organizations to which it was already giving money simply is

not worth the release of individual class members' claims, nor commensurate with the attorneys' fees request. 696 F.3d at 821 (emphasis added).[5] *Cf. Webb v. Carter's*, 272 F.R.D. 489, 504 (C.D. Cal. 2011) (rejecting class certification where the manufacturer of children's tagless clothes was already offering the relief sought by the putative class members).

C. Frank further objects to AARP as a recipient.

The AARP takes political positions opposed by many class members, including Frank. They should not be receiving *cy pres* funds.

V. In the alternative, if distributions to individual class members are impracticable, then a class action is not superior to other available methods of adjudicating the controversy.

One prerequisite of class certification is that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). If a *cy pres*-only settlement is necessary because it would be too costly to distribute the settlement funds to individual class members,

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[5] *Lane* also has no application to a distribution that unjustifiably favors non-party class counsel. *See supra* § IV.A. Settlement concessions should reflect the interest of "both parties" —the class members themselves and the defendant—but not the interest of class counsel.

then a class action is not an efficient and superior means of adjudicating this controversy. *Supler v. FKAACS, Inc.*, No.. 5-11-CV-00229-FL, 2012 U.S. Dist. LEXIS 159210, at *10-*11 (E.D.N.C. Nov. 6, 2012) (holding that, because "benefits to putative class members" from *cy pres* payments "are attenuated and insignificant..., class certification does not...promote judicial efficiency.") (internal quotations, ellipses, and citations omitted). The Ninth Circuit came to a similar conclusion in *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974). There, the court reasoned that "[w]henever the principal, if not the only, beneficiaries to the class action are...not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute," and that, "[w]hen, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected." *Id.* at 91-92. In this case, the proposed settlement falls into that category. It provides at most an indirect and attenuated benefit to the class, justified on the grounds that individual distributions would be too costly because of the size of the class. PAO at 10-11.

If true, then these claims should proceed as individual actions. Under such actions, class members can seek statutory damages of up to $10,000. 18 U.S.C. § 2520(c)(2)(B) (authorizing statutory damages for violations of the Electronic Communications Pri-

vacy Act). No matter how slim the possibility of attaining such damages, that possibility is superior to releasing those claims for no compensation. *See Brown v. Wells Fargo & Co.*, No. 11-1362 (JRT/JJG), 2013 U.S. Dist. LEXIS 181262, at *16-*17 (D. Minn. Dec. 30, 2013) (concluding that superiority was not satisfied where individuals would be "entitled to between $100 and $1,000 dollars in statutory damages" in successful individual litigation, but only $55 as a class member); *Sonmore v. CheckRite Recovery Servs.*, 206 F.R.D. 257, 265-66 (D. Minn. 2001) (holding that the discrepancy between the $25 that class members could recover and the $1000 in statutory damages they could recover individually meant that a class action was not superior); *cf. also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 n.5 (9th Cir. 1974) (finding no superiority where individual recoveries could have amounted to $1,875 and attorneys' fees and costs were statutorily recoverable); *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716 (9th Cir. 2010) ("We think it clear that the Rule 23(b)(3) superiority analysis must be consistent with the congressional intent in enacting a particular statutory damages provision.").

Superiority must be contemplated from the perspective of putative absent class members, among other angles. *Bateman*, 623 F.3d at 713 (quoting *Kamm v. California City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975)). What is best for them? This settlement intends to release their rights in exchange for no compensatory relief. From the perspective of a

class member, that cannot be a superior method of adjudicating this controversy. *Cf. Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 U.S. Dist. LEXIS 74081, at *8 (N.D. Cal. May 29, 2014) ("No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars. The collective-action opt ins would be better off simply walking away from this lawsuit with their rights to sue still intact."). A *cy pres* settlement, in which many of the beneficiaries are already receiving donations from the defendant, is not be superior in either fairness or efficiency to other methods of adjudication.

VI. If the Court approves the certification and settlement, it should decline to award the $2.125 million attorneys' fees requested.

For several reasons, the settlement is substantively unfair (*see supra* §§ III-IV), procedurally unfair (*see infra* §§ VII-VIII), and premised on a theory that makes class certification untenable (*see supra* § V). Nevertheless, if this Court disagrees with each of those propositions, it should still deem unreasonable the $2.125 million fee requested by plaintiffs. *See* Motion for Approval of Fees and Costs ("Fee Motion") (Dkt. 66).

Plaintiffs believe that the Ninth Circuit's 25% benchmark approach applies equivalently regardless of whether the defendant is obligated by a settlement to pay class members $8.5 million or obligated to pay

non-class member third parties $8.5 million. Fee Motion at 2-4. Plaintiffs' belief is wrong as a matter of law and would be disastrous as a matter of public policy.[6]

As a matter of law, class members are simply "not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178. When "class counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class," it is "appropriate for the court to decrease the award." *Id.* at 178-79 (citing, *inter alia*, two Ninth Circuit decisions and *ALI Principles* §3.13); *accord* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV.__ (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstractid=2413951 (advocating for "presumptive reduction of attorneys' fees" where settlement includes

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[6] One principle on which objectors can agree with plaintiffs is that any hypothetical value of the prospective injunctive relief should not be included in the denominator for purposes of making a percentage fee award. *See Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) ("Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund. We hold, therefore, that only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees."); *compare* Fee Motion at 2 (seeking a percentage upon "only the cash portion of the total recovery").

significant *cy pres* component). Although obligating Google to donate to third parties may impose a cost on Google,[7] the Ninth Circuit has been clear that compensable value "is not how much money a company spends on purported benefits, but the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944 (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)).

A dollar that goes to *cy pres* is less valuable than a dollar that goes directly to a class member. So, although plaintiffs reference a number of district court decisions that disregard this reality (*see* Fee Motion at 3 (citing cases)), plenty of courts have wisely concluded otherwise and have refused to value *cy pres* donations the same as a dollar to the class. *E.g.*, *In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (discounting *cy pres* by 50% for purposes of awarding fees); *In re Livingsocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 19, 22 (D.D.C. 2013) (cutting fees to 18% in consideration of "proportion of the award that is going to *cy pres*."); *Weeks v. Kellogg Co.*, No. CV 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *111 (C.D. Cal. Nov. 23, 2011) (awarding 16.2% "in light of the fact that almost half of the settlement's value is guaranteed not to directly benefit individual class members."); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 n.9 (E.D.

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[7] Of course, it also may not impose very much of a cost at all. *See supra* § IV.B.

Pa. 2005) (excluding *cy pres* and non-economic injunctive relief benefits entirely). More importantly, the only Ninth Circuit case mustered by the plaintiffs, *Lane*, did not confront the question of whether the fee award in that case was excessive, nor whether the Ninth Circuit's benchmark should apply identically to *cy pres* only settlements. Rather, the objectors in *Lane* focused their attack solely on the substantive fairness of the settlement, not the fee award. 696 F.3d at 818, 820.

The "key consideration in determining a fee award is reasonableness in light of the benefit *actually conferred*." *In re HP Inkjet Printer Litig.*, No. 5:05–cv-3580 JF, 2011 WL 1158635, at *10 (N.D. Cal. Mar. 29, 2011), *rev'd on other grounds* 716 F.3d 1173 (9th Cir. 2013) (emphasis in original) (internal citation and quotation omitted); *accord* Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (in awarding fees the "fundamental focus is the result actually achieved *for class members*") (emphasis added). For this reason, where actual benefit is slim, courts will deviate downward from the 25% benchmark. *Pearson v. Nbty, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *21-*27 (N.D. Ill. Jan. 3, 2014) (reducing 25% benchmark to 9.6% based on "low claims rate in combination with funds being remitted to *cy pres* in an amount greater than the actual benefit to the Class"); *Tarlecki v. Bebe Stores, Inc.*, No. C 05-1777 MHP, 2009 WL 3720872, 2009 U.S. Dist. LEXIS 102531, at *12 (N.D. Cal. Nov. 3, 2009) (reducing fee award to less than 13%) (cited by Fee Motion at 4).

If this Court endorses a rule that makes class counsel financially indifferent between a settlement that awards cash directly to class members and a *cy pres* only settlement, the parties will always agree to the *cy pres* arrangement and unnamed class members will be permanently left out in the cold. The reason that the parties will incline toward the *cy pres* arrangement is because of reasons related to those discussed *supra* at 9-10: defendants will prefer to make payments to third parties to whom they are already donating money rather than payments to absent class members. Donations may engender good will, and often merely replace or supplement donations that are already in the pipeline, or which the defendant has a habit of making: in the latter case, then the "relief" to the class is even more illusory, because it merely reflects a shift in accounting entries. Coupled with the class counsel's financial indifference, the defendant's preference *for* charitable donations means that the easy way of reaching settlement will be agreeing to *cy pres* only settlements.

The percentage of recovery/ benchmark is the prevailing Ninth Circuit methodology because it aligns the incentives of class counsel and the class much better than does the competing lodestar method. *In re Apple Iphone/Ipod Warranty Litig.*, No. C 10-1610 RS, 2014 U.S. Dist. LEXIS 52050, at *8-*9 (N.D. Cal. Apr. 14, 2014) ("[A]pplying the lodestar to common fund cases does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work

and protracting the litigation. It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process.") (internal quotation and ellipsis omitted); *see generally* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809 (2000) (observing "solid consensus that the contingent approach minimizes conflicts more efficiently than the lodestar"). To apply the benchmark equally regardless of whether the class actually recovers funds is to undermine its core benefit and to again misalign the interests of class counsel and its clients.

Put simply, "courts need to consider the level of direct benefit provided to the class in calculating attorneys' fees." *Baby Prods.*, 708 F.3d at 170. If the court it inclined to approve the settlement and certification, to comply with Rule 23(h), it should reduce the fee award to no more than 10% of the $8.5 million *cy pres* fund.

VII. The notice plan is inadequate because it does not include direct notice for class members for whom Google has contact information.

The principle of disclosure through notice has been referred to as the "first and perhaps most important principle for class action governance." Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 118 (2003).

While "direct notice to class members by mail, e-mail or other electronic individualized means [may be] impractical" for the entirety of the class, it is obligatory for those class members for whom the defendant has contact information. PAO at 12. And yet the notice plan here is publication only. *Id.*

Google would have contact information at least for all class members who have gmail accounts. According to AYTM Market Research, 74% of all consumers use Google as their primary search engine, and 60% of all consumers use Google's gmail as their primary email service, suggesting that, if an even higher percentage of class members (Google's search engine users) have gmail accounts, Google has contact information for approximately perhaps 80% of the class or more. *74 Percent of Consumers Use Google Search, 60 Percent Own Gmail Accounts*, Brafton (Apr. 9, 2012), http://www.brafton.com/news/74-percent-of-consumers-use-google-search-60-own-gmail-accounts (last visited July 25, 2014).

The *Mullane* constitutional imperative is that the settlement notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As *Mullane* held, "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to

means less likely than the mails to apprise them of its pendency." *Id.* at 318.

Likewise, in *Eisen v. Carlisle and Jacquelin*, the Supreme Court held that "individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case....each class member who can be identified through reasonable effort must be notified." 417 U.S. 156, 176 (1974). There, the class numbered approximately 6 million, with only a minority, 2.25 million, being identifiable to the defendant. *Id.* at 166-67. Nevertheless, the large size of the class and the expense of the notice did not obviate the need for individual notice where the requisite information was in the possession of the defendant. *Id.* at 175-76.

Following these decisions, the Ninth Circuit holds that "[t]o comply with the spirit of [Rule 23 notice provisions], it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice." *Mandujano*, 541 F.2d 832, 835. Class members for whom Google has contact information are just such an identifiable group. Even where only a limited percentage of the class can be reached through direct notice, direct notice is still mandatory for those class members. *Eisen*, *supra*; *Smith v. Levine Leichtman Capital*, 2012 U.S. Dist. LEXIS 163672, at *7-*8 (N.D. Cal. Nov. 15, 2012) (holding that "[n]otice to class...must be 'the best...practicable under the cir-

cumstances, including individual notice to all members who can be identified through reasonable effort,'" and that even where only 75-85% of the class could be reached through direct mail, direct mail was still required.) (quoting *Amchem*); *Fraser v. Asus Computer Int'l*, 2012 U.S. Dist. LEXIS 181315, at *10-*12 (N.D. Cal. Dec. 21, 2012) (concluding that postal notice is required even when only would reach 30% of class, publication is not sufficient).

The fact that class members will not recover any money for themselves under this settlement in no way negates their right to direct notice. *Hecht v. United Collection Bureau*, 691 F.3d 218, 225 (2d Cir. 2012) (repudiating argument that "the negligible amount of money to be awarded per person under the...settlement justified lesser notice.") "A cause of action for damages is a property right, and thus cannot be taken without due process." *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir. 1989). In other words, at the very least whenever any monetary claims are released as part of a class action, the stringent due process standards of *Mullane* and *Eisen* apply. In this case, where the class members would be giving up their individual causes of action as part of the settlement, individual notice is necessary wherever possible.

Once it is established that the full rigors of due process notice apply, there should be no dispute that the publication only notice here is unacceptable when the defendant's records house class members' contact

information. *See, e.g., Larson v. AT&T Mobility LLC*, 687 F.3d 109, 122-31 (3d Cir. 2012) (reversing notice plan that did not require defendants to search through their record for the purpose of providing individual notice). "Plaintiffs' pocketbooks are not a factor—the mandatory notice requirement may not be relaxed based on the high cost of providing notice." *In re Motor Fuel Temperature Sales Practices Litig.*, 279 F.R.D. 598 (D. Kan. 2012) (citing *Amchem* and *Eisen*).

For the settling parties, meager notice means less resistance, and even more importantly, less cost to settlement. But for class members, it means an abridgment of statutory and constitutional rights. This Court should consider the wisdom of the Western District of New York in a recent decision. "If plaintiffs and their attorneys are acting like they have something to hide from the absent class members, perhaps it's because they do." *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 408 (W.D.N.Y. 2013).

VIII. The parties have artificially burdened the right of objection and opt-out by requiring four separate paper-mail submissions for a class of internet users; no positive inference should be drawn from a low number of formal objectors.

Almost any given class action settlement, no matter how much it betrays the interests of the class, will

produce only a small percentage of objectors. The predominating response will always be apathy because objectors without counsel must expend significant resources on an enterprise that will create little direct benefit for themselves. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors). Another common response from non-lawyers will be the affirmative avoidance, whenever possible, of anything involving a courtroom.

Class counsel argues that this understandable tendency to ignore notices or free-ride on the work of other objectors is best understood as acquiescence or even affirmative support for the settlement. Motion for Final Approval (Dkt. 65) at 18-19. This is wrong. Silence is simply *not* consent. *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001). "Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007).

Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual. "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (internal citation omitted). Moreover, "where notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a *fait accompli*." *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co..*, 834 F.2d 677, 680-81 (7th Cir. 1987).

"[T]he absence or silence of class parties does not elieve the judge of his duty and, in fact, adds to his responsibility." *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971). The Court should draw no inference in favor of the settlement from the number of objections, especially given the vociferousness of the objectors that do appear. *GM Trucks*, 55 F.3d at 812-13; *Vought*, 901 F. Supp. 2d. at 1093. "One good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement." *Richardson v. L'Oreal USA, Inc.*, __F. Supp. 2d__, 2013 WL 5941486, at *14 (D.D.C. Nov. 6, 2013) (sustaining Ms. Holyoak's objection).

Yet more conducive to apathetic inaction, the parties have elected a process of objecting and opting out which is "unnecessarily burdensome." *Newman v. Americredit Fin. Servs.*, No. 11-cv-3041 DMS (BLM), 2014 U.S. Dist. LEXIS 15728, at *17 (S.D. Cal. Feb. 3, 2014) ("The Court is not inclined to approve a settlement which makes it unnecessarily burdensome to submit a claim or opt out. The class members are required to submit claim forms and opt out requests by mail, although the settlement administrator is obligated to provide a phone number and a website. The only justification offered for the mailing requirement is that the claim forms require an affirmation. Plaintiff does not explain why an affirmation could not be provided through an online form or by phone with adequate identification of the class member.") (internal citations omitted); *Galloway v. Kan. City Landsmen*, No. 4:11-1020-CV-W-DGK, 2012 U.S. Dist. LEXIS 147148, at *16 (W.D. Mo. Oct. 12, 2012) (denying settlement in part based on parties' failure to allow class members to opt out via email alone), *later proceeding reported at* 2013 U.S. Dist. LEXIS 92650, at *10-*11 (W.D. Mo. Jul. 2, 2013) (noting that after the initial settlement rejection "[t]he parties have simplified the opt-out provision so that in order to opt-out, class members need only send a single email to defense counsel."). The requirement that objectors print and post multiple copies of their objection/exclusion is both expensive and outdated in 2014. *E.g.*, *Newman*, *supra*; *Smith*, 2012 U.S. Dist. LEXIS 163672, at *8-*9 ("[T]he parties have made the procedures for filing objections unduly burdensome. There is no reason to

require...the objectors to mail their objections to three different locations.").

Rather than requiring class members to snail-mail an objection to four recipients, other cases permit the relatively efficient (indeed, close to costless) method of transmitting objections and by a single electronic submission. *See e.g., In re Motor Fuel Temperature Sales Practices Litig.*, No 07-md-01840-KHV-JPO, Order (Dkt. No. 3019), at 2 (D. Kan. Nov. 10, 2011) ("If Costco plans to proceed with email notification, it must allow class members to opt out of the class and object to the settlement electronically"); *Boring v. Bed Bath & Beyond*, No. 12-cv-05259-JST (N.D. Cal. Nov. 21, 2013) ("The Court notes that the filing of objections with the Court constitutes service upon counsel for the parties, as the parties' counsel are registered to receive filings through the Court's Electronic Case Filing system."). Likewise, there is no valid reason why a class member in this settlement should have to download, print, fill out and mail an exclusion in this day and age. *See, e.g.*, http://ebayfeaturedplus classaction.com/#qf (allowing email opt out); http://www.copyrightclassaction.com/exclusion.php3(online opt out); http://www.fraleyfacebook settlement.com/faq#Q14 (same)

Where electronic modes of opting-out and objecting are available, the "vast majority" of participating class members will use those avenues. *Motor Fuel Temperature*, 2012 U.S. Dist. LEXIS 57981, at

*76 (D. Kan. Apr. 24, 2012); *id.* at *74 n.13 (nearly three times more people opted-out electronically than by mail); *Fraley v. Facebook, Inc.*, No. 11-cv-01726 RS (N.D. Cal. Jun. 7, 2013), Declaration of Jennifer M. Keough Regarding Settlement Administration (Dkt. 341) at ¶12 (6,884 of 6,946 opt-out requests (99.1%) were submitted electronically via the settlement website when that option was available). This is especially true of course, when, as here, the class consists entirely of internet users. *See* Declaration of Richard W. Simmons (Dkt. 65-4) ¶16 ("By definition, all of the interaction between Google and class members occurred on-line.")

At the very least it is improper for the parties to require objectors to mail their objections to **four** different locations. *See* Procedural Guidance for Class Action Settlements, *available at* http://cand.uscourts.gov/ClassActionSettlementGuidance ("The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filing.").

Imposing a costly, inefficient alternative over affordable, seamless electronic processes can only give rise to the inference that the parties wished to undermine the autonomous decisions of class members. It has been known for at least a half-decade that "the ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class

member participation." Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 766 n. 251 (2008); Leslie, *The Significance of Silence*, 59 FLA. L. REV. at 128-29. Indeed, notice was almost entirely distributed via the internet, yet absent class members' expressions of dissent cannot be made in the same medium. Class counsel is not licensed to consign objectors or opt-outs to second class status.

"One hallmark of a reasonable settlement agreement is that it makes participation as easy as possible, whether class members wish to make a claim, opt out, or object." *McClintic v. Lithia Motors*, No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *17 (W.D. Wash. Jan. 12, 2012) (critiquing comparable opt-out and objection process and ultimately rejecting settlement). Together, the hurdles imposed on exclusion and objection do not appropriately respect class members' Fed. R. Civ. P. 23 rights. Moreover, the court loses the benefit of valuable adversarial perspectives that objectors can bring to the evaluation of a settlement's fairness. Not only do the hurdles constitute a reason to reject the settlement in this case, they provide an added reason to discredit any argument that the lack of objectors signals the class members' approval of the settlement.

CONCLUSION

For the forgoing reasons, the settlement cannot be approved. It asks class members to surrender their

individual claims in exchange for a few million dollars being given to unrelated third parties, many of whom have prior relationships to the defendant or class counsel. The settlement does not afford effective notice to the class and makes objecting or opting out needlessly and artificially burdensome. The class itself is not certifiable, both because, if individual recoveries are genuinely impossible, then a class action is not superior to other methods of adjudication. If the Court decides to approve the settlement anyhow, it should drastically pare down the requested fee award.

Dated: August 8, 2014

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION PALOMA GAOS; ANTHONY ITALIANO; GABRIEL PRIYEV, individually and on behalf of all others similarly situated, *Plaintiffs-Appellees,* v. MELISSA ANN HOLYOAK; THEODORE H. FRANK, *Objectors-Appellants,* v. GOOGLE, INC., a Delaware corporation, *Defendant-Appellee.*	No. 15-15858 D.C. No. 5:10-cv-04809-EJD OPINION

App. 2

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted March 13, 2017
San Francisco, California

Filed August 22, 2017

Before: J. Clifford Wallace, M. Margaret McKeown, and Jay S. Bybee, Circuit Judges.

Opinion by Judge McKeown;
Partial Concurrence and Partial Dissent by Judge Wallace

COUNSEL

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OPINION

McKEOWN, Circuit Judge

Google's free Internet search engine ("Google Search") processes more than one billion user-generated search requests every day. This case arises from class action claims that Google violated users' privacy by disclosing their Internet search terms to owners of third-party websites. We consider whether the district court abused its discretion in approving the $8.5 million *cy pres*–only settlement and conclude that it did not.

BACKGROUND

In these consolidated class actions, three Google Search users—Paloma Gaos, Anthony Italiano, and Gabriel Priyev (collectively "plaintiffs")—asserted claims for violation of the Stored Communications Act, 18 U.S.C. § 2701 et seq.; breach of contract; breach of the covenant of good faith and fair dealing; breach of implied contract; and unjust enrichment. The plaintiffs sought statutory and punitive damages and declaratory and injunctive relief for the alleged privacy violations.

The claimed privacy violations are the consequence of the browser architecture. Once users submit search terms to Google Search, it returns a list of relevant websites in a new webpage, the "search results page." Users can then visit any website listed in the search results page by clicking on the provided link.

When a user visits a website via Google Search, that website is allegedly privy to the search terms the user originally submitted to Google Search. This occurs because, for each search results page, Google Search generates a unique "Uniform Resource Locator" ("URL") that includes the user's search terms. In turn, every major desktop and mobile web browser (including Internet Explorer, Firefox, Chrome, and Safari) by default reports the URL of the last webpage that the user viewed before clicking on the link to the current page as part of "referrer header" information. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how "referrer headers" operate).[1]

The genesis of the plaintiffs' complaints is the application of the search protocol, coupled with Google's "Web History" service, which tracks and stores account holders' browsing activity on Google's servers.

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[1] For instance, if a user enters "2016 presidential election" into Google Search and clicks on a link to www.cnn.com/election on the search results page, the "referrer header" would tell CNN that the user found her way there via "http://www.google.com/search?q=2016+presidential+election."

Following mediation, the parties reached a settlement, which they submitted to the district court for preliminary approval in July 2013. The settlement provided that Google would pay a total of $8.5 million and provide information on its website disclosing how users' search terms are shared with third parties, in exchange for a release of the claims of the approximately 129 million people who used Google Search in the United States between October 25, 2006 and April 25, 2014 (the date the class was given notice of the settlement).

Of the $8.5 million settlement fund, approximately $3.2 million was set aside for attorneys' fees, administration costs, and incentive payments to the named plaintiffs. The remaining $5.3 million or so was allocated to six cy pres recipients, each of which would receive anywhere from 15 to 21% of the money, provided that they agreed "to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." The six recipients were AARP, Inc.; the Berkman Center for Internet and Society at Harvard University; Carnegie Mellon University; the Illinois Institute of Technology Chicago-Kent College of Law Center for Information, Society and Policy; the Stanford Center for Internet and Society; and the World Privacy Forum. Each of the recipients submitted a detailed proposal for how the funds would be used to promote Internet privacy.

After a hearing, the district court certified the class for settlement purposes and preliminarily approved the settlement. Notice was given to the class on April 25, 2014, via a website, toll-free telephone number, paid banner ads, and press articles. Thirteen class members opted out of the settlement, and five class members, including Melissa Ann Holyoak and Theodore H. Frank (collectively "Objectors"), filed objections.

Following a final settlement approval hearing at which the district court heard from both the parties and Objectors, the district court granted final approval of the settlement on March 31, 2015. With respect to the objections, the district court found that: (1) a cy pres–only settlement was appropriate because the settlement fund was non-distributable; (2) whether or not the settlement was cy pres–only had no bearing on whether Rule 23(b)(3)'s superiority requirement was met; (3) the cy pres recipients had a substantial nexus to the interests of the class members, and there was no evidence that the parties' preexisting relationships with the recipients factored into the selection process; and (4) the attorneys' fees were commensurate with the benefit to the class. The district court awarded $2.125 million in fees to class counsel and $15,000 in incentive awards to the three named plaintiffs. Objectors appealed.

ANALYSIS

The settlement at issue involves a *cy pres*–only distribution of the $5.3 million or so that remains in the settlement fund after attorneys' fees, administration costs, and incentive awards for the named plaintiffs are accounted for. *Cy pres*, which takes its name from the Norman French expression *cy pres comme possible* (or "as near as possible"), is an equitable doctrine that originated in trusts and estates law as a way to effectuate the testator's intent in making charitable gifts. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). In the class action settlement context, the *cy pres* doctrine permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class. *Id.*

Here, the cy pres recipients were six organizations that have pledged to use the settlement funds to promote the protection of Internet privacy. We review for abuse of discretion the district court's approval of the proposed class action settlement. *Id.* In addition, because the settlement took place before formal class certification, settlement approval requires a "higher standard of fairness." *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)), *cert. denied sub nom. Marek v. Lane*, 134 S. Ct. 8 (2013). Recognizing that, at this early stage of litigation, the district court cannot as effectively monitor for collusion and other abuses, we scrutinize the proceedings to discern whether the court sufficiently "account[ed] for

the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit." *Id.*

I. Appropriateness of the *Cy Pres*–Only Settlement

As an initial matter, we quickly dispose of the argument that the district court erred by approving a *cy pres*–only settlement. Notably, Objectors do not contest the value of the settlement nor do they plead monetary injury. To be sure, *cy pres*–only settlements are considered the exception, not the rule. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (explaining that direct distributions to class members are preferable because "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims," are "the property of the class"); *accord* William B. Rubenstein, Newberg on Class Actions § 12:26 (5th ed. 2017). However, they are appropriate where the settlement fund is "non-distributable" because "the proof of individual claims would be burdensome or distribution of damages costly." *Lane*, 696 F.3d at 819 (quoting *Nachshin*, 663 F.3d at 1038). We have never imposed a categorical ban on a settlement that does not include direct payments to class members.

The district court's finding that the settlement fund was non-distributable accords with our precedent. In *Lane*, we deemed direct monetary payments

"infeasible" where each class member's individual recovery would have been "*de minimis*" because the remaining settlement fund was approximately $6.5 million and there were over 3.6 million class members. *Id.* at 817–18, 820–21. The gap between the fund and a miniscule award is even more dramatic here. The remaining settlement fund was approximately $5.3 million, but there were an estimated 129 million class members, so each class member was entitled to a paltry 4 cents in recovery—a *de minimis* amount if ever there was one. The district court found that the cost of verifying and "sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class."

To begin, the district court found that the amount of the fund was appropriate given the shakiness of the plaintiffs' claims. Objectors do not contend that it would have been feasible to make a 4-cent distribution to every class member. Instead, they ask us to impose a mechanism that would permit a miniscule portion of the class to receive direct payments, eschewing a class settlement that benefits members through programs on privacy and data protection instituted by the *cy pres* recipients. Objectors suggest, for example, that "it is possible to compensate an oversized class with a small settlement fund by random lottery distribution," or by offering "$5 to $10 per claimant" on the assumption that few class members will make claims. Our review of the district court's settlement approval is not predicated simply on whether there may be "possible" alternatives; rather,

we benchmark whether the district court discharged its obligation to assure that the settlement is "fair, adequate, and free from collusion." *Lane*, 696 F.3d at 819 (quoting *Hanlon*, 150 F.3d at 1027). If we took their objections at face value, Objectors would have us jettison the teachings of *Lane*. Objectors would also have us ignore our prior endorsement of *cy pres* awards that go to uses consistent with the nature of the underlying action. *Nachshin*, 663 F.3d at 1039–40.[2]

Likewise, we easily reject Objectors' argument that if the settlement fund *was* non-distributable, then a class action cannot be the superior means of adjudicating this controversy under Rule 23(b)(3). "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (alteration in original) (quoting 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1779 (3d ed. 2005)). Not surprisingly, there is a relationship between the superiority requirement and the appropriateness of a *cy pres*–only settlement.

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[2] It bears noting, of course, that district courts are not precluded from approving other distribution methods that might benefit the class more directly under certain circumstances. However, the fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them. *See Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) (per curiam) (holding that "[t]he abuse of discretion standard requires us to uphold a district court determination that falls within a broad range of permissible conclusions").

The two concepts are not mutually exclusive, since "[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Id.* The district court did not abuse its discretion in finding the superiority requirement was met because the litigation would otherwise be economically infeasible. This finding dovetails with the rationale for the *cy pres*–only settlement.[3]

II. The *Cy Pres* Recipients

We now turn to the crux of this appeal: whether approval of the settlement was an abuse of discretion due to claimed relationships between counsel or the parties and some of the *cy pres* recipients. We have long recognized that the *cy pres* doctrine, when "unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries[,] poses many nascent dangers to the fairness of the distribution process," because the selection process may then "answer to the

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[3] Objectors point to *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974), as an example of a case where we found the superiority requirement not met because "the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members." But *In re Hotel* did not involve a *cy pres* distribution or even a settlement. *See id.* Instead, we held that a class action was not the superior means of resolving the controversy because the class members' antitrust claims involved a "great variety" of individualized determinations. *Id.* at 90–91; *see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305–06 (9th Cir. 1990) (distinguishing *In re Hotel* on the basis that the case raised concerns regarding "individual proof of damages").

whims and self interests of the parties, their counsel, or the court." *Nachshin*, 663 F.3d at 1038–39; *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308–39 (9th Cir. 1990). Due to these dangers, we require *cy pres* awards to meet a "nexus" requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members. *Nachshin*, 663 F.3d at 1039.

Objectors suggest that the district court rubberstamped the settlement, by "simply h[olding] that the Ninth Circuit and district courts have approved other all–*cy–pres* settlements and class members effectively had no right to complain about the parties' choice of compromise." That characterization is unfair and untrue. And oddly, despite this claim, Objectors do not dispute that the nexus requirement is satisfied here.

The district court found that the six *cy pres* recipients are "established organizations," that they were selected because they are "independent," have a nationwide reach and "a record of promoting privacy protection on the Internet," and "are capable of using the funds to educate the class about online privacy risks." Although the district court expressed some disappointment that the recipients were the "usual suspects," it recognized that "failure to diversify the list of distributees is not a basis to reject the settlement . . . when the proposed recipients otherwise qualify under the applicable standard." Accordingly, the district court appropriately found that the *cy pres* distribution

addressed the objectives of the Stored Communications Act and furthered the interests of the class members. Previous *cy pres* distributions rest on this same understanding of the nexus requirement. *See, e.g.*, *Dennis*, 697 F.3d at 866–67 (no nexus between false advertising claims relating to the nutritional value of Frosted Mini-Wheats® and charities providing food for the indigent); *Lane*, 696 F.3d at 817, 820–22 (nexus between Facebook privacy claims and charity giving grants promoting online privacy and security); *Nachshin*, 663 F.3d at 1039–41 (no nexus between breach of privacy, unjust enrichment, and breach of contract claims relating to AOL's provision of commercial e-mail services and the Legal Aid Foundation of Los Angeles, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center Foundation); *Six (6) Mexican Workers*, 904 F.2d at 1307–09 (no nexus between Farm Labor Contractor Registration Act claims and foundation operating human assistance projects in areas where plaintiffs resided).

Nonetheless, Objectors take issue with the choice of *cy pres* recipients because Google has in the past donated to at least some of the *cy pres* recipients, three of the *cy pres* recipients previously received Google settlement funds, and three of the *cy pres* recipients are organizations housed at class counsel's *alma maters*. *See In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011). The Objectors point to a comment from the American Law Institute's ("ALI") Principles of the

Law of Aggregate Litigation which suggests that "[a] *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." Principles of the Law of Aggregate Litig. § 3.07 cmt. b (Am. Law Inst. 2010) (emphasis added).[4]

The benchmark for "significant prior affiliation" is left undefined. *Id.* Of course it makes sense that the district court should examine any claimed relationship between the *cy pres* recipient and the parties or their counsel. But a prior relationship or connection between the two, without more, is not an absolute disqualifier. Rather, a number of factors, such as the nature of the relationship, the timing and recency of the relationship, the significance of dealings between the recipient and the party or counsel, the circumstances of the selection process, and the merits of the recipient play into the analysis. The district court explicitly or implicitly addressed this range of considerations.

We do not need to explore the contours of the "significant prior affiliation" comment because in the context of this settlement, the claimed relationships do not "raise substantial questions about whether the selection of the recipient was made on the merits." *See*

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[4] This statement is found in a comment that is unsupported by any illustration, case law, or other authority. *Id.* § 3.07 cmt. b.

id. § 3.07 cmt. b.[5] As a starting premise, Google's role as a party in reviewing the *cy pres* recipients does not cast doubt on the settlement. In *Lane*, we approved a *cy pres*–only settlement in which the distributor of the settlement fund was a newly-created entity run by a three-member board of directors, one of whom was defendant Facebook's Director of Public Policy. 696 F.3d at 817. We rejected the claim that this structure created an "unacceptable conflict of interest," explaining that "[w]e do not require . . . that settling parties select a *cy pres* recipient that the court or class members would find ideal" since "such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process." *Id.* at 820–21. Instead, we recognized that, as the "'offspring of compromise,'" settlement agreements "necessarily reflect the interests of both parties to the settlement." *Id.* at 821 (quoting *Hanlon*, 150 F.3d at 1027). Thus, we concluded that Facebook's ability to have "its say" in the distribution of *cy pres* funds was "the unremarkable result of the parties' give-and-take negotiations" and acceptable so long as the nexus requirement was satisfied. *Id.* at 821–22.

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[5] Other circuits have endorsed § 3.07's preference for direct distribution to class members over the use of *cy pres* awards where practicable. *See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064–65 (8th Cir. 2015); *Klier*, 658 F.3d at 475 n.16. And though we have not adopted § 3.07, we too have expressed a similar preference. *See Nachshin*, 663 F.3d at 1036. However, no circuit has yet adopted § 3.07 comment b's "significant prior affiliation" reference.

Given the burgeoning importance of Internet privacy, it is no surprise that Google has chosen to support the programs and research of recognized academic institutes and nonprofit organizations. Google has donated to hundreds of third-party organizations whose work implicates technology and Internet policy issues, including university research centers, think tanks, advocacy groups, and trade organizations.[6] These earlier donations do not undermine the selection process employed to vet the *cy pres* recipients in this litigation. The district court conducted a "careful[] review" of the recipient's "detailed proposals" and found a "substantial nexus" between the recipients and the interests of the class members. Notably, some of the recipient organizations have challenged Google's Internet privacy policies in the past.[7] Most

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[6] *See Transparency – U.S. Public Policy – Google*, Google.com, https://www.google.com/publicpolicy/transparency.html (last visited July 21, 2017) (listing third-party organizations Google has supported in the past).

[7] At least one of the recipients, World Privacy Forum, has publicly criticized Google's lack of transparency regarding its privacy policies. *See* Joseph Menn, *Privacy Advocates Target Google*, L.A. Times (June 4, 2008), http://articles.latimes.com/2008/jun/04/business/fi-google4. And a complaint filed by the World Privacy Forum and a Stanford Center for Internet and Society study played a key role in the $17 million fine Google paid to the Federal Trade Commission for circumventing user's privacy choices in Apple's Safari Internet browser. *See* Kukil Bora, *FTC Appears Ready to Fine Google Millions Over Apple Safari Privacy Breach*, Int'l Bus. Times (May 5, 2012), http://www.ibtimes.com/ftc-appears-ready-fine-google-millions-over-apple-safari-privacy-breach-report-696537; Claire

importantly, there was transparency in this process, with the proposed recipients disclosing donations received from Google. Each recipient's *cy pres* proposal identified the scope of Google's previous contributions to the organization, and, unlike in *Lane*, explained how the *cy pres* funds were distinct from Google's general donations. *See Dennis*, 697 F.3d at 867–68 (casting doubt on the value of *cy pres* funds that a defendant "has already obligated itself to donate"). Citing *Lane*, the district court found that "[t]he chosen recipients and their respective proposals are sufficiently related so as to warrant approval; they do not have to be the recipients that objectors or the court consider ideal."

The objection that three of the *cy pres* recipients had previously received *cy pres* funds from Google does not impugn the settlement without something more, such as fraud or collusion. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). That "something more" is missing here. Indeed, the proposition that *cy pres* funds should not be awarded to previous recipients would be in some tension with our nexus requirements. As we have recognized, it is often beneficial for a *cy pres* recipient to have a "'substantial

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Cain Miller, *Google to Pay $17 Million to Settle Privacy Case*, N.Y. Times (Nov. 18, 2013), http://www.nytimes.com/2013/11/19/technology/google-to-pay-17-million-to-settle-privacy-case.html; Elinor Mills, *Privacy Brouhaha Reveals Google's Split Personality*, CNET (Feb. 17, 2012), http://www.cnet.com/news/privacy-brouhaha-reveals-googles-split-personality/. Both organizations are *cy pres* recipients here.

record of service,'" because such a record inspires confidence that the recipient will use the funds to the benefit of class members. *See Dennis*, 697 F.3d at 865 (quoting *Six (6) Mexican Workers*, 904 F.2d at 1308); *Lane*, 696 F.3d at 822. But in emerging areas such as Internet and data privacy, expertise in the subject matter may limit the universe of qualified organizations that can meet the strong nexus requirements we impose upon *cy pres* recipients. Given that, over time, major players such as Google may be involved in more than one *cy pres* settlement, it is not an abuse of discretion for a court to bless a strong nexus between the *cy pres* recipient and the interests of the class over a desire to diversify the pick via novel beneficiaries that are less relevant or less qualified. *See Nachshin*, 663 F.3d at 1040 (considering whether the *cy pres* distribution "provide[s] reasonable certainty that any member will be benefitted").

Finally, we reject the proposition that the link between the *cy pres* recipients and class counsel's *alma maters* raises a significant question about whether the recipients were selected on the merits. There may be occasions where the nature of the alumni connections between the parties and the recipients could cast doubt on the propriety of the selection process. But here, we have nothing more than a barebones allegation that class counsel graduated from schools that house the Internet research centers that will receive funds.

The claim that counsel's receipt of a degree from one of these schools taints the settlement can't be entertained with a straight face. Each of these schools graduates thousands of students each year. Objectors have never disputed that class counsel have no ongoing or recent relationships with their *alma maters* and have no affiliations with the specific research centers. Nor did the district court simply accept this concession or put the burden on the Objectors. The district court appropriately considered the substance of the objections and explained why those challenges did not undermine the overall fairness of the settlement. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995). The court affirmatively analyzed the issue and was cognizant of the claim of a potential conflict. All class counsel swore that they have no affiliations with the specific research centers. Class counsel repeated that attestation at the final settlement approval hearing and added that they sit on no boards for any of the proposed recipients. As one class counsel put it, "I simply got my law degree [at Harvard], and that's simply the end of it."[8] The recipients are well-recognized centers focusing on the Internet and data privacy, and the district court conducted a "careful[] review" of the recipients' "detailed proposals" and found a "substantial nexus" between the recipients

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[8] The dissent's suggestion that what is needed is a hearing with sworn testimony seems superfluous in view of the extensive hearing held by the district court, the specific queries to counsel about the *cy pres* recipients, and the submission of sworn declarations.

and the interests of the class members.[9] No one suggested that any of the centers acted with any impropriety, and the Objectors provided no alternative suggestions for other law schools with more qualified centers or institutes. The district court found "no indication that counsel's allegiance to a particular alma mater factored into the selection process," particularly since the identity of the recipients "was a negotiated term included in the Settlement Agreement and therefore not chosen solely by . . . alumni." Thus, the district court gave a "sufficient[ly] reasoned" response

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[9] The dissent challenges the inclusion of the Chicago-Kent College of Law Center for Information, Society and Policy ("CISP") as a recipient, noting that the center was only inaugurated in 2012. *See* CHICAGO-KENT MAG., Summer 2012, at 8, *available at* https://issuu.com/chicagokentlaw/docs/chicago-kent-magazine-2012. This judicial second-guessing does not bear scrutiny, particularly in a field that is developing quickly and where the record reveals a different story. CISP's *cy pres* proposal, which outlines a "privacy preparedness" project that would develop interactive materials to educate the public about ways to protect their Internet and data privacy, notes that the five faculty involved in the proposed project are respected leaders in the field of Internet and privacy law, that CISP has received other *cy pres* awards and grants, and that CISP has hosted five conferences on Internet and data privacy issues that have attracted hundreds of attendees and trained over a hundred journalists on data privacy. In addition, CISP conducts research in such areas as data aggregation, social networks and health information, and children and internet privacy; engages in policy advocacy, community outreach, and public education; and holds seminars on Internet and data privacy issues for law students. *See Center for Information, Society and Policy*, Kentlaw.iit.edu, https://www.kentlaw.iit.edu/institutes-centers/center-for-information-society-and-policy (last visited July 24, 2017).

to the objections as to the claimed preexisting relationships. *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 377. We can hardly say that the alumni connections cloud the fairness of the settlement.

As an overarching matter, nothing in this record "raise[s] substantial questions about whether the selection of the recipient was made on the merits." *See* Principles of the Law of Aggregate Litig. § 3.07 cmt. b. We do not suggest, however, that a party's prior relationship with a *cy pres* recipient could not be a stumbling block to approval of a settlement. *Cf. Marek*, 134 S. Ct. at 9 (mem.) (statement of Roberts, C.J., respecting the denial of certiorari) (recognizing that given the "fundamental concerns surrounding" *cy pres* awards and their increasing prevalence, the Court "may need to clarify the limits on the use of such remedies" in the future). We hold merely that, under the circumstances here, the district court did not abuse its discretion in approving the *cy pres* recipients.

III. Attorneys' Fees

Turning to the issue of attorneys' fees, the district court did not abuse its discretion by approving $2.125 million in fees and $21,643.16 in costs. As an initial matter, there is no support for Objectors' view that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*–only. *See generally Lane*, 696 F.3d at 818 (acknowledging a 25% fee award that also involved a *cy pres*–only settlement).

Rather, the question is whether the amount of attorneys' fees was reasonable. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

In a settlement that produces a common fund for the benefit of the entire class, a court has discretion to employ either the "percentage-of-recovery" method or the "lodestar" method to calculate appropriate attorneys' fees, so long as its discretion is exercised so as to achieve a reasonable result. *See id.* at 942. Here, the district court found that the requested fees were appropriate under either metric.

Under the percentage-of-recovery method, the requested fee was equal to 25% of the settlement fund. According to the district court, this percentage was commensurate with the risk posed by the action and the time and skill required to secure a successful result for the class, given that class counsel faced three motions to dismiss and participated in extensive settlement negotiations. The district court also found that this percentage hewed closely to that awarded in similar Internet privacy actions. *See, e.g.*, *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *9–10 (N.D. Cal. Mar. 18, 2013); *see also In re Bluetooth*, 654 F.3d at 942 (noting that 25% is our "benchmark" for a reasonable fee award).

Although not required to do so, the district court took an extra step, cross-checking this result by using the lodestar method. *See In re Bluetooth*, 654 F.3d at

941–44 (checking the district court's percentage-of-recovery fees calculation against the lodestar method, which is "calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation . . . by a reasonable hourly rate for the region and the experience of the lawyer"). The district court found that class counsel provided sufficient support for its lodestar calculation that fees totaled $2,126,517.25.

AFFIRMED.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I concur in Sections I and III of the majority opinion. I agree that a *cy pres*-only settlement was appropriate in this case and do not contend that the district court abused its discretion in calculating class counsel's fees.

I dissent, however, from Section II of the opinion, in which the majority blesses the district court's approval of the settlement, despite the preexisting relationships between class counsel and the *cy pres* recipients. To me, the fact alone that 47% of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further in a case such as

this. The district court made no serious inquiry to alleviate that concern. Accordingly, I would vacate the district court's approval of the class settlement, and remand with instructions to hold an evidentiary hearing, examine class counsel under oath, and determine whether class counsel's prior affiliation with the *cy pres* recipients played *any* role in their selection as beneficiaries.

I.

As the majority opinion outlines, plaintiffs in this case alleged that Google violated class members' privacy rights by disclosing personal information (such as search terms) to unauthorized third parties. Google's practice allegedly violated the federal Stored Communications Act, along with various state laws. After several rounds at the motion to dismiss stage, the parties agreed to a class-wide settlement (before formal class certification by the district court). The parties estimated the size of the class to be 129 million people.

The settlement contained the following key terms: (1) Google agreed to pay $8.5 million into a settlement fund; (2) Google would provide notice of the settlement on its website; (3) each class representative would receive $5,000, claims administration costs would be $1 million, and attorney's fees would be $2.125 million (25% of the settlement fund); and (4) the remainder of the settlement fund (about $5 million) would go to six *cy pres* recipients. The six *cy pres*

recipients were to be Carnegie Mellon University (21% of the remainder), the World Privacy Forum (17%), Chicago-Kent College of Law Center for Information, Society and Policy (16%), the Stanford Center for Internet and Society (16%), the Berkman Center for Internet and Society at Harvard University (15%), and that the AARP Foundation (15%).

II.

We review a district court's approval of a class action settlement for an abuse of discretion. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). Here, however, the parties reached the settlement before the class certification stage. "Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

As stated above, three of the *cy pres* distribution payments in our case are to Chicago-Kent College of Law (16%), Stanford (16%), and Harvard (15%). Attorneys for the class attended all three of these institutions. We, along with other courts and observers, have pointed out the unseemly occurrence of *cy pres* funds being doled out to interested parties' alma maters. *See, e.g., Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011); *Securities & Exchange Comm'n*

v. Bear, Stearns & Co., Inc., 626 F.Supp.2d 402, 414–16 (S.D.N.Y. 2009); Adam Liptak, *Doling out Other People's Money*, N.Y. Times, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like").

In response to this all-too-common development, the American Law Institute has set forth, in its Principles of the Law of Aggregate Litigation, that "[a] *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." American Law Institute (ALI), Principles of the Law of Aggregate Litigation § 3.07 comment b (2010) (emphasis added). Although the majority tells us correctly that no circuit has adopted the specific "prior affiliation" language, circuits have endorsed § 3.07's guidance regarding scrutinizing *cy pres* disbursements. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064–65 (8th Cir. 2015) (vacating a *cy pres* settlement because "class counsel and the district court entirely ignored this now-published ALI authority"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (quoting ALI § 3.07, comment a (2010)); *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012) (citing to ALI § 3.07 and asserting that "[c]ourts have generally agreed with the ALI Principles").

I conclude that our circuit should adopt the ALI's guidance as set forth in § 3.07. District courts should be required to scrutinize *cy pres* settlements when the proffered recipients of the funds have a "prior affiliation" with counsel, a party, or even the judge, especially when one of those players is a loyal alumni of a *cy pres* recipient. I do not mean to suggest that class counsel's alma mater can never be a *cy pres* beneficiary. Rather, I propose that the burden should be on class counsel to show through sworn testimony, in an on-the-record hearing, that the prior affiliation played *no role* in the negotiations, that other institutions were sincerely considered, and that the participant's alma mater is the proper *cy pres* recipient.

The majority responds to this line of argument by asserting that "here, we have nothing more than a barebones allegation that class counsel graduated from schools that house the Internet research centers that will receive funds." The majority then salutes the district court's conclusion that there is "no indication that counsel's allegiance to a particular alma mater factored into the selection process," and stresses that the *cy pres* recipients were a negotiated term, not chosen solely by alumni. In essence, the majority holds that despite the nascent dangers posed by apportioning *cy pres* funds to the distributing parties' alma maters, the burden is entirely on the objectors to show that the settlement might be tainted.

I disagree fundamentally with this analysis. Our precedent requires that district courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947. In our case, we have a *cy pres*-only settlement. That alone raises a yellow flag. Furthermore, we have a class settlement before formal class certification. That raises another yellow flag. Lastly, we have almost half of the settlement fund, several million dollars, being given to class counsel's alma maters. To me, that raises a red flag. I am especially dubious of the inclusion of the Center for Information, Society and Policy at Chicago-Kent Law School (a law school attended by class counsel), which center appears to have inaugurated only a year before the parties herein agreed to their settlement. Even with these red and yellow flags, under the majority's holding, the burden is still on the objectors to prove more, despite the objectors' lack of access to virtually any relevant evidence that would do so.

I would hold that the combination of a *cy pres*-only award, a pre-certification settlement, and the fact that almost half the *cy pres* fund is going to class counsel's alma maters, is sufficient to shift the burden to the proponents of the settlement to show, on a sworn record, that nothing in the acknowledged relationship was a factor in the ultimate choice. Here, the only sworn-to items in the record on this issue are boiler plate, one-line declarations from class counsel stating

"I have no affiliation" with the subject institutions. While the majority asserts that the district court conducted a "careful review," these terse declarations are the only shred of sworn-to evidence in the record. There was essentially nothing for the district court to review—carefully or not. Although there was some discussion between counsel and the district court during the hearings on the settlement, this was nothing more than unsworn lawyer talk during an oral argument.[1]

I still have many questions surrounding how these universities were chosen, such as: What other institutions were considered? Why were the non-alma mater institutions rejected? What relationship have counsel had with these universities? Have counsel donated funds to their alma maters in the past? Do counsel serve on any alma mater committees or boards? Do counsel's family members? How often do counsel visit their alma maters? There are many questions still lingering that have not been answered under oath. Here, as we have directed before, "the district court should have pressed the parties to substantiate their bald assertions with corroborating evidence." *Id.* at 948.

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[1] I disagree with the majority's assertion that "sworn testimony seems superfluous" because counsel submitted one-line boilerplate declarations and the district court heard some unsworn argument from the lawyers. My experience as a trial judge taught me to be skeptical of unsworn statements from lawyers, especially when it comes to conflict of interest issues. To me, there is a significant difference between sworn and unsworn testimony.

Although I would vacate the parties' settlement, I express no opinion on the definitive fairness of the parties' agreement. It is not the province of appellate judges to "substitute our notions of fairness for those of the district judge." *Officers for Justice v. Civ. Serv. Commission of the City and County of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982) (internal citations omitted). Instead, I would remand the case to the district court for further fact finding in accordance with the concerns I have expressed.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION	Case No. 5:10-cv-04809-EJD **ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING MOTION FOR ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS** Re: Dkt. Nos. 65, 66

This consolidated internet privacy litigation against Defendant Google Inc. ("Google") returns for final approval of a class action settlement. *See* Docket Item No. 65. Representative Plaintiffs Paloma Gaos, Anthony Italiano and Gabriel Priyev ("Plaintiffs") also seek an order approving their request for attorneys fees, costs and incentive awards. *See* Docket Item No. 66.

Federal jurisdiction arises pursuant to 28 U.S.C. § 1331. Having carefully considered the written brief-

ing along with the arguments of counsel at the hearing on this matter, the court has determined the motions should be granted for the reasons explained below.

I. FACTUAL AND PROCEDURAL BACKGROUND

The court previously described the factual allegations underlying this lawsuit and repeats them again here. According to the Consolidated Class Action Complaint ("CCAC"), "searching" is one of the "most basic activities performed in the Internet," and Google's website offers "the most-used search engine in the world." *See* CCAC, Docket Item No. 50, at ¶¶ 15, 16. This case focuses on that proprietary search engine. Plaintiffs allege Google operated its search engine in a manner that violated their Internet privacy rights by disclosing personal information to third parties.

Specifically, Plaintiffs allege that Google's search engine intentionally and by default included the user's search terms in the resulting URL of the search results page. *Id.* at ¶ 56. Thus, when a user of Google's search engine clicked on a link from the search results page, the owner of the website subject to the click receives the user's search terms in the "referrer header" from Google. *Id.* at ¶ 57. This information is then disseminated further, since several web analytics services parse search query information from web server logs, or otherwise collect the search query from the

referrer header transmitted by each user's web browser. *Id.* at ¶ 58. Indeed, Google's own analytics product provides webmasters with this information in the aggregate. *Id.*

According to Plaintiffs, the problem with Google's disclosure of users' search information to the third parties is that the referrer header - which displays the user's search terms - can sometimes contain certain personal information often subject to search queries, including "users' real names, street addresses, phone numbers, credit card numbers, social security numbers, financial account numbers and more, all of which increases the risk of identity theft." *Id.* at ¶ 3. "User search queries can also contain highly-personal and sensitive issues, such as confidential medical information, racial or ethnic origins, political or religious beliefs or sexuality, which are often tied to the user's personal information. *Id.* at ¶ 3.

Based on these allegations, Plaintiffs assert the following causes of action against Google: (1) violation of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) breach of implied contract; (5) unjust enrichment; and (6) declaratory and injunctive relief.

Gaos initiated an action in this court on October 25, 2010, and Priyev filed an action on February 29, 2012, in the Northern District of Illinois. On April 30,

2013, the cases were consolidated after the Priyev action was transferred to this court. On March 26, 2014, the court granted the parties motion for preliminary approval of the settlement, certified a settlement class and appointed counsel. These motions were filed upon completion of the notice plan.

The court received four written objections to the settlement from Kim Morrison, David Weiner, Melissa Holyoak, Theodore H. Frank, and Cameron Jan. A hearing addressing final approval was held on August 29, 2014.

II. LEGAL STANDARD

A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties to a putative class action reach a settlement agreement prior to class certification, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

"Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage,

the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Having already completed an preliminary examination of the agreement, the court reviews it again, mindful that the law favors the compromise and settlement of class action suits. *See, e.g.*, *Churchill Village, LLC. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Ultimately, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof." *Hanlon*, 150 F.3d at 1026.

III. DISCUSSION

A. Continuing Certification of Settlement Class

This analysis begins with an examination of whether class treatment remains appropriate. The court found at the preliminary approval stage that Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequate protection by the named representatives were satisfied. As to those issues, Plaintiffs anticipated a class comprised of approximately 129 million individuals who all share a common injury. The existence of this injury for each class

member could be determined by resolving one question: whether Google's system-wide practice and policy of storage and disclosure of their search query information was unlawful. Plaintiffs' claims were also typical, if not identical, to that of other class members. For that reason, there was no indication that Plaintiffs' interest would conflict with that of the class, and Plaintiffs and their counsel had proven a desire to vigorously pursue class claims as evidenced by prior motion practice.

As to Rule 23(b), the court found that common questions predominate and that the class action mechanism was a superior process for this litigation. The alternatives to class certification - millions of separate, individual and time-consuming proceedings or a complete abandonment of claims by a majority of class members - were not preferable. Moreover, class treatment was appropriate because Defendant's policy was directed at all of its users as whole rather than at particular users of its search engine. Since an adequate showing was made as to all of the Rule 23 factors, the court conditionally certified the class for settlement purposes.

The filings related to this motion do not compel an alteration to the prior findings under Rule 23. Although Objectors Frank and Holyoak argue the class should be decertified unless the class members receive direct payments from the settlement fund, such an argument is unpersuasive under these circum-

stances. Frank and Holyoak appear to generally contend that the only acceptable benefit is some form of monetary compensation. If it is too costly to distribute settlement funds to class members, then Frank and Holyoak believe the class action mechanism is an inferior method of resolution under Rule 23(b).

This argument directed at the superiority element of Rule 23(b) is misplaced. Within the context of a class action settlement, the superiority inquiry focuses on "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. Here, the primary objective of the class action procedure - to enable litigation where it would otherwise be economically infeasible - is achieved in this case. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). As noted, the alternatives to a class action are not preferable since they involve either thousands of individual cases or a complete abandonment of millions of claims. *Hanlon*, 150 F.3d at 1023 (holding that a superiority determination "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution.").

Moreover, a class-wide resolution is not rendered inferior simply because the settlement agreement calls for an indirect rather than a direct benefit to the

class. Assuming the circumstances support it, a settlement calling for a cy pres remedy can be approved. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (recognizing that federal courts frequently use the cy pres doctrine where proof of individual claims would be overly-burdensome or distribution of damages too costly.); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (affirming approval of class action settlement providing for $6.5 million distribution of funds to cy pres recipients where direct monetary payments to class members would be de minimis). This case is distinguishable from the one relied upon by Frank and Holyoak, *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), because, while the Court discussed the issue of de minimis recovery versus extraordinary costs of administration, the possibility of a cy pres distribution in place of direct payments to the class was not considered.

Accordingly, the objection of Frank of Holyoak on this topic is overruled. The class shall remain certified for settlement purposes.

B. Appropriateness of the Notice Plan

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." However, individual notice is not always practical. When that is the case, publication or some similar mechanism can be sufficient to provide notice to the individuals that will be

bound by the class action judgment. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

On the issue of appropriate notice, the court previously recognized the uniqueness of the class asserted in this case, since it could potentially cover most internet users in the United States. On that ground, the court approved the proposed notice plan involving four media channels: (1) internet-based notice using paid banner ads targeted at potential class members (in English and in Spanish on Spanish-language websites); (2) notice via "earned media" or, in other words, through articles in the press; (3) a website decided solely to the settlement (in English and Spanish versions); and (4) a toll-free telephone number where class members can obtain additional information and request a class notice. In addition, the court approved the content and appearance of the class notice and related forms as consistent with Rule 23(c)(2)(B).

The court again finds that the notice plan and class notices are consistent with Rule 23, and that the plan has been fully and properly implemented by the parties and the class administrator.

C. Fairness of the Settlement

The court now reexamines the fairness of the proposed settlement, this time with the benefit of notice having been provided to the class. The settlement agreement contains the following major components:

- Google will pay a total amount of $8.5 million, which will constitute the entirety of the settlement fund. All payments will be made from this fund, including: (1) distributions to cy pres recipients, (2) attorneys fees and costs awards, (3) incentive awards to named plaintiffs, and (4) administration costs, including the costs due to the claims administrator. Funds that remain after all payments are made will not revert to Google.

- Google will maintain information on its website under the "FAQ," "Key Terms," and "Privacy FAQ for Google Web History" webpages which discloses how information concerning users' search queries are shared with third parties. Specifically, the "FAQ" webpage will include an answer to the question "Are my search queries sent to websites when I click on Google Search results?" which notifies users that search terms may be disclosed to the destination webpage in the referrer header. In conjunction, the "Key Terms" webpage will include a definition of "HTTP Referrer," and the "Privacy FAQ for Google Web History" webpage will direct users to the Privacy Policy FAQ for more information on how Google handles search queries generally. Importantly, however, Google is not required to make changes to its homepage, www.google.com, or to practices or functionality of Google Search, Google AdWords, Google Analytics or Google Web History.

- As to particular payments to be made from the settlement fund, Plaintiffs request that each of the three representative plaintiffs receive incentive awards $5,000, and anticipate up to $1 million in claims administration costs. They also request the court approve their counsel's request for $2.125 million in fees and $21,643.16 in costs.

- After all contemplated payments are made from the fund, the balance will be distributed to the cy pres recipients previously approved by the court. To that end, Plaintiffs propose that Carnegie Mellon University receive 21% of the remainder, that the World Privacy Forum receive 17%, that Chicago-Kent College of Law Center for Information, Society and Policy receive 16%, that the Stanford Center for Internet and Society receive 16%, that the Berkman Center for Internet and Society at Harvard University receive 15%, and that the AARP Foundation receive 15%.

To determine whether a class action settlement is fair, adequate and reasonable, the court must balance a series of factors, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experi-

ence and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.*

When, as here, settlement occurs before formal class certification, approval requires a higher standard of fairness in order to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. *Lane*, 696 F.3d at 819.

i. Strength of Plaintiffs' Case

To assess strength of the case, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). There is no "particular formula by which that outcome must be tested," (*Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)), and the district court is not required to render specific findings on the strength of all claims. *Lane*, 696 F.3d at 823. Instead, the court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm Mutual Auto. Ins. Co.*, No. 08-CV-1365-CW, 2010 U.S. Dist. LEXIS 49477, at *24, 2010 WL 1687832 (N.D. Cal. April 22, 2010).

Here, Plaintiffs readily state that the alleged privacy violation underlying all of their claims is novel and was potentially one of first impression in this circuit. Thus, from the outset, there was no guarantee that any claims would survive pre-trial challenges if adversarial litigation had continued. Indeed, by the time the parties reached a settlement, some of the claims were facing a third motion to dismiss and the one claim that had survived the second dismissal motion, the SCA claim, was subsequently invalidated by the Ninth Circuit in a case presenting a similar theory. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1107 (9th Cir. 2014) (rejecting a claim under the SCA based on webpage disclosures in a referrer header).

Plaintiff also faced challenges had the case proceeded to trial. In light of the technology involved, the jury would have been required to review complex technical evidence about the inner-workings of Google's search engine, leaving significant opportunity for misunderstanding. Furthermore, success at trial would not have equated to an ultimate success for the class. This is because the calculation of damages based on a potentially unquantifiable privacy injury would have posed a serious challenge to Plaintiffs in obtaining some type of valuable relief, and any meaningful monetary amount awarded to each class member would have resulted in an astronomical judgment far exceeding the value of Google, given the size of the class. For that reason, the judgment would undoubtedly have been met with a remittitur motion and an appeal.

This factor weighs strongly in favor of the settlement. Without a compromise, there was little guarantee of any benefit to the class without a substantial amount of further litigation.

ii. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

This case was a particularly risky one for counsel because the type of privacy injury asserted by Plaintiffs renders it legally unproven, technically complex and potentially of little value. It also would have been expensive to litigate and try since expert testimony would be necessary to explain the referrer header technology and establish a basis for damages in an untested area.

Moreover, Google's denial of liability means Plaintiffs would continue to face "serious hurdles," including a motion for summary judgment, *Daubert* challenges, and inevitable appeals that would "likely prolong the litigation, and any recovery by class members, for years." *Rodriguez*, 563 F.3d at 966. Because a negotiated resolution provides for a certain recovery in the face of an uncertain legal theory, this factor favors the settlement. *Curtis-Bauer v. Morgan Stanley & Co.*, Inc., No. 06-C-3903 TEH, 2008 U.S. Dist. LEXIS 85028, at *13, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.").

iii. The Risk of Maintaining Class Action Status

Although a class can be certified for settlement purposes, the notion that a district court could decertify a class at any time is an inescapable and weighty risk that weighs in favor of a settlement. *See Rodriguez*, 563 F.3d at 966 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). Here, there is little doubt that Google would have vigorously opposed class certification at every opportunity before the district and appellate courts. In addition, the sheer size of the class - essentially covering all persons in the United States who submitted a search query to Google for a period of years - all but invites challenges to class certification based on overbreadth or management difficulties, some of which could be considered meritorious. Thus, the very real risk of never obtaining or losing class status in the absence of settlement weighs in favor of approval.

iv. The Amount Offered in Settlement

This settlement has a monetary component requiring Google to pay $8.5 million into a common fund and an injunctive component obligating certain disclosures on the Google website. After court-approved payments, the remainder of the fund will be distributed to identified cy pres recipients in proportions designated by Plaintiffs' counsel.

In support of final approval, Plaintiffs point out that the amount of the agreed-upon settlement fund

compares favorably to that of other similar class actions. *See, e.g., In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *3-4 (N.D. Cal. June 2, 2011) (approving $8.5 million settlement fund for unauthorized disclosure of email contact lists; *Lane*, 696 F.3d at 818 (approving $9.5 million settlement fund for unauthorized disclosure of online behavior); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 372862013, at *16-18, WL 1120801 (N.D. Cal. March 18, 2013) (approving $ 9 million settlement fund for unauthorized storage of personal information). This comparison is instructive because, like those cases, the potential value of this case far exceeds that of the settlement fund. But also like those cases, a theoretical value in the trillions of dollars does not preclude approval here since a fund of $8.5 million is significant given the substantial legal obstacles to a recovery through litigation.

Plaintiffs also believe that a distribution of the settlement funds to cy pres recipients is appropriate in this case. Cy pres payments like those proposed for this case can be approved when actual funds are "non-distributable," or "'where the proof of individual claims would be burdensome or distribution of damages costly.'" *Nachshin*, 663 F.3d at 1038 (quoting *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)). But due to a heightened potential for collusion at the expense of absent class members, this form of settlement must be examined to ensure it is the "next best" remedy to direct payments to the class. *See id.*; *see also Lane*, 696 F.3d at

819 (holding that a class settlement should not be approved unless it was evaluated "to account for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit."). A district court should not approve a cy pres distribution "unless it bears a substantial nexus to the interests of the class members" such that it accounts for the nature of the lawsuit, the objectives of the underlying statutes, and the interests of the non-appearing class members. *Lane*, 696 F.3d at 821.

On this issue, the court echoes the comments it made at preliminary approval describing why a cy pres remedy is the "next best" result here. First, the settlement fund, while sizeable, is "non-distributable." Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, review and then verify. Similarly, the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.

Second, the cy pres distribution accounts for the nature of this suit, meets the objectives of the SCA, and furthers the interests of class members. The recipients are established organizations chosen by Plaintiffs' counsel after considering whether they are independent and free from conflict, have a record of promoting privacy protection on the Internet, reach

and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online privacy risks.[1] Having carefully reviewed the proposals submitted by counsel, the court is satisfied that the proposed cy pres distribution "bears a substantial nexus to the interests of the class

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[1] Some of the proposed cy pres recipients are "usual suspects," or organizations that routinely receive distributions from class action settlements. At the two approval hearings held in this case, the court expressed a concern with using the same list of cy pres recipients in every internet privacy class action and observed that this practice discourages the development of other worthy organizations. This practice also raises questions about the effectiveness of those organizations that have received prior distributions. The court was somewhat surprised at the final list of distributees, since Plaintiffs' counsel suggested the selection process would potentially cast a wider net. *See* Tr. of Proceedings on Aug. 23, 2013, Docket Item No. 57, at p. 14:25-15:4 ("We are raising the bar, and I think raising the bar for all cy pres settlements like this to follow. We're treating the cy pres allocation more like a grant making organization would treat grant - prospective grant recipients.").

Despite this concern, the court recognizes that failure to diversify the list of distributees is not a basis to reject the settlement, particularly when the proposed recipients otherwise qualify under the applicable standard. *See Lane*, 696 F.3d at 820-21 ("We do not require... that settling parties select a cy pres recipient that the court or class members would find ideal ....such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process."). However, if class action counsel truly seeks to raise the bar for cy pres settlements, they should consider contributing to organizations other than the same typical few.

members," as required by the Ninth Circuit. *Id.* at 821.

Aside from the cy pres portion of the settlement, the court must also comment on the fact that Google's allegedly unlawful practice will not change as a result of this case. Instead, Google will be obligated to make certain "agreed-upon disclosures," or changes to certain portions of its website, the purpose of which is to better inform users how their search terms could be disclosed to third parties through a referrer header. It was noted previously that this relief is not the best result when compared to that sought in the CCAC, since the order contemplated by that pleading would have required Google to stop disclosing search queries altogether.

At the same time, a class action settlement does not need to embody the best possible result to be approved. The court's role is not to advocate for any particular relief, but instead to determine whether the settlement terms fall within a reasonable range of possible settlements, giving "proper deference to the private consensual decision of the parties" to reach an agreement rather than to continue litigating. *Hanlon*, 150 F.3d at 1027; *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Considering all of the circumstances which led to a compromise here, the relief obtained for the class falls within a reasonable range of possible settlements since it was entirely possible that nothing would be obtained if the case were to proceed further. Under

the terms of the parties' agreement, and contrary to what the objectors argue, future users of Google's website will receive something from the injunctive relief: the capability to better understand Google's disclosure practices before conducting a search on its website, and the ability to make a better informed choice based on that information.

In sum, this factor favors settlement.

v. The Extent of Discovery Completed and the Stage of the Proceedings

Prior to reaching a settlement, the parties had engaged in extensive document exchange and had fully briefed three motions to dismiss. They also met in person numerous times and engaged an experienced neutral to assist them in reaching a negotiated resolution. The extent of Plaintiffs' counsel factual investigation and the amount of pre-compromise litigation shows they "had a good grasp on the merits of their case before settlement talks began." *Rodriguez*, 563 F.3d at 967. As such, this factor weighs in favor of the settlement.

vi. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Id.* Consequently, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *In re Omnivision Techns., Inc.*, 559

F. Supp. 2d 1036, 1043 (N.D. Cal. 2009) (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Given the extensive experience of Plaintiffs' counsel with complex class action lawsuits of a similar size to the instant case, this factor favors approval of the settlement.

vii. The Presence of a Governmental Participant

The Class Action Fairness Act, or "CAFA," requires that notice of a settlement be given to state and federal officials and provides those officials a window of time to comment. 28 U.S.C. § 1715(b). "Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." *Garner*, 2010 U.S. Dist. LEXIS 49477, at *37. Here, the Class Administrator complied with the CAFA notice requirement on August 8, 2013. No objections from a government official have been received. Thus, this factor favors the settlement.

viii. The Reaction of Class Members

A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval. *See Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the

class presents at least some objective positive commentary as to its fairness."); *see also Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). Here, out of a class of more than 100 million individuals, the Class Administrator received thirteen requests for exclusion and four written objections from five class members. These low rates of exclusion and objection can be characterized as, at most, a favorable reaction by the class, or at least, as an absence of an overwhelming negative reaction. This factor does weigh in favor of approval, albeit without significant force.

In sum, all of the applicable factors weigh in favor of finally approving the settlement.

IV. ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS

When attorneys fees and costs are requested by counsel for the class, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

"Where a settlement produces a common fund for the benefit of the entire class, courts have discretion

to employ either the lodestar method or the percentage-of-recovery method." *Id.* at 942. The former method is routinely used when "the relief sought - and obtained - is often primarily injunctive in nature and thus not easily monetized." *Id.* The figure is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* The court can "adjust [the figure] upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* at 941-42 (internal quotations omitted). "Foremost among these considerations, however, is the benefit obtained for the class." *Id.* at 942.

Under the latter method, the court awards as fees a percentage of the common fund in lieu of the lodestar amount. *Id.* "[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *Id.* Relevant factors to a determination of the percentage ultimately awarded include: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *Tarlecki v. bebe Stores, Inc.*, No. C 05-1777 MHP, 2009

U.S. Dist. LEXIS 102531, at *10, 2009 WL 3720872 (N.D. Cal. Nov. 3, 2009).

"Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *Id.*

A. Percentage of the Fund

Plaintiffs' counsel seek a fee award of $2.125 million, which is equal to 25% of the settlement fund. According to counsel, the combination of monetary distributions and injunctive relief obtained in the settlement is an excellent result for the class because they "work in concert . . . reshape the landscape of Internet privacy protections" and "enact a regime of informed consent for Google Search users, who can now access complete and truthful information about the ways Google handles user search queries before deciding whether to use Google Search, Google Encrypted Search, or a competing search engine."

Plaintiffs' counsel also believe they undertook substantial risk by agreeing to litigate this case on a purely contingent basis given the unsettled legal issues, and, for that reason, spent considerable time and money with no guarantee of payment. In addition, they assert the novel nature of this case coupled with an opponent armed with substantial defenses and resources required sophisticated litigation and negotiation skills. Finally, counsel points out that the award requested is consistent with that awarded in other similar cases.

Having considered the relevant factors, the court agrees with Plaintiffs' counsel that this action posed a substantial risk and required significant time and skill to obtain a result for the class. This case was not one where settlement was easily secured; to the contrary, Plaintiffs' counsel was required to defend their claims against three motions to dismiss. An agreement only materialized after extensive in-person negotiations, first without and then including a professional neutral. Moreover, counsel's request is not disproportionate to the class benefit and is comparable to awards approved in other similar internet privacy class actions, including one previously approved by this court. *See In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 372862013, at *29 (approving benchmark award of $2.25 million). Accordingly, a benchmark fee award of amounting to 25% of the settlement fund is appropriate.

B. Lodestar Comparison

The Ninth Circuit encourages district courts "to guard against an unreasonable result" by cross-checking attorneys fees calculations against a second method. *In re Bluetooth*, 654 F.3d at 944. Since a 25% benchmark award might be reasonable in some cases but arbitrary in cases involving an extremely large settlement fund, the purpose of the comparison is to ensure counsel is not overcompensated. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 103 F.3d 602, 607 (9th Cir. 1997).

Here, Plaintiffs' counsel calculates a lodestar figure of $966,598.75 for 2085.6 billing hours from four law firms, to which they apply a 2.2 multiplier for a total amount of $2,126,517.25. They also seek compensation for total costs of $21,643.16. These amounts are attributable to each firm as follows:

Firm	Fees	Expenses	Total Cost
Aschenbrener Law, P.C.	$321,184.00	$5,844.54	$327,028.54
Nassiri & Jung LLP	$253,776.50	$4,464.95	$258,241.45
Progressive Law Group	$331,967.25	$7,551.27 (+ $22.40)	$339,540.92
Edelson PC	$59,671.00	$3,760.00	$63,431.00
Totals	$966,598.75	$21,643.16	$988,241.91

Among the participating law firms, the hourly rates charged by attorneys range from $300 to $685. The hourly rate for law clerks is $75, and for paralegals is $125. Altogether, the average hourly rate for all work performed is $463.

Plaintiff's counsel has provided sufficient support for its proposed lodestar calculation. The amount of hours and other costs attributed to this case are reasonable in light of the efforts required to litigate and ultimately engage in a lengthy settlement process. In

addition, the hourly rates charged fall within the range of those approved in other similar cases, and the suggested lodestar multiplier of 2.2 is comparable to that previously permitted by other courts in similar internet privacy cases. Accordingly, the lodestar cross-check confirms the reasonableness of the percentage-based calculation.

C. Incentive Awards

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. To determine the appropriateness of incentive awards a district court should use "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation." *Id.* (internal quotation marks omitted).

The Settlement Agreement provides that the named Plaintiffs may receive incentive awards of up to $5,000 each. In this district, that amount is presumptively reasonable. *Jacobs v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, No. C 07-00362 MHP, 2009 U.S. Dist. LEXIS 101586, at *13-14, 2009 WL 3562871 (N.D. Cal. Oct. 27, 2009). Since the named plaintiffs assumed the responsibilities and burdens of acting as representatives in this lawsuit, including

providing documents, verifying allegations, and consulting with counsel, the court finds the incentive awards reasonable in light of the eligibility factors set forth in *Staton*.

V. OBJECTIONS

The court now addresses the points raised in the four written objections, keeping in mind that objectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990).

The objectors have not satisfied this burden. To begin, all four objectors take issue with the cy pres character of this settlement, or with cy pres settlements in general. These arguments overlook both the law of this circuit which permits cy pres settlements such as this one, and the indirect benefit provided by a cy pres settlements. *See Lane*, 696 F.3d at 819. In addition, the court has explained why Plaintiffs made a sufficient showing that the cost of distributing this or really any settlement fund to the class members would be prohibitive.

The objectors similarly argue that the size of the settlement fund is insufficient in comparison to the value of the case, and believe that a fair settlement would have resulted in an end to Google's "unlawful" practices. This contention is misguided, however, because the objectors do not account for the significant and potentially case-ending weakness in the SCA

claim brought about by the Ninth Circuit's decision in *Zynga Privacy Litigation*. In light of this development, whether or not Google's practice of disclosing search queries can actually be characterized as unlawful is questionable. In the end, the parties fashioned a settlement in consideration of the favorable and unfavorable aspects of each side's case. And it is the parties themselves, as opposed to the court or the objectors, who are in the best position to assess whether a settlement "fairly reflects" their "expected outcome in litigation." *In re Pac. Ents. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Just because a settlement could be improved does not mean it is not fair, reasonable or adequate. *Hanlon*, 150 F.3d at 1027. Here, there is no reason to believe the settlement is inadequate when viewed against the diminished strength of the claims.

Objectors also argue that the cy pres recipients are unrelated to the subject matter of this case, and one claims there is a conflict of interest because some of the attorneys representing Plaintiffs attended Harvard University. The court rejects these arguments. The chosen recipients and their respective proposals are sufficiently related so as to warrant approval; they do not have to be the recipients that objectors or the court consider ideal. *Lane*, 696 F.3d at 820-21. Additionally, while the potential for a conflict of interest is noted, there is no indication that counsel's allegiance to a particular alma mater factored into the selection process. Indeed, the identity of potential cy pres recipients was a negotiated term included in the

Settlement Agreement and therefore not chosen solely by Harvard alumni.

Some objections challenge the notice plan or the contents of the notice and describe alternative ways that notice could have been provided to the class. It may be true that other methods of notice exist. But here, the court approved one specific plan that satisfied the standard Rule 23(c)(2)(B) standard. Although the plan did not call for individual notice, that type of notice is not required in all cases. *See Mullane*, 339 U.S. at 315.

Finally, the objectors challenge the provisions of the Settlement Agreement which provide for attorney's fees and incentive awards. The court does not agree that the fees and incentive awards are inconsistent with the value of the class benefit, and notes that the approved amounts are consistent with the relevant Ninth Circuit authority on this topic.

For these reasons, the court is unpersuaded by the objections. They are each overruled.

VI. CONCLUSION AND ORDER

Based on the preceding discussion, the court finds that the terms of the settlement, including the awards of attorneys fees, costs, and incentive awards, is fair, adequate, and reasonable; that it satisfies Federal Rule of Civil Procedure 23(e) and the fairness and adequacy factors; and that it should be approved and implemented.

The Motion for Final Approval (Docket Item No. 65) and the Motion for Attorneys Fees and Costs (Docket Item No. 66) are therefore GRANTED. The Clerk shall close this file upon entry of Judgment.

IT IS SO ORDERED.

Dated: March 31, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PALOMA GAOS, ANTHONY ITALIANO, AND GABRIEL PRIYEV individually and on behalf of others similarly situated, Plaintiffs, v. GOOGLE, INC., a Delaware corporation, Defendant.	CASE No. 5:10-cv-04809-EJD CLASS ACTION ~~[PROPOSED]~~ **FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE** Judge: Edward J. Davila

Pending before the Court is Plaintiffs' Motion for Final Approval of the Class Action Settlement (Dkt. 65) and Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Awards (Dkt. 66). Having reviewed the papers filed in support of the Motion, heard argument of counsel, and good cause appearing therein, Plaintiffs' Motions are hereby GRANTED and it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Any terms and phrases in this Order shall have the same meaning as the Settlement Agreement reached by the Parties.

2. This Court has appropriate subject matter jurisdiction over this action and over all Parties to the Action, including all Settlement Class Members.

3. The Court affirms certification of the Class and gives final approval to the Settlement and finds the Settlement is fair, adequate, and reasonable, and in the best interests of the Class. The Settlement Agreement is the result of arms-length negotiations and was overseen by a neutral mediator. The Class Representatives and Class Counsel appropriately represented the Settlement Class for purposes of entering into and implementing the Settlement. Accordingly, the Settlement Agreement is finally approved in all respects, and the Parties are directed to perform its terms.

4. The Court-approved Notice Plan to the Class was the best practicable under the circumstances and included substantial Internet advertising and a website comprehensively detailing the terms of the Settlement. The Notice Plan was successfully implemented and satisfies the requirements of Due Process and Federal Rule of Civil Procedure 23.

5. The Court finds that the Parties properly and timely notified the appropriate state and federal officials to alert them to the Settlement, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1714 ("CAFA"). The Court reviewed the substance of this notice and accompanying materials and finds that they complied with all necessary CAFA requirements.

6. Subject to the terms and conditions of the Settlement, this Court dismisses the action on the merits and with prejudice.

7. Twelve individuals timely and validly excluded themselves from the Settlement.

8. Plaintiffs and each member of the Class, fully, finally, completely, and forever release, acquit, and discharge Google from any and all claims that were raised in this litigation, as further described in the Settlement Agreement.

9. This release of claims and the Settlement Agreement will be binding on and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and all other Class Members, and their heirs, executors, and administrators, successors, and assigns. All Class Members who have not been properly excluded from the Settlement are hereby permanently barred and enjoined from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on or arising out of the released claims.

10. The Court awards $2,125,000 in fees to Class Counsel and $21,643.16 in expenses for costs incurred.

11. The Court will distribute the awarded fees according to the following formula:

a. 39% of fees awarded to Nassiri & Jung LLP;

b. 39% of fees awarded to Aschenbrener Law, P.C.; and

c. 22% of fees awarded to Progressive Law Group, LLC.

12. Costs and expenses awarded to Class Counsel shall be distributed as follows: Aschenbrener Law is entitled to $5,844.54; Nassiri & Jung is entitled to $4,464.95; and Progressive Law Group is entitled to $7,551.27; Edelson PC is entitled to $3,760.00; and Diemer, Whitman & Cardosi LLP is entitled to $22.40.

13. The Court awards $5,000 to each of the three Class Representatives (Plaintiff Gaos, Plaintiff Italiano, and Plaintiff Priyev) for a total of $15,000 in incentive awards.

14. Defendant shall pay the Fee Award and Incentive Award pursuant to and in the manner provided by in the terms of the Settlement Agreement.

15. The Court directs entry of final judgment based on the Court's finding that there is no just reason for delay of enforcement or appeal of this judgment, notwithstanding the Court's retention of jurisdiction to oversee the implementation and enforcement of the Settlement.

16. Without affecting the finality of this judgment, the Court shall continue to have jurisdiction over (a)

the implementation, enforcement, and administration of the Settlement; (b) the resolution of any disputes concerning class membership or entitlement to benefits under the terms of the Settlement; and (c) all Parties, for the purpose of enforcing and administering the Settlement and this litigation until each act agreed upon amongst the Parties is performed pursuant to the Settlement.

IT IS SO ORDERED.

Dated: April 2, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GOOGLE REFERRER HEADER PRIVACY LITIGATION PALOMA GAOS; et al., Plaintiffs-Appellees, v. MELISSA ANN HOLYOAK; THEODORE H. FRANK, Objectors-Appellants, v. GOOGLE, INC., a Delaware corporation, Defendant-Appellee.	No. 15-15858 D.C. No. 5:10-cv-04809-EJD Northern District of California, San Jose ORDER

Before: WALLACE, McKEOWN, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

Judge McKeown and Judge Bybee vote to deny the petition for rehearing en banc. Judge Wallace recommends granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release ("Agreement") is made by and between Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev (the "Class Representatives" or the "Plaintiffs"), on behalf of themselves and others similarly situated (collectively, the "Class"), on the one hand, and Google Inc. ("Google" or "Defendant," and together with Plaintiffs, the "Parties"), on the other hand. The Parties intend this Agreement to fully, finally, and forever resolve, discharge, and settle the Released Claims (as the term is defined below), subject to the terms and conditions of this Agreement, and subject to final approval of the Court.

WHEREAS, on October 25, 2010, Plaintiff Gaos brought a putative class action against Google in the Northern District of California, captioned *Gaos v. Google Inc.*, Case No. 5-10-CV-04809, that was initially assigned to Chief Judge Ware (the "Gaos Action"), alleging violations of certain federal and state laws;

WHEREAS, following the April 7, 2011 dismissal of that initial complaint, Plaintiff Gaos filed the First Amended Complaint on May 2, 2011, alleging similar claims;

WHEREAS, the case was re-assigned from Chief Judge Ware to Judge Davila;

WHEREAS, following the March 29, 2012 dismissal of the First Amended Complaint's state-law claims for lack of standing, Plaintiff Gaos, together with Plaintiff Italiano (the "Gaos Plaintiffs"), filed the operative Second Amended Complaint ("Gaos Complaint") alleging (i) violations of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*; (ii) breach of contract; (iii) violations of California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200; and (iv) unjust enrichment;

WHEREAS, Google's motion to dismiss the Gaos Complaint is still pending before this Court;

WHEREAS, on February 29, 2012, Plaintiff Priyev brought a putative class action in the United States District Court, Northern District of Illinois, Eastern Division, against Google, formerly captioned *Priyev v. Google Inc.*, Case No. 12-CV-01467 (the "Priyev Action" and, together with the Gaos Action, the "Actions"), alleging violations of certain federal and state laws;

WHEREAS, following Google's April 30, 2012 motion to dismiss the Priyev Action, Plaintiff Priyev twice sought and obtained leave to amend his initial complaint, and on August 10, 2012 filed the operative Second Amended Class Action Complaint ("Priyev Complaint") alleging (i) breach of contract; (ii) breach of contract by breach of covenant of good faith and fair dealing; (iii) breach of contract implied in law; (iv) violations of the Electronic Communications Privacy

Act; (v) violations of California's Unfair Competition Law; and (vi) seeking declaratory judgment and corresponding injunctive relief;

WHEREAS, on August 28, 2012, the Priyev Action was transferred from the Northern District of Illinois to the Northern District of California and is now docketed as Case No. 5-13-00093, and, after Plaintiff Priyev declined consent to assignment to Magistrate Judge Grewal, the case has been assigned to Judge Koh;

WHEREAS, Priyev intends to file a notice of related case to the Gaos Action to seek transfer of the Priyev Action to Judge Davila, and both Google and the Gaos Plaintiffs intend to support the transfer request;

WHEREAS, the Parties engaged in direct negotiations during 2012 in each of the Actions and participated in an all-day mediation before Randall Wulff of Wulff, Quinby & Sochynsky on January 28, 2013;

WHEREAS, Plaintiffs have conducted meaningful investigation and analyzed and evaluated the merits of the claims made to date against Google in the Actions, and the impact of this Agreement on Plaintiffs and the Class, and based upon that analysis and the evaluation of a number of factors, and recognizing the substantial risks of continued litigation, including the possibility that the Actions, if not settled now, might not result in any recovery whatsoever for the Class,

or might result in a recovery that is less favorable to the Class, and that any such recovery would not occur for several years, Plaintiffs are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate, and that this Agreement is in the best interest of the Class; and

WHEREAS, Google has denied and continues to deny each allegation and all charges of wrongdoing or liability of any kind whatsoever asserted or that could have been asserted in the Actions; and

WHEREAS, while Plaintiffs believe these claims possess substantial merit and while Google vigorously disputes such claims, without in any way agreeing as to any fault or liability, the Parties have agreed to enter into this Agreement as an appropriate compromise of the Class claims to put to rest all controversy and to avoid the uncertainty, risk, expense, and burdensome, protracted, and costly litigation that would be involved in prosecuting and defending the Actions;

NOW, THEREFORE, it is hereby agreed by the Parties that, in consideration for the undertakings, promises, and payments set forth in this Agreement and upon the entry by the Court of a Final Order and Judgment approving and directing the implementation of the terms and conditions of this Agreement, the Actions shall be settled and compromised upon the terms and conditions set forth below.

1. DEFINITIONS

Whenever the following capitalized terms are used in this Agreement and in the attached exhibits (in addition to any definitions elsewhere in this Agreement), they shall have the following meanings:

1.1 "Actions" means both the Priyev Action and the Gaos Action, as those terms are defined below.

1.2 "Agreed-Upon Disclosures" means the additional disclosures that Google has agreed to make to its "FAQs" webpage currently located at http://www.google.com/policies/privacy/faq/, the "Key Terms" webpage currently located at http://www.google.com/policies/privacy/key-terms/, and the "Privacy FAQ for Google Web History" web page currently located at https://support.google.com/accounts/bin/answer.py?hl=en&answer=54050, pursuant to Paragraph 3.1.

1.3 "Agreement" means this Settlement Agreement and Release, including all exhibits.

1.4 "Class" means all Persons in the United States who submitted a search query to Google at any time during the period commencing on October 25, 2006, up to and including the date of the Notice of Proposed Class Action Settlement pursuant to the Notice Plan. This term wholly encompasses, but is not limited to, the Classes set forth in Paragraph 72 of the

Priyev Complaint and in Paragraphs 97, 98, and 99 of the Gaos Complaint, respectively.

1.5 "Class Administrator" means a third-party class action settlement administrator to be selected by the Parties' mutual agreement and whose responsibilities will include overseeing and implementing the Notice Plan and managing the dissemination of funds from the Common Fund until all financial obligations under this Agreement have been satisfied and no funds remain in the Common Fund.

1.6 "Class Counsel" means Kassra Nassiri of Nassiri & Jung LLP, Michael Aschenbrener of Aschenbrener Law, P.C., and Ilan Chorowsky of Progressive Law Group, LLC.

1.7 "Class Member" means any person who qualifies under the definition of "Class," excluding: (i) Google, its subsidiaries and affiliates, officers, and directors; (ii) the judge(s) to whom these cases are assigned and any member of the judge's or judges' immediate family; (iii) Persons who have settled with and released Google from individual claims substantially similar to those alleged in the Gaos Complaint and the Priyev Complaint; and (iv) Persons who submit a valid and timely Request for Exclusion pursuant to Paragraph 6.1.

1.8 "Class Representatives" or "Plaintiffs" means named Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev, acting either individually or through Class Counsel.

1.9 "Combined Action" means the action consolidating the Gaos Action and the Priyev Action, as set forth in Paragraph 2.3.

1.10 "Court" means the United States District Court for the Northern District of California.

1.11 "*Cy Pres* Recipients" means any of the following entities (and any other mutually-agreed upon entity) that is approved by the Court for a *cy pres* distribution pursuant to Paragraph 3.3: Berkman Center for Internet and Society (Harvard Law School), Center for Internet and Society (Stanford Law School), MacArthur Foundation, and AARP, Inc.

1.12 "Day" or "days" refers to calendar days.

1.13 "Effective Date" means the first date after a Final Order and Judgment is entered in the Action granting approval to the terms of this Agreement without modification (unless any modification is accepted by all Parties to this Agreement, pursuant to Paragraph 13.3) *and* either of the following events also has occurred (i) the date upon which the time to appeal the Final Order and Judgment expires with no appeal having been filed; or (ii) the date upon which any such appeal of the Final Order and Judgment is

successfully resolved such that, in either case, the Final Order and Judgment approving this Agreement is no longer subject to any challenge on direct appeal.

1.14 "Fee Award" means any attorneys' fees, reimbursement of expenses, and other costs awarded by the Court to Class Counsel.

1.15 "Final Approval Hearing" means the hearing before the Court where (i) the Parties request that the Court approve this Agreement as fair, reasonable, and adequate; (ii) the Parties request that the Court enter its Final Order and Judgment in accordance with this Agreement; and (iii) Class Counsel request approval of their petition for reasonable attorneys' fees and expenses, as well as any requested incentive award to the Class Representatives.

1.16 "Final Order and Judgment" means the order entered by the Court, in a form that is mutually agreeable to the Parties, approving this Agreement as fair, reasonable, adequate, and in the best interest of the Class as a whole, and making such other findings and determinations as the Court deems necessary and appropriate to effectuate the terms of this Agreement, without modifying any terms of this Agreement that either Party deems material.

1.17 "Gaos Action" means *Gaos v. Google Inc.*, No. 5-10-CV-04809, filed on October 25, 2010 in the United States District Court for the Northern District of California.

1.18 "Gaos Complaint" means the Second Amended Complaint filed in the Gaos Action on May 1, 2012 and available on the online docket at ECF No. 39.

1.19 "Google" means Google Inc. and its affiliates, agents, assigns, attorneys, directors, divisions, employees, officers, or other representatives.

1.20 "Google AdWords" means Google's advertising service currently described at http://adwords.google.com.

1.21 "Google Analytics" means Google's web analytics service currently described at http://www.google.com/analytics/.

1.22 "Google Releasees" means Google and any of Google's current or former administrators, affiliates, agents, assigns, attorneys, beneficiaries, branches, contractors, directors, divisions, employee benefit plans, employees, insurers, investors, joint venturers, members, officers, parents, predecessors, related entities, representatives, servants, shareholders, subsidiaries, successors, trustees, units, and all other individuals and entities acting on Google's behalf.

1.23 "Google Search" means the search engine accessible at www.google.com.

1.24 "Google Web History" means a product available to Google account holders, currently described at http://support.google.com/accounts/bin/topic.py?hl=en&topic= 14148.

1.25 "Incentive Award" means any amount awarded by the Court to the Class Representatives for their time and effort in bringing these Actions and for serving as Class Representatives.

1.26 "Notice Plan" means the content of the notice of this Agreement and the agreed upon program by which that notice will be disseminated.

1.27 "Notice of Proposed Class Action Settlement" means the notice as described in the Notice Plan.

1.28 "Opt-Out Deadline" means the deadline for a Class Member to properly submit a Request for Exclusion as set forth in Paragraph 6.1 of this Agreement and in the Preliminary Approval Order and which shall be no more than sixty (60) days from the completion date of the Notice of Proposed Class Action Settlement.

1.29 "Party" means any one of the Plaintiffs or Google, and "Parties" means Plaintiffs and Google.

1.30 "Person" means an individual or legal entity, including an association, or his, her, or its respective successors or assigns.

1.31 "Preliminary Approval Order" means the order issued by this Court (i) granting preliminary approval of this Agreement; (ii) provisionally certifying the Class for settlement purposes; (iii) appointing Plaintiffs as Class Representatives and their counsel as Class Counsel; (iv) approving the form and manner of the Notice Plan and appointing a Class Administrator; (v) approving the proposed *Cy Pres* Recipients; (vi) establishing deadlines for Requests for Exclusion and the filing of objections to the proposed settlement contemplated by this Agreement; (vii) finding that Google has complied with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715; and (viii) scheduling the Final Approval Hearing.

1.32 "Priyev Action" means *Priyev v. Google Inc.*, No. 12-CV-01467, initially filed on February 29, 2012 in the United States District Court for the Northern District of Illinois and now transferred to the United States District Court for the Northern District of California.

1.33 "Priyev Complaint" means the Second Amended Class Action Complaint filed in the Priyev Action on August 10, 2012 and available on the online docket at ECF No. 40.

1.34 "Released Claims" means any and all claims that any Class Member may now or at any time have up to the date of preliminary approval of this Agreement, whether or not known or existing at

the time of this Agreement, arising out of the subject matter giving rise to the claims in the Actions.

1.35 "Releasing Party" means Plaintiffs and all Class Members.

1.36 "Request for Exclusion" means the form attached as Exhibit B to this Agreement which must be completed and returned in the manner and within the time period specified in Paragraph 6.1.

1.37 "Settlement Amount" means the total sum that Google will pay in connection with this Agreement, as described in Paragraph 3.2.

1.38 "Settlement Website" means the third-party website, referred to in Paragraph 5.5, created and maintained by the Class Administrator to provide, among other things, Notice of Proposed Class Action Settlement and containing the operative complaint(s), and neutral information about this Agreement and the Notice of Proposed Class Action Settlement.

2. SETTLEMENT PURPOSES ONLY

2.1 This Agreement is for settlement purposes only, and to the fullest extent permitted by law, neither the fact or content of this Agreement or its attachments, nor any action based on it, shall constitute, be construed as, or be admissible in evidence as an admission of the validity of any claim, of any fact

alleged by Plaintiffs in the Actions or in any other pending or subsequently filed action, or of any wrongdoing, fault, violation of law, or liability of Google. Likewise, neither the fact or content of this Agreement, nor any action based on it, shall constitute, be construed as, or be admissible in evidence as an admission by any of the Parties of the validity or lack thereof of any claim, allegation, or defense asserted in these Actions, the Combined Action, or in any other action.

2.2 Subject to approval by the Court, Google conditionally agrees and consents to certification of the Class for settlement purposes only and within the context of this Agreement only. If this Agreement, for any reason, is not approved or is otherwise terminated, Google reserves the right to assert any and all objections and defenses to certification of a class, and neither this Agreement nor any order or other action relating to this Agreement shall be offered as evidence in support of a motion to certify a class for a purpose other than settlement pursuant to this Agreement.

2.3 The Parties agree that, within ten (10) days of all Parties signing this Agreement, Plaintiffs in the Gaos Action and the Priyev Action will seek to consolidate the Actions into a single Combined Action, with Plaintiffs filing a consolidated complaint to the extent appropriate to encompass the definition of the Class (and not reducing the scope of the substantive allegations from those set forth in the Actions).

3. RELIEF

3.1 Google agrees to make certain Agreed-Upon Disclosures concerning search queries on or before the date of Notice of Proposed Class Action Settlement pursuant to the Notice Plan. These Agreed-Upon Disclosures will appear on Google's "FAQs" webpage currently located at http://www.google.com/policies/privacy/faq/, "Key Terms" webpage currently located at http://www.google.com/policies/privacy/key-terms/, and the "Privacy FAQ for Google Web History" webpage currently located at https://support.google.com/accounts/bin/answer.py?hl=en&answer=54050, as further described in Exhibit A. If a subsequent change to Google's services renders the Agreed-Upon Disclosures inaccurate, Google may make future changes to its disclosures to ensure continued accuracy. Likewise, Google may change the form or placement of the disclosures as part of future changes to its privacy policies, provided that the substance remains substantially the same and that it is incorporated into the applicable terms of service or privacy policy and is reasonably accessible to the user. Google will not be required or requested to make any changes to its homepage www.google.com or to the practices or functionality of Google Search, Google Ad Words, Google Analytics or Google Web History.

3.2 Google agrees to and shall deposit in an interest-bearing bank account designated and controlled by the Class Administrator (the "Common

Fund") the total sum of eight million five hundred thousand dollars ($8,500,000.00) (the "Settlement Amount"). That Settlement Amount will represent the full payment to be made by Google under this Agreement, and the Class Administrator will draw from the Common Fund to cover all obligations with respect to costs related to this Agreement, including the expenses of the Class Administrator, the Notice Plan, payments to *Cy Pres* Recipients, any Incentive Awards, the Fee Award, and any other administrative fees and expenses in connection with this Agreement; provided, however, that the Parties must approve any payments to the Class Administrator. The first installment, of one million dollars ($ 1,000,000.00) shall be deposited within fourteen (14) business days of entry of the Preliminary Approval Order. The remainder shall be deposited within twenty-one (21) days of the Effective Date. If this Agreement is terminated pursuant to Section 11, the Class Administrator shall return all funds to Google within ten (10) days of the termination date; provided, however, that the Class Administrator need not return any funds already spent on notice and on reasonable Class Administrator expenses before the termination date. Other than the Settlement Amount, Google shall have no financial obligations to Plaintiffs, the Class, the *Cy Pres* Recipients, or the Class Administrator under this Agreement.

3.3 The *cy pres* amount will consist of the Settlement Amount, including any accrued interest, and minus any expenses for the Class Administrator, the

Notice Plan, the Fee Award, any Incentive Award, and any other administrative and notice costs or other expenses in connection with this Agreement. As a condition to receiving the payment, each *Cy Pres* Recipient must agree to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet. If any *Cy Pres* Recipient does not agree to these conditions, then its portion will be distributed pro rata to the other identified recipients; if no recipient agrees to the conditions, or if the Court so requires, the Parties shall meet and confer to identify other appropriate recipients. The Class Administrator shall make payments to the *Cy Pres* Recipients within sixty (60) days after the Effective Date.

3.4 Because the *Cy Pres* Recipients will receive the remaining amounts due after all other payment obligations listed in Paragraph 3.2 are met, no portion of the Settlement Amount or interest thereon will revert to Google.

3.5 Under no circumstances will Google have any liability for taxes or the tax expenses of any Person that receives a portion of the Settlement Amount under this Agreement to the extent permitted by applicable law.

4. SUBMISSION FOR PRELIMINARY APPROVAL

4.1 Within the later of thirty (30) days of the execution of this Agreement by both Parties and ten (10) days after an order consolidating the Actions, Class Counsel shall submit this Agreement to the Court and request that the Court enter the Preliminary Approval Order in a form mutually agreed to by all parties.

4.2 Class Counsel will take any acts reasonably necessary to carry out this Settlement Agreement's expressed intent.

5. NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

5.1 The Class Administrator will be allocated up to one million dollars ($1,000,000.00) out of the Settlement Amount to implement a Notice Plan, subject to the Parties' agreement in consultation with the Class Administrator and further subject to Court approval as part of the Preliminary Approval Order and consistent with the requirements of due process. The Parties shall agree to the Notice Plan before submission of this Agreement for preliminary approval. The Notice Plan will not take the form of a bulk email message to Class Members.

5.2 The specific text and content of the Notice Plan and Notice of Proposed Class Action Settlement

will be mutually agreed upon by the Parties, subject to Court approval.

5.3 The Class Administrator will oversee and implement the Notice Plan. Although the Class Administrator may purchase commercial services at standard rates from Google as part of the Notice Plan, Google has no obligation to otherwise facilitate delivery of the Notice of Proposed Class Action Settlement. For example, Google will have no obligation to send bulk email messages to any Person or group of Persons. All costs associated with the Notice Plan and Class Administrator will be paid by Google as part of the overall payment obligation in Paragraph 3.2.

5.4 The Notice Plan will be implemented, and all announcements at least initially posted on the Settlement Website, within thirty (30) days of entry of the Preliminary Approval Order.

5.5 The Settlement Website shall (i) post, without limitation, the operative complaint(s), this Settlement Agreement, and Long Form Notice and Opt-Out Form; (ii) notify Class Members of their rights to object or opt out; (iii) inform Class Members that they should monitor the Settlement Website for developments; and (iv) notify Class Members that no further notice will be provided to them once the Court enters the Final Order and Judgment, other than through updates on the Settlement Website. The Settlement Website will remain active until at least thirty (30)

days after the Final Settlement Date. The Class Administrator will establish an email account and P.O. Box to which Class Members may submit questions regarding the Settlement. The Class Administrator will monitor the email account and P.O. Box and respond promptly to administrative inquiries received from Class Members and may direct substantive inquiries to Class Counsel.

5.6 Within ten (10) days after filing of this Settlement Agreement with the Court, the Class Administrator shall notify the appropriate state and federal officials of this Agreement pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

6. CLASS MEMBERS' RIGHT OF EXCLUSION/INCLUSION

6.1 A Class Member may request exclusion from the Class up until the Opt-Out Deadline. To request exclusion, the Class Member must complete, sign, and mail to the Class Administrator a Request for Exclusion, using the form attached as Exhibit B. The Request for Exclusion must be signed by the Class Member seeking exclusion under penalty of perjury. The Request for Exclusion must be postmarked on or before the Opt-Out Deadline. Any Person who submits a valid and timely Request for Exclusion shall not be entitled to relief under, and shall not be affected by, this Agreement or any relief provided by this Agreement.

6.2 The Parties shall have the right to challenge the timeliness and validity of any Request for Exclusion. The Court shall determine whether any contested exclusion request is valid.

6.3 Within ten (10) days after the Opt-Out Deadline, the Class Administrator will provide the Parties a list of all Persons who opted out by validly requesting exclusion.

7. OBJECTIONS

7.1 Any Class Member who does not submit a valid and timely Request for Exclusion may object to the fairness, reasonableness, or adequacy of this Agreement. Class Members may not seek to exclude themselves from the Class ***and*** submit an objection to this Agreement.

7.2 No later than twenty-one (21) days before the Final Approval Hearing, any Class Member who wishes to object to any aspect of this Agreement must send to the Class Administrator, Class Counsel and Google's counsel, and file with the Court, a written statement of the objection(s). The written statement of the objection(s) must include (i) a detailed statement of the Class Member's objection(s), as well as the specific reasons, if any, for each objection, including any evidence and legal authority the Class Member wishes to bring to the Court's attention and any evidence the Class Member wishes to introduce in support of his/her objection(s); (ii) the Class Member's full

name, address and telephone number; and (iii) information demonstrating that the Class Member is entitled to be included as a member of the Class.

7.3 Class Members may raise an objection either on their own or through an attorney hired at their own expense. If a Class Member hires an attorney other than Class Counsel to represent him or her, the attorney must (i) file a notice of appearance with the Court no later than twenty-one (21) days before the Final Approval Hearing or as the Court otherwise may direct, and (ii) deliver a copy of the notice of appearance on Class Counsel and Google's counsel, no later than twenty-one (21) days before the Final Approval Hearing. Class Members, or their attorneys, intending to make an appearance at any hearing relating to this Agreement, including the Final Approval Hearing, must deliver to Class Counsel and Google's counsel, and file with the Court, no later than twenty-one (21) days before the date of the hearing at which they plan to appear, or as the Court otherwise may direct, a notice of their intention to appear at that hearing.

7.4 Any Class Member who fails to comply with the provisions of the preceding subsections shall waive and forfeit any and all rights he or she may have to appear separately and/or object, and shall be bound by all the terms of this Agreement and by all proceedings, orders, and judgments in the Actions.

8. EXCLUSIVE REMEDY; DISMISSAL OF ACTIONS; JURISDICTION OF COURT

8.1 This Agreement shall be the sole and exclusive remedy for any and all Released Claims. Upon entry of the Final Order and Judgment, each Class Member shall be barred from initiating, asserting, or prosecuting any Released Claims against Google. If any Class Member attempts to prosecute an action in contravention of the Final Order and Judgment and this Agreement, counsel for any of the Parties may forward this Agreement and the Final Order and Judgment to such Class Member and advise him, her, or it of the releases provided pursuant to this Agreement.

8.2 Upon entry of Final Order and Judgment, the Combined Action shall be dismissed with prejudice.

8.3 The Court retains exclusive and continuing jurisdiction over the Combined Action and all Parties and Class Members to interpret and enforce the terms, conditions, and obligations of this Agreement.

9. RELEASES

9.1 Upon entry of the Final Order and Judgment, and regardless of whether any Class Member executes and delivers a written release, each Plaintiff and each Class Member (each of whom is a Releasing

Party) shall be deemed to waive, release and forever discharge Google and the Google Releasees from all Released Claims, whether or not known. Each Releasing Party is deemed to provide the waiver, release and discharge on his, her, or its own behalf, as well as on behalf of any administrators, affiliates, agents, assigns, attorneys, beneficiaries, contractors, dependents, descendants, directors, employees, executors, heirs, insurers, investors, joint venturers, members, officers, parents, predecessors, related entities, representatives, servants, shareholders, subsidiaries, successors, underwriters, units, and anyone else who could bring any Released Claim on his, her, or its behalf or based on a transfer of rights—by law, contract, or otherwise—from any Releasing Party.

9.2 The release described in Paragraph 9.1 is, and shall remain, a full and complete release, notwithstanding the discovery or existence of any additional or different facts or claims existing before the Effective Date. The Releasing Parties shall, by operation of the Final Order and Judgment, expressly waive the provisions of California Civil Code § 1542 (and all other similar provisions of law) to the full extent that these provisions may be applicable to this release. California Civil Code § 1542 provides:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,**

WHICH IF KNOWN TO HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Releasing Parties shall, by operation of the Final Order and Judgment, be deemed to assume the risk that facts additional, different, or contrary to the facts which each believes or understands to exist, may now exist or may be discovered after the release set forth in this Agreement becomes effective, and the Releasing Parties shall, by operation of the Final Order and Judgment, be deemed to have agreed that any such additional, different, or contrary facts shall in no way limit, waive, or reduce the foregoing releases, which shall remain in full force and effect.

9.3 Nothing in this Agreement shall be construed in any way to prejudice or interfere with any Releasing Party's ability to pursue his, her, or its rights under any applicable insurance policies.

10. CLASS COUNSEL FEES AND COSTS AND INCENTIVE AWARDS

10.1 Plaintiffs may apply to the Court seeking a reasonable proportion of the Settlement Amount as payment of any reasonable attorneys' fees and costs ("Fee Award"). The Fee Award will be paid as part of the Settlement Amount specified in Paragraph 3.2. It is not a condition of this Settlement that any particu-

lar amount of attorneys' fees, costs or expenses or incentive awards be approved by the Court, or that such fees, costs, expenses or awards be approved at all. Any order or proceeding relating to the amount of any award of attorneys' fees, costs, or expenses or inventive awards, or any appeal from any order relating thereto, or reversal or modification thereof, shall not operate to modify, terminate or cancel this Settlement Agreement, or affect or delay the finality of the Final Order and Judgment, except that any modification, order or judgment cannot result in Google's overall obligation exceeding the Settlement Amount specified in Paragraph 3.2. The Class Administrator will distribute from the Common Fund any Fee Award approved by the Court within thirty-one (31) days of the Effective Date. The Class Administrator shall wire the amount awarded in the Fee Award to the trust account of Nassiri & Jung LLP, on behalf of all Class Counsel; Nassiri & Jung LLP shall be responsible for distributing the Fee Award among Class Counsel.

10.2 In recognition of Plaintiffs' efforts on behalf of the Class, and subject to Court approval, Class Counsel may apply to the Court for an award for each Plaintiff of up to $5,000 each, as appropriate compensation for their time and effort expended in serving as Class Representatives. The Incentive Award will be paid as part of the Settlement Amount specified in Paragraph 3.2. It shall be paid contemporaneously and in the same manner as any Fee Award, as specified in § 10.1.

10.3 Except as otherwise provided in this section, each Party will bear its own costs, including attorneys' fees, incurred in connection with the Actions.

11. TERMINATION OF THE AGREEMENT

11.1 The performance of this Agreement is expressly contingent upon achieving the Effective Date. This includes both (i) the entry of the Preliminary Approval Order approving this Agreement, including the Notice Plan and the selection of the *Cy Pres* Recipients, and the Final Order and Judgment approving this Agreement and the expiration of all appeal periods and appeal rights without modification to the Final Order and Judgment that any Party deems material. If the Court fails to issue either (i) the Preliminary Approval Order or (ii) the Final Order and Judgment approving this Agreement without modification that any Party deems material following conclusion of the Final Approval Hearing, or if the circumstances in Paragraph 11.2 are met, this Agreement will be deemed terminated.

11.2 If the Final Order and Judgment is vacated, modified in a manner deemed material by any Party, or reversed, in whole or in part, this Agreement will be deemed terminated (except with respect to rulings on any Fee Award), unless all Parties who are adversely affected thereby, in their sole discretion within thirty (30) days of receipt of such ruling, provide written notice through counsel to Class Counsel

and Defendant of their intent to proceed with this Agreement as modified by the Court or on appeal.

11.3 If this Agreement is deemed terminated pursuant to any provision in Paragraph 11, it will have no force or effect whatsoever, shall be null and void, and will not be admissible as evidence for any purpose in any pending or future litigation in any jurisdiction.

12. CONFIDENTIALITY

12.1 Other than responses to inquiries from governmental entities or as necessary to comply with federal and state tax and securities laws, no Party shall initiate any publicity relating to or make any public comment regarding this Agreement until a motion seeking the Preliminary Approval Order is filed with the Court.

12.2 Unless and until all Parties execute this Agreement and present it to the Court in a motion seeking the Preliminary Approval Order, the Parties agree that all terms of this Agreement will remain confidential and subject to Federal Rule of Evidence 408.

13. MISCELLANEOUS PROVISIONS

13.1 Google will provide Plaintiffs with confirmatory discovery no later than thirty (30) days after Preliminary Approval. The confirmatory discovery

shall consist of a declaration from the appropriate Google personnel consisting of an explanation of when search queries are transmitted to third parties via referrer headers, any differences for users signed in to a Google account or using SSL, and when those differences arose.

13.2 This Agreement, including all attached exhibits, shall constitute the entire agreement among the Parties (and covering the Parties and the Class) with regard to the subject matter of this Agreement and shall supersede any previous agreements and understandings between the Parties.

13.3 This Agreement may not be changed, modified or amended except in writing signed by Class Counsel and Google's counsel, subject to Court approval if required.

13.4 Each Party represents and warrants that it enters into this Agreement of his, her, or its own free will. Each Party is relying solely on its own judgment and knowledge and is not relying on any statement or representation made by any other Party or any other Party's agents or attorneys concerning the subject matter, basis, or effect of this Agreement.

13.5 This Agreement has been negotiated at arm's length by Class Counsel and Google's counsel. In the event of any dispute arising out of this Agreement, or in any proceeding to enforce any of the terms of this Agreement, no Party shall be deemed to be the

drafter of this Agreement or of any particular provision or provisions, and no part of this Agreement shall be construed against any Party on the basis of that Party's identity as the drafter of any part of this Agreement.

13.6 The Parties agree to cooperate fully and to take all additional action that may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

13.7 This Agreement shall be binding upon and inure to the benefit of all the Parties and Class Members, and their respective representatives, heirs, successors, and assigns.

13.8 The headings of the sections of this Agreement are included for convenience only and shall not be deemed to constitute part of this Agreement or to affect its construction.

13.9 The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to this Agreement.

13.10 Prior to pursuing relief or submitting any dispute relating to this Agreement or the Actions to the Court, the Parties and Class Counsel agree to mediate the dispute before Randall Wulff of Wulff, Quinby & Sochynsky, located at 1901 Harrison Street, Suite 1420, Oakland, California, 94612.

13.11 All claims arising out of or relating to this Agreement will be litigated exclusively in the federal or state courts of Santa Clara County, California, U.S.A. The Parties (i) irrevocably submit to the personal jurisdiction of; ~~(ii)~~ waive any objection to venue in; and (iii) waive any objection to the convenience of litigating in the above courts in any claim arising out of or related to this Agreement.

13.12 Any notice, instruction, court filing, or other document to be given by any Party to any other Party shall be in writing and delivered personally or sent by registered or certified mail, postage prepaid, or overnight delivery service to the respective representatives identified below or to other recipients as the Court may specify. As of the date of this Agreement, these respective representatives are as follows:

For the Class:

NASSIRI & JUNG LLP
c/o Kassra P. Nassiri
47 Kearny Street, Suite 700
San Francisco, CA 94108

For Google:

MAYER BROWN LLP
c/o Edward D. Johnson
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112

13.13 The Parties agree to work in good faith to effectuate the settlement proposed in this Agreement. This Agreement shall be dissolved, and shall be null and void, if the Parties do not execute this Agreement, if the Court does not preliminarily or finally approve this Agreement, or if this Agreement does not become final and effective due to any ruling on any appeals or remand from any appeals. If the Court does not approve this Agreement in its entirety (except as provided in Paragraph 10.1), or if the approval is not upheld in its entirety on any appeals and remand from any appeals, this Agreement cannot be enforced against either Party; in other words, this Agreement's terms are not separable unless otherwise subsequently agreed in writing or except as provided in Paragraph 10.1.

13.14 The Parties each represent and warrant that they have not sold, assigned, transferred, conveyed, subrogated, or otherwise disposed of any claim or demand covered by this Agreement. If a Class Member has sold, assigned, transferred, conveyed, subrogated or otherwise disposed of any claim or demand, the Person that acquired such claim or demand is bound by the terms of this Agreement to the same extent as the Class Member would have been but for the sale, assignment, transfer, conveyance, or other disposition.

13.15 The signatories to this Agreement represent that they have been duly authorized to execute this Agreement on behalf of the Parties they purport

to represent. This Agreement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Dated: March 16, 2013 Plaintiff Paloma Gaos

/s/ Paloma Gaos
Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

Individually and in his representative capacity

Dated: March 15, 2013 NASSIRI & JUNG LLP

/s/ Kassra Nassiri
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano.

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

Individually and in her
representative capacity

Dated: March 15, 2013 Plaintiff Anthony Italiano

/s/ Anthony Italiano
Individually and in his
representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

Individually and in his
representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

Kassra Nassiri
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

Individually and in her
representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

Individually and in his
representative capacity

Dated: March 16, 2013 Plaintiff Gabriel Priyev

/s/ Gabriel Priyev
Individually and in his representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

Individually and in his representative capacity

Dated: March 15, 2013 NASSIRI & JUNG LLP

/s/ Kassra Nassiri
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

Michael Aschenbrener
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Dated: March __, 2013 Plaintiff Paloma Gaos

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Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____

Individually and in his representative capacity

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_____

Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March 15, 2013 ASCHENBRENER LAW, P.C.

/s/ Michael Aschenbrener
Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March 15, 2013 PROGRESSIVE LAW GROUP, LLC.

/s/ Ilan Chorowsky
Ilan Chorowsky
on behalf of Plaintiff Gabriel Priyev

Dated: March __, 2013 GOOGLE, INC.

Kent Walker
SVP and General Counsel

Dated: March __, 2013 PROGRESSIVE LAW GROUP, LLC.

/s/ Ilan Chorowsky
Ilan Chorowsky
on behalf of Plaintiff Gabriel Priyev

Dated: March 15, 2013 GOOGLE, INC.

/s/ Kent Walker
Kent Walker
SVP and General Counsel

EXHIBIT A TO SETTLEMENT AGREEMENT

1. Content for Disclosure on Google's "FAQ" webpage:

A disclosure in substantially the same content and form as the following shall be included on Google's "FAQ" webpage currently located at https://www.google.com/policies/privacy/faq/:

"Are my search queries sent to websites when I click on Google Search results?

In some cases, yes. When you click on a search result in Google Search, your web browser also may send the Internet address, or URL, of the search results page to the destination webpage as the HTIP Referrer [preceding term will be a hyperlink to the Key Terms page, located at https://www.google.com/intl/en/policies/privacy/key-terms/]. The URL of the search results page will sometimes contain the search query you entered. If you are using SSL Search (Google's encrypted search functionality) or if you are logged in to your Google Account, under most circumstances your search terms will not be sent as part of the URL in the HTTP Referrer. There are some exceptions to this behavior. For example, if you click on an ad appearing on the search results page, your browser will continue to send the search terms in the HTIP Referrer to help advertisers to improve the relevancy of the ads they present to you. More information on SSL Search can be found

here [preceding term will be a hyperlink to: http://suppo1t.google.com/websearch/bin/answer.py?hl=en&answe1= 173733]. Google may provide Google Analytics users with the search query or with the information contained in the HTTP Referrer."

2. Content for Disclosure on Google's "Key Terms" webpage:

A disclosure in substantially the same content and form as the following shall be included on Google's "Key Terms" webpage currently located at https://www.google.com/intl/en/policies/privacy/key-terms/:

"HTTP Referrer"

An HTTP Referrer is information transmitted to a destination webpage by a web browser, typically when you click a link to that webpage. The HTTP Referrer contains the URL of the last
webpage the browser visited."

3. Content for Disclosure on Google's "Privacy FAQ for Google Web History" webpage:

A disclosure in substantially the same content and form as the following shall be included on the "Privacy FAQ for Google Web History" webpage currently located at https://support.google.com/accounts/bin/an-

swer.py?hl=en&answet=54050 in a separate paragraph set off from the existing answer to the FAQ: "How do you use the information you collect when I use Google Web History":

"For more information on how Google handles search queries generally, see the Privacy Policy FAQ." [preceding term will be a hyperlink to the Privacy Policy FAQ (available at available at https://www.google.com/policies/privacy/faq/)].

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION	Case No. 5:10-cv-04809-EJD **OBJECTION OF MELISSA HOLYOAK AND THEODORE H. FRANK**
MELISSA HOLYOAK and THEODORE H. FRANK, Objectors.	Date: August 29, 2014 Time: 9:00 a.m. Courtroom: 4 Judge: Hon. Edward J. Davila

INTRODUCTION

Plaintiffs filed a complaint alleging trillions of dollars in statutory damages on behalf of a class consisting of more than one hundred million people, and then settled it for $8.5 million, of which the class members will see not one penny. Instead, the entire net settlement fund will go third-party *"cy pres"* recipients, even though it would be practicable to allow class members to recover through a claims-made process and/or a sampling lottery method. Moreover, several of the proposed *cy pres* recipients have prior relationships with class counsel or defendants. Preexisting relationships with the defendant undermine the value of the settlement to the class. Preexisting relationships with class counsel qualify as improper conflicts of interest. These defects render the settlement substantively unfair. *See infra* §§ III-IV.

Procedurally, notice to the class is inadequate under this proposed settlement because it fails to directly notify those class members for whom the defendant has contact information, thus depriving them of due process. The settlement makes objecting or opting out of the settlement artificially and needlessly burdensome by requiring paper-mail printouts from a class of internet users. *See infra* §§ VII-VIII.

The proposed settlement structure suggests that class certification is untenable. If in fact distributions to class members are impossible, then a class action

is not superior to other methods of adjudicating the dispute. *See infra* § V.

Finally, in the alternative, if the Court overrules all the above objections, the Rule 23(h) request is excessive and should be reduced. *See infra* § VI.

I. The objectors are members of the class.

Objectors Theodore H. Frank and Melissa Holyoak are United States residents who have submitted at least one search query to Google between October 26, 2006 and the present. *See* Declaration of Theodore H. Frank ¶3; Declaration of Melissa Holyoak ¶3. They are therefore members of the settlement class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5).

Frank's mailing address is 1718 M Street NW, #236, Washington DC 20036, his phone number is (703) 203-3848, and his email address is tfrank@gmail.com. Frank Decl. ¶2. Holyoak's mailing address is 1718 M Street NW, #236, Washington DC 20036, her phone number is (573) 823-5377, and her email address is melissaholyoak@gmail.com. Holyoak Decl. ¶2. Frank represents Holyoak, and himself *in pro per*. As discussed in their contemporaneously-filed Notice of Intent to Appear, Frank plans to attend the fairness hearing in this case, where he wishes to discuss matters raised in this objection. Objectors do not intend to call any witnesses at the fairness hearing,

but reserve the right to make use of all documents entered on to the docket by any settling party or objector. Objectors reserve the right to cross-examine any witnesses who testify at the hearing in support of final approval. Objectors join the objections of any other objectors or *amici* to the extent those objections are not inconsistent with this one.

II. The court has a fiduciary duty to the unnamed members of this class.

A district court must act as a "fiduciary for the class," "with a jealous regard" for the rights and interests of absent class members. *In re Mercury Interactive Corp.*, 618 F.3d 988, 994–95 (9th Cir. 2010) (internal quotation and citation omitted); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 623 (1997) ("Rule 23(e) protects unnamed class members from 'unjust or unfair settlements' agreed to by 'faint-hearted' or self-interested class 'representatives.'")). "Both the class representative and the courts have a duty to protect the interests of absent class members." *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). *Accord Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) ("The district court must ensure that the representative plaintiff fulfills his fiduciary duty toward the absent class members").

There should be no presumption in favor of settlement approval: "[t]he proponents of a settlement bear the burden of proving its fairness." *True v. American Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal.

2010) (*citing* 4 Newberg on Class Actions § 11:42 (4th ed. 2009)). *Accord* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05(c) (2010) ("*ALI Principles*") ("In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.").

"[W]here the court is '[c]onfronted with a request for settlement-only class certification,' the court must look to the factors 'designed to protect absentees.'" *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (*quoting Amchem*, 521 U.S. at 620). "[S]ettlements that take place prior to formal class certification require a higher standard of fairness." *Molski*, 318 F.3d at 953. "[P]re-certification settlement agreements require that we carefully review the entire settlement, paying special attention to 'terms of the agreement contain[ing] convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of the negotiations.'" *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (*quoting Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003)). Where the Court confronts a pre-certification settlement, consideration of the eight *Churchill*[1] factors "alone is not enough to survive appellate review." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

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[1] *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

It is insufficient that the settlement happened to be at "arm's length" without express collusion between the settling parties. Because of the danger of conflicts of interest endemic to class action procedure, third parties must monitor the reasonableness of the settlement as well. *Bluetooth*, 654 F.3d at 948 (*quoting Staton*, 327 F.3d at 960). Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests ... to infect the negotiations." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (quoting *Dennis*, 697 F.3d at 864).

III. The settlement improperly favors third party charities over class members through its *cy pres* provision.

It is a foundational premise that the plaintiff-class itself as a legal entity "is not the client. [Rather,] the class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement." *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 834-35 (9th Cir. 1976).

The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). Imported

to the class action context, it has become an increasingly popular method of distributing settlement funds to non-class third parties. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari) ("*Cy pres* remedies...are a growing feature of class action settlements" that raise "fundamental concerns"); *Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing en banc).

Despite its growing popularity among some members of the class action bar, *cy pres* distributions are non-compensatory, disfavored among both courts and commentators alike, and remain an inferior avenue of last resort. *See e.g., Klier*, 658 F.3d at 475 ("[The *cy pres*] option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly."); *Dennis*, 697 F.3d at 868 (*cy pres* settlement can easily become "a paper tiger"); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) ("[A] growing number of scholars and courts have observed, the *cy pres* doctrine...poses many nascent dangers to the fairness of the distribution process") (citing authorities); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) ("*Cy pres* distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory"); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else."); Martin H. Redish, Peter Julian, & Samantha

Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

One variety of class action *cy pres* is *ex ante cy pres*. It can be defined as an award "that was designated as part of a settlement agreement or judgment where: (1) an amount *and* at least one charity was named as a recipient of part of the fund from the outset and the charity's receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one charity with no attempt to compensate the absent class. Redish et al., *Cy Pres Relief and Pathologies*, 62 FLA. L. REV. 617, 657 n.171. The relief here is a clear example of (2). Settlement Agreement (Dkt. 52-3) § 3. It provides that the entire $8.5 million settlement fund will be disbursed to non-class member charities, with no payments to the vast majority of class members who are not stakeholders in those charities.

As compared with *ex post cy pres*—third-party awards made only after class members fail to cash checks that are distributed—*ex ante cy pres* stands on even shakier footing. *See Molski*, 318 F.3d at 954-55 (rejecting all *cy pres* settlement as inadequate substitute to individual compensation); *Fraley v. Facebook*, No. C 11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at *4-*7 (N.D. Cal. Aug. 17, 2012) ("*Fraley I*") (questioning propriety of an all *cy pres* settlement); *Zapeda v. Paypal*, No. C 10-2500 SBA, 2014 U.S. Dist LEXIS

24388, at *21 (N.D. Cal. Feb. 24, 2014) (expressing concern "that the only persons receiving any funds are persons *other than* class members" and denying settlement approval) (emphasis in original). "This form of *cy pres* stands on the weakest ground because *cy pres* is no longer a last-resort solution for a problem of claims administration. The concern for compensating victims is ignored (at least unless the indirect benefits of the *cy pres* award flow primarily to the victims)." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 770-71 (2013).

Cy pres is improper when it is feasible to make distributions to class members, at least where there is no other compelling reason for preferring non-class members. This "last-resort rule" is a well-recognized principle of law. §3.07(a) of the *ALI Principles* succinctly states the limitation: "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members."[2] The last-resort rule follows from the

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[2] Numerous other courts have also endorsed §3.07 to a greater or lesser degree. *Nachshin*, 663 F.3d at 1039 n.2; *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 689-690 (7th Cir. 2013); *In re Lupron Mktg and Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012); *Klier*, 658 F.3d at 474-75 & nn. 14-16; *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citing draft version); *Baby Prods.*, 708 F.3d at 173 (agreeing in part); *Better v. YRC Worldwide Inc.*, No. 11-cv-2072- KHV, 2013

precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (5th Cir. 2011) (citing *ALI Principles* §3.07 cmt. (b)).

While it may be true that the full statutory damages that would be owed to every class member in the event that plaintiffs were to prevail at trial would be greater than the market capitalization of Google, that is not the relevant question. The relevant question is whether it would be practicable to distribute the available $8.5 million settlement fund to class members through a lottery or claims-made process. The answer is yes. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d. 939 (N.D. Cal. 2013) ("*Fraley II*"). In *Fraley*, the class of Facebook users numbered in the hundreds of millions, and the parties proposed a *cy pres*-only settlement to the court alleging that class distributions "[are] simply not practicable in this case, given the size of the class." *Fraley I.*, 2012 U.S. Dist. LEXIS 116526, at *6. Judge Seeborg refused to accept the proposal because "[m]erely pointing to the infeasibility of dividing up the agreed-to $10 million recovery...is insufficient...to justify resort to purely cy pres payments." 2012 U.S. Dist. LEXIS 116526, at *5. After the court denied approval, the agreement was

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U.S. Dist. LEXIS 163569, at *19-*21 (D. Kan. Nov. 18, 2013) (rejecting settlement for non-compliance with §3.07); *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087 BTM (KSC), 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (same).

then restructured as a claims-made settlement disbursing cash directly to class members. *See Fraley II*. Claimants under the amended agreement were so few in fact that the court would have been able to double the baseline $10 awards and did actually augment the awards by 50%. *Id.* at 944. Here too, the percentage of the 100+ million person class that will submit claims is likely low enough that a claims-made settlement would not be impracticable.

Recently, a well-respected settlement administration company conducted a wide-ranging survey that concluded "settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%)." *Poertner v. The Gillette Co.*, No. 6:12-v-00803-GAP-DAB, Declaration of Deborah McComb re Settlement Claims (Dkt. 156) ¶5. Recent data points reveal that this is true in low-stakes settlements with or without direct notice. *In re Livingsocial Mktg. and Sales Practices Litig.*, 298 F.R.D. 1, 19 (D.D.C. 2013) (0.25% claims rate with direct email notice); *Spillman v. RPM Pizza, LLC*, No. 10-349-BAJ-SCR, 2013 U.S. Dist. LEXIS 72947, at *8 (M.D. La. May 23, 2013) (0.27% claims rate for $15 max claim); *Lagarde v. Support.com, Inc.*, No. 12-0609 JSC, 2013 U.S. Dist. LEXIS 67875, at *7 (N.D. Cal. May 13, 2013) ("[A] mere 1,259 timely claims were submitted for the $10 refund, which represents 0.17% of the total number of class members and 0.18% of the total number of class members who received notice."); *Pearson v. Nbty, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *22 (N.D. Ill. Jan. 3, 2014) (0.25%

claims rate overall where maximum claim was $12 without proof of purchase and $50 with proof of purchase). *Fraley* is the proof; even where a class numbers over one-hundred million, that a claims-made device can be feasible.

Even if it were not possible to distribute $8.5 million through a claims-made process, there is no legitimate reason why the parties should not randomly sample the class and/or accept claims submission, and then make payouts on a lottery basis. *See* Shay Levie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011).

Which alternate method the parties elect is not crucial; what matters is that non-compensatory *cy pres* remains the last resort. As discussed thoroughly in the Third Circuit's *Baby Products* opinion, for individual class members, direct payment matters. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." 708 F.3d at 178; *id.* at 178-79 (counsel has "responsibility to seek an award that adequately prioritizes direct benefit to the class" and fees should reflect that fact). "Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174. If *cy pres* is an excessive share of the total relative to direct class recovery, a district court should consider whether to

> urge the parties to implement a settlement structure that attempts to maintain an appropriate balance between payments to the class and *cy pres* awards. For instance, it could condition approval of a settlement on the inclusion of a mechanism for additional payouts to individual class members if the number of claimants turns out to be insufficient to deplete a significant portion of the total settlement fund.

Id.

Furthermore, it is perhaps the case that some of the *cy pres* recipients are class members. There is no reason to favor those recipients in an uncertified subclass over other class members, and even less reason to favor non-class members over the actual class members.

Where there is a will, there is a way. But class counsel did not negotiate for using the fund to compensate class members, either on a claims-made, lottery, or some combination thereof basis. Rather, in dereliction of their fiduciary obligations, class counsel proposes to give that money away to non-class entities.[3] The bare legitimacy of *cy pres* in the class action

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[3] If it was apathy toward class members or—worse yet—preference for non-class third-parties that drove the decision to prioritize *cy pres* distributions, that casts even further doubt on the

context is controvertible with good reason. *See Klier*, 658 F.3d at 480-82 (Jones J., concurring); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 358 (3d Cir. 2010) (Weis, J., concurring and dissenting); *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (collecting sources); Redish et al., *supra*. Although *cy pres* has been given a narrow berth in the Ninth Circuit, settled law requires that this application of *cy pres* be rejected for the foregoing reasons.

IV. The Court must consider the pre-existing relationships between the cy pres recipients, class counsel and the defendant.

The proposed *cy pres* recipients include institutions with prior relationships with both the defendant and class counsel. "A *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits." *ALI Principles* §3.07 cmt. (b). Where, as here, class counsel are the alumni of several of the *cy pres* recipients, there is the appearance of divided loyalties of class counsel. And where

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adequacy of class representation. *See Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members.").

the defendant is already an established donor to certain of the *cy pres* recipients, there is the significant risk that the value of the settlement will be less beneficial to the class than it would appear.

A. Cy pres beneficiaries should not have a pre-existing relationship with class counsel.

"The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) (internal quotation omitted). "Cy pres distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations." *Dennis*, 858 F.3d at 867.

Yet undisclosed to the class is the fact that two of the three class attorneys who signed the settlement agreement, Kassra Powell Nassiri and Michael Aschenbrener, are alumni of three of the *cy pres* recipients. Settlement 16-17. Nassiri has a master's degree from Stanford and a juris doctorate from Harvard. Nassiri and Jung, LLP, http://njfirm.com/kassra-nassiri/ (last visited July 23, 2014). Aschenbrener received his juris doctorate from the Chicago-Kent College of Law. Aschenbrener Law, http://aschenbrenerlaw.com/michael-aschenbrener/ (last visited July 23, 2014). Harvard, Stanford, and

Chicago-Kent are three of the four proposed university recipients. Preliminary Approval Order (Dkt. 63) ("PAO") at 8. These are not recipients that are "independent and free from conflict." *Id.* at 11 n.7; Motion for Final Approval (Dkt. 65) at 14 n.2.

In *Nachshin*, the Ninth Circuit criticized *alma mater cy pres* distributions, suggesting that such dispensations present exactly the sort of conflicts of interest that are problematic. 663 F.3d at 1039. Other commentators are in accord, specifically identifying the *alma mater* problem as the type of conflict that is objectionable. *E.g.*, George Krueger & Judd Serotta, Op-Ed, *Our Class-Action System is Unconstitutional*, WALL ST. J., Aug. 6, 2008 ("Judges...have occasionally been known to order a distribution to some place like their own alma mater ..."); Adam Liptak, *Doling out Other People's Money*, N.Y. TIMES, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like."). In *Nachshin*, the court cited each of these three sources approvingly. 663 F.3d at 1039, 1039 n.2.

"Courts are wary of distributing cy pres funds to organizations that have a close relationship with class counsel given the appearance of a conflict of interest." *Weeks v. Kellogg Co.*, No. CV-0908102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *69 n.102 (C.D. Cal. Nov. 23, 2011); *see also Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 577 n.2 (E.D.

Pa. 2005) (noting the appearance of impropriety in selecting a beneficiary (the University of Pennsylvania) with long established ties to the Eastern District bench). *Weeks* properly refused to ratify such a conflict. 2011 U.S. Dist. LEXIS 155472, at *70-*71. *Accord In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 U.S. Dist. LEXIS 77739, at *14-*15 (E.D. Pa. Oct. 3, 2008) (rebuffing proposed *cy pres* awards to institutions with preexisting relationships to class counsel); *but see In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1050-51 (S.D. Cal. 2013), *appeal pending* No. 13-55373 (9th Cir.) (overruling objection where one of three university *cy pres* recipients had *alma mater* affiliation with class counsel). This objection may have only scratched the surface; who knows what conflicts lurk deeper? Before the Court approves any award, it should require the parties to certify that the beneficiaries have no ties to the parties or the lawyers. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 1361, 2005 U.S. Dist. LEXIS 11332, at *4 (D. Me. June 10, 2005). This Court should not approve any settlement afflicted by such a conflict of interest.[4]

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[4] An all too rare best practice that mitigates this problem is to poll class members— efficiently done through the settlement website—as to which charities should be designated *cy pres* beneficiaries. *See, e.g., In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1197 (N.D. Cal. 1998) (Walker, J.) ("The fact remains that this money belongs to class members, and it is they who should decide whether and to whom to donate it."); *see generally* Alexandra Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1961-63 (2011) (recommending polling the class as a "modest proposal" to increase class members' voice).

B. Pre-existing relationships between the defendant and the cy pres recipients undermine the value of the settlement.

As the Ninth Circuit has warned, "[t]he issue of the valuation of [the *cy pres*] aspect of a settlement must be examined with great care to eliminate the possibility that it serves only the "self-interests" of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis*, 697 F.3d at 868. Google is already a donor to Berkman Center for Internet and Society at Harvard University; Stanford Center for Internet and Society; AARP; and Chicago-Kent. *See* http://cyber.law.harvard.edu/about/support (last visited July 23, 2014);
http://cyberlaw.stanford.edu/about-us (last visited July 23, 2014).
http://www.google.com/publicpolicy/transparency.html (AARP) (last visited August 8, 2014); http://www.alumni.kentlaw.edu/s/815/index.aspx?sid=815&gid=1&pgid=773 (last visited August 8, 2014). When the defendant is already a regular contributor to the proposed *cy pres* recipient, there is no demonstrable value added by the defendant's agreement to give money to that institution. *See Dennis*, 697 F.3d at 867-68. Google is agreeing to do something that it was in all likelihood going to do anyway. Such an agreement is of little or no incremental value to the class. *See Reynolds v. Beneficial Nat'l*

Bank, 288 F.3d 277, 286 (7th Cir. 2002) (it is the "*incremental* benefits" that matter, not the "total benefits") (emphasis in original)); *see also In re Hydroxycut Mktg. and Sales Practices Litig.*, No. 09-md-2087 BTM (KSC), 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (rejecting *cy pres* that provided not additional benefit to class members beyond the status quo); American Law Institute, Principles of the Law of Aggregate Litig. § 3.13 (settlement benefit does not include gratuitous inclusion of actions that defendant was conducting pre-settlement). This Court should require additional disclosures from Google, as they are likely to have preexisting relationships with the other two *cy pres* recipients that are not readily publicly available.

Recently, a divided panel of the Ninth Circuit affirmed a *cy pres* distribution over an objector's challenge to the fact that the beneficiary was closely affiliated with the defendant. *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), *rehearing en banc den'd*, 709 F.3d 791 (2013), *cert den'd sub nom* 134 S. Ct. 8 (2013). In that case, however, the objectors argued that there was a per se conflict of interest when the defendant had a pre-existing relationship with a *cy pres* recipient. The rationale by which the *Lane* court sanctioned the *cy pres* award—that the terms of the settlement are "the offspring of compromise" that "necessarily reflect the interest of **both** parties"—has no application to this objection, where the assertion is that Google's promise to give money to organizations to which it was already giving money simply is

not worth the release of individual class members' claims, nor commensurate with the attorneys' fees request. 696 F.3d at 821 (emphasis added).[5] *Cf. Webb v. Carter's*, 272 F.R.D. 489, 504 (C.D. Cal. 2011) (rejecting class certification where the manufacturer of children's tagless clothes was already offering the relief sought by the putative class members).

C. Frank further objects to AARP as a recipient.

The AARP takes political positions opposed by many class members, including Frank. They should not be receiving *cy pres* funds.

V. In the alternative, if distributions to individual class members are impracticable, then a class action is not superior to other available methods of adjudicating the controversy.

One prerequisite of class certification is that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). If a *cy pres*-only settlement is necessary because it would be too costly to distribute the settlement funds to individual class members,

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[5] *Lane* also has no application to a distribution that unjustifiably favors non-party class counsel. *See supra* § IV.A. Settlement concessions should reflect the interest of "both parties" —the class members themselves and the defendant—but not the interest of class counsel.

then a class action is not an efficient and superior means of adjudicating this controversy. *Supler v. FKAACS, Inc.*, No.. 5-11-CV-00229-FL, 2012 U.S. Dist. LEXIS 159210, at *10-*11 (E.D.N.C. Nov. 6, 2012) (holding that, because "benefits to putative class members" from *cy pres* payments "are attenuated and insignificant..., class certification does not...promote judicial efficiency.") (internal quotations, ellipses, and citations omitted). The Ninth Circuit came to a similar conclusion in *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974). There, the court reasoned that "[w]henever the principal, if not the only, beneficiaries to the class action are...not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute," and that, "[w]hen, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected." *Id.* at 91-92. In this case, the proposed settlement falls into that category. It provides at most an indirect and attenuated benefit to the class, justified on the grounds that individual distributions would be too costly because of the size of the class. PAO at 10-11.

If true, then these claims should proceed as individual actions. Under such actions, class members can seek statutory damages of up to $10,000. 18 U.S.C. § 2520(c)(2)(B) (authorizing statutory damages for violations of the Electronic Communications Pri-

vacy Act). No matter how slim the possibility of attaining such damages, that possibility is superior to releasing those claims for no compensation. *See Brown v. Wells Fargo & Co.*, No. 11-1362 (JRT/JJG), 2013 U.S. Dist. LEXIS 181262, at *16-*17 (D. Minn. Dec. 30, 2013) (concluding that superiority was not satisfied where individuals would be "entitled to between $100 and $1,000 dollars in statutory damages" in successful individual litigation, but only $55 as a class member); *Sonmore v. CheckRite Recovery Servs.*, 206 F.R.D. 257, 265-66 (D. Minn. 2001) (holding that the discrepancy between the $25 that class members could recover and the $1000 in statutory damages they could recover individually meant that a class action was not superior); *cf. also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 n.5 (9th Cir. 1974) (finding no superiority where individual recoveries could have amounted to $1,875 and attorneys' fees and costs were statutorily recoverable); *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716 (9th Cir. 2010) ("We think it clear that the Rule 23(b)(3) superiority analysis must be consistent with the congressional intent in enacting a particular statutory damages provision.").

Superiority must be contemplated from the perspective of putative absent class members, among other angles. *Bateman*, 623 F.3d at 713 (quoting *Kamm v. California City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975)). What is best for them? This settlement intends to release their rights in exchange for no compensatory relief. From the perspective of a

class member, that cannot be a superior method of adjudicating this controversy. *Cf. Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 U.S. Dist. LEXIS 74081, at *8 (N.D. Cal. May 29, 2014) ("No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars. The collective-action opt ins would be better off simply walking away from this lawsuit with their rights to sue still intact."). A *cy pres* settlement, in which many of the beneficiaries are already receiving donations from the defendant, is not be superior in either fairness or efficiency to other methods of adjudication.

VI. If the Court approves the certification and settlement, it should decline to award the $2.125 million attorneys' fees requested.

For several reasons, the settlement is substantively unfair (*see supra* §§ III-IV), procedurally unfair (*see infra* §§ VII-VIII), and premised on a theory that makes class certification untenable (*see supra* § V). Nevertheless, if this Court disagrees with each of those propositions, it should still deem unreasonable the $2.125 million fee requested by plaintiffs. *See* Motion for Approval of Fees and Costs ("Fee Motion") (Dkt. 66).

Plaintiffs believe that the Ninth Circuit's 25% benchmark approach applies equivalently regardless of whether the defendant is obligated by a settlement to pay class members $8.5 million or obligated to pay

non-class member third parties $8.5 million. Fee Motion at 2-4. Plaintiffs' belief is wrong as a matter of law and would be disastrous as a matter of public policy.[6]

As a matter of law, class members are simply "not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178. When "class counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class," it is "appropriate for the court to decrease the award." *Id.* at 178-79 (citing, *inter alia*, two Ninth Circuit decisions and *ALI Principles* §3.13); *accord* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV.__ (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstractid=2413951 (advocating for "presumptive reduction of attorneys' fees" where settlement includes

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[6] One principle on which objectors can agree with plaintiffs is that any hypothetical value of the prospective injunctive relief should not be included in the denominator for purposes of making a percentage fee award. *See Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) ("Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund. We hold, therefore, that only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees."); *compare* Fee Motion at 2 (seeking a percentage upon "only the cash portion of the total recovery").

significant *cy pres* component). Although obligating Google to donate to third parties may impose a cost on Google,[7] the Ninth Circuit has been clear that compensable value "is not how much money a company spends on purported benefits, but the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944 (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)).

A dollar that goes to *cy pres* is less valuable than a dollar that goes directly to a class member. So, although plaintiffs reference a number of district court decisions that disregard this reality (*see* Fee Motion at 3 (citing cases)), plenty of courts have wisely concluded otherwise and have refused to value *cy pres* donations the same as a dollar to the class. *E.g.*, *In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (discounting *cy pres* by 50% for purposes of awarding fees); *In re Livingsocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 19, 22 (D.D.C. 2013) (cutting fees to 18% in consideration of "proportion of the award that is going to *cy pres*."); *Weeks v. Kellogg Co.*, No. CV 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *111 (C.D. Cal. Nov. 23, 2011) (awarding 16.2% "in light of the fact that almost half of the settlement's value is guaranteed not to directly benefit individual class members."); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 n.9 (E.D.

[7] Of course, it also may not impose very much of a cost at all. *See supra* § IV.B.

Pa. 2005) (excluding *cy pres* and non-economic injunctive relief benefits entirely). More importantly, the only Ninth Circuit case mustered by the plaintiffs, *Lane*, did not confront the question of whether the fee award in that case was excessive, nor whether the Ninth Circuit's benchmark should apply identically to *cy pres* only settlements. Rather, the objectors in *Lane* focused their attack solely on the substantive fairness of the settlement, not the fee award. 696 F.3d at 818, 820.

The "key consideration in determining a fee award is reasonableness in light of the benefit *actually conferred*." *In re HP Inkjet Printer Litig.*, No. 5:05–cv-3580 JF, 2011 WL 1158635, at *10 (N.D. Cal. Mar. 29, 2011), *rev'd on other grounds* 716 F.3d 1173 (9th Cir. 2013) (emphasis in original) (internal citation and quotation omitted); *accord* Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (in awarding fees the "fundamental focus is the result actually achieved *for class members*") (emphasis added). For this reason, where actual benefit is slim, courts will deviate downward from the 25% benchmark. *Pearson v. Nbty, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *21-*27 (N.D. Ill. Jan. 3, 2014) (reducing 25% benchmark to 9.6% based on "low claims rate in combination with funds being remitted to *cy pres* in an amount greater than the actual benefit to the Class"); *Tarlecki v. Bebe Stores, Inc.*, No. C 05-1777 MHP, 2009 WL 3720872, 2009 U.S. Dist. LEXIS 102531, at *12 (N.D. Cal. Nov. 3, 2009) (reducing fee award to less than 13%) (cited by Fee Motion at 4).

If this Court endorses a rule that makes class counsel financially indifferent between a settlement that awards cash directly to class members and a *cy pres* only settlement, the parties will always agree to the *cy pres* arrangement and unnamed class members will be permanently left out in the cold. The reason that the parties will incline toward the *cy pres* arrangement is because of reasons related to those discussed *supra* at 9-10: defendants will prefer to make payments to third parties to whom they are already donating money rather than payments to absent class members. Donations may engender good will, and often merely replace or supplement donations that are already in the pipeline, or which the defendant has a habit of making: in the latter case, then the "relief" to the class is even more illusory, because it merely reflects a shift in accounting entries. Coupled with the class counsel's financial indifference, the defendant's preference *for* charitable donations means that the easy way of reaching settlement will be agreeing to *cy pres* only settlements.

The percentage of recovery/ benchmark is the prevailing Ninth Circuit methodology because it aligns the incentives of class counsel and the class much better than does the competing lodestar method. *In re Apple Iphone/Ipod Warranty Litig.*, No. C 10-1610 RS, 2014 U.S. Dist. LEXIS 52050, at *8-*9 (N.D. Cal. Apr. 14, 2014) ("[A]pplying the lodestar to common fund cases does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work

and protracting the litigation. It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process.") (internal quotation and ellipsis omitted); *see generally* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809 (2000) (observing "solid consensus that the contingent approach minimizes conflicts more efficiently than the lodestar"). To apply the benchmark equally regardless of whether the class actually recovers funds is to undermine its core benefit and to again misalign the interests of class counsel and its clients.

Put simply, "courts need to consider the level of direct benefit provided to the class in calculating attorneys' fees." *Baby Prods.*, 708 F.3d at 170. If the court it inclined to approve the settlement and certification, to comply with Rule 23(h), it should reduce the fee award to no more than 10% of the $8.5 million *cy pres* fund.

VII. The notice plan is inadequate because it does not include direct notice for class members for whom Google has contact information.

The principle of disclosure through notice has been referred to as the "first and perhaps most important principle for class action governance." Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 118 (2003).

While "direct notice to class members by mail, e-mail or other electronic individualized means [may be] impractical" for the entirety of the class, it is obligatory for those class members for whom the defendant has contact information. PAO at 12. And yet the notice plan here is publication only. *Id.*

Google would have contact information at least for all class members who have gmail accounts. According to AYTM Market Research, 74% of all consumers use Google as their primary search engine, and 60% of all consumers use Google's gmail as their primary email service, suggesting that, if an even higher percentage of class members (Google's search engine users) have gmail accounts, Google has contact information for approximately perhaps 80% of the class or more. *74 Percent of Consumers Use Google Search, 60 Percent Own Gmail Accounts*, Brafton (Apr. 9, 2012), http://www.brafton.com/news/74-percent-of-consumers-use-google-search-60-own-gmail-accounts (last visited July 25, 2014).

The *Mullane* constitutional imperative is that the settlement notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As *Mullane* held, "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to

means less likely than the mails to apprise them of its pendency." *Id.* at 318.

Likewise, in *Eisen v. Carlisle and Jacquelin*, the Supreme Court held that "individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case....each class member who can be identified through reasonable effort must be notified." 417 U.S. 156, 176 (1974). There, the class numbered approximately 6 million, with only a minority, 2.25 million, being identifiable to the defendant. *Id.* at 166-67. Nevertheless, the large size of the class and the expense of the notice did not obviate the need for individual notice where the requisite information was in the possession of the defendant. *Id.* at 175-76.

Following these decisions, the Ninth Circuit holds that "[t]o comply with the spirit of [Rule 23 notice provisions], it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice." *Mandujano*, 541 F.2d 832, 835. Class members for whom Google has contact information are just such an identifiable group. Even where only a limited percentage of the class can be reached through direct notice, direct notice is still mandatory for those class members. *Eisen, supra*; *Smith v. Levine Leichtman Capital*, 2012 U.S. Dist. LEXIS 163672, at *7-*8 (N.D. Cal. Nov. 15, 2012) (holding that "[n]otice to class...must be 'the best...practicable under the cir-

cumstances, including individual notice to all members who can be identified through reasonable effort,'" and that even where only 75-85% of the class could be reached through direct mail, direct mail was still required.) (quoting *Amchem*); *Fraser v. Asus Computer Int'l*, 2012 U.S. Dist. LEXIS 181315, at *10-*12 (N.D. Cal. Dec. 21, 2012) (concluding that postal notice is required even when only would reach 30% of class, publication is not sufficient).

The fact that class members will not recover any money for themselves under this settlement in no way negates their right to direct notice. *Hecht v. United Collection Bureau*, 691 F.3d 218, 225 (2d Cir. 2012) (repudiating argument that "the negligible amount of money to be awarded per person under the...settlement justified lesser notice.") "A cause of action for damages is a property right, and thus cannot be taken without due process." *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir. 1989). In other words, at the very least whenever any monetary claims are released as part of a class action, the stringent due process standards of *Mullane* and *Eisen* apply. In this case, where the class members would be giving up their individual causes of action as part of the settlement, individual notice is necessary wherever possible.

Once it is established that the full rigors of due process notice apply, there should be no dispute that the publication only notice here is unacceptable when the defendant's records house class members' contact

information. *See, e.g., Larson v. AT&T Mobility LLC*, 687 F.3d 109, 122-31 (3d Cir. 2012) (reversing notice plan that did not require defendants to search through their record for the purpose of providing individual notice). "Plaintiffs' pocketbooks are not a factor—the mandatory notice requirement may not be relaxed based on the high cost of providing notice." *In re Motor Fuel Temperature Sales Practices Litig.*, 279 F.R.D. 598 (D. Kan. 2012) (citing *Amchem* and *Eisen*).

For the settling parties, meager notice means less resistance, and even more importantly, less cost to settlement. But for class members, it means an abridgment of statutory and constitutional rights. This Court should consider the wisdom of the Western District of New York in a recent decision. "If plaintiffs and their attorneys are acting like they have something to hide from the absent class members, perhaps it's because they do." *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 408 (W.D.N.Y. 2013).

VIII. The parties have artificially burdened the right of objection and opt-out by requiring four separate paper-mail submissions for a class of internet users; no positive inference should be drawn from a low number of formal objectors.

Almost any given class action settlement, no matter how much it betrays the interests of the class, will

produce only a small percentage of objectors. The predominating response will always be apathy because objectors without counsel must expend significant resources on an enterprise that will create little direct benefit for themselves. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors). Another common response from non-lawyers will be the affirmative avoidance, whenever possible, of anything involving a courtroom.

Class counsel argues that this understandable tendency to ignore notices or free-ride on the work of other objectors is best understood as acquiescence or even affirmative support for the settlement. Motion for Final Approval (Dkt. 65) at 18-19. This is wrong. Silence is simply *not* consent. *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001). "Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007).

Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual. "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (internal citation omitted). Moreover, "where notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a *fait accompli*." *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co..*, 834 F.2d 677, 680-81 (7th Cir. 1987).

"[T]he absence or silence of class parties does not relieve the judge of his duty and, in fact, adds to his responsibility." *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971). The Court should draw no inference in favor of the settlement from the number of objections, especially given the vociferousness of the objectors that do appear. *GM Trucks*, 55 F.3d at 812-13; *Vought*, 901 F. Supp. 2d. at 1093. "One good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement." *Richardson v. L'Oreal USA, Inc.*, __F. Supp. 2d__, 2013 WL 5941486, at *14 (D.D.C. Nov. 6, 2013) (sustaining Ms. Holyoak's objection).

Yet more conducive to apathetic inaction, the parties have elected a process of objecting and opting out which is "unnecessarily burdensome." *Newman v. Americredit Fin. Servs.*, No. 11-cv-3041 DMS (BLM), 2014 U.S. Dist. LEXIS 15728, at *17 (S.D. Cal. Feb. 3, 2014) ("The Court is not inclined to approve a settlement which makes it unnecessarily burdensome to submit a claim or opt out. The class members are required to submit claim forms and opt out requests by mail, although the settlement administrator is obligated to provide a phone number and a website. The only justification offered for the mailing requirement is that the claim forms require an affirmation. Plaintiff does not explain why an affirmation could not be provided through an online form or by phone with adequate identification of the class member.") (internal citations omitted); *Galloway v. Kan. City Landsmen*, No. 4:11-1020-CV-W-DGK, 2012 U.S. Dist. LEXIS 147148, at *16 (W.D. Mo. Oct. 12, 2012) (denying settlement in part based on parties' failure to allow class members to opt out via email alone), *later proceeding reported at* 2013 U.S. Dist. LEXIS 92650, at *10-*11 (W.D. Mo. Jul. 2, 2013) (noting that after the initial settlement rejection "[t]he parties have simplified the opt-out provision so that in order to opt-out, class members need only send a single email to defense counsel."). The requirement that objectors print and post multiple copies of their objection/exclusion is both expensive and outdated in 2014. *E.g.*, *Newman*, *supra*; *Smith*, 2012 U.S. Dist. LEXIS 163672, at *8-*9 ("[T]he parties have made the procedures for filing objections unduly burdensome. There is no reason to

require...the objectors to mail their objections to three different locations.").

Rather than requiring class members to snail-mail an objection to four recipients, other cases permit the relatively efficient (indeed, close to costless) method of transmitting objections and by a single electronic submission. *See e.g., In re Motor Fuel Temperature Sales Practices Litig.*, No 07-md-01840-KHV-JPO, Order (Dkt. No. 3019), at 2 (D. Kan. Nov. 10, 2011) ("If Costco plans to proceed with email notification, it must allow class members to opt out of the class and object to the settlement electronically"); *Boring v. Bed Bath & Beyond*, No. 12-cv-05259-JST (N.D. Cal. Nov. 21, 2013) ("The Court notes that the filing of objections with the Court constitutes service upon counsel for the parties, as the parties' counsel are registered to receive filings through the Court's Electronic Case Filing system."). Likewise, there is no valid reason why a class member in this settlement should have to download, print, fill out and mail an exclusion in this day and age. *See, e.g.*, http://ebayfeaturedplus classaction.com/#qf (allowing email opt out); http://www.copyrightclassaction.com/exclusion.php3(online opt out); http://www.fraleyfacebook settlement.com/faq#Q14 (same)

Where electronic modes of opting-out and objecting are available, the "vast majority" of participating class members will use those avenues. *Motor Fuel Temperature*, 2012 U.S. Dist. LEXIS 57981, at

*76 (D. Kan. Apr. 24, 2012); *id.* at *74 n.13 (nearly three times more people opted-out electronically than by mail); *Fraley v. Facebook, Inc.*, No. 11-cv-01726 RS (N.D. Cal. Jun. 7, 2013), Declaration of Jennifer M. Keough Regarding Settlement Administration (Dkt. 341) at ¶12 (6,884 of 6,946 opt-out requests (99.1%) were submitted electronically via the settlement website when that option was available). This is especially true of course, when, as here, the class consists entirely of internet users. *See* Declaration of Richard W. Simmons (Dkt. 65-4) ¶16 ("By definition, all of the interaction between Google and class members occurred on-line.")

At the very least it is improper for the parties to require objectors to mail their objections to **four** different locations. *See* Procedural Guidance for Class Action Settlements, *available at* http://cand.uscourts.gov/ClassActionSettlementGuidance ("The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filing.").

Imposing a costly, inefficient alternative over affordable, seamless electronic processes can only give rise to the inference that the parties wished to undermine the autonomous decisions of class members. It has been known for at least a half-decade that "the ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class

member participation." Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 766 n. 251 (2008); Leslie, *The Significance of Silence*, 59 FLA. L. REV. at 128-29. Indeed, notice was almost entirely distributed via the internet, yet absent class members' expressions of dissent cannot be made in the same medium. Class counsel is not licensed to consign objectors or opt-outs to second class status.

"One hallmark of a reasonable settlement agreement is that it makes participation as easy as possible, whether class members wish to make a claim, opt out, or object." *McClintic v. Lithia Motors*, No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *17 (W.D. Wash. Jan. 12, 2012) (critiquing comparable opt-out and objection process and ultimately rejecting settlement). Together, the hurdles imposed on exclusion and objection do not appropriately respect class members' Fed. R. Civ. P. 23 rights. Moreover, the court loses the benefit of valuable adversarial perspectives that objectors can bring to the evaluation of a settlement's fairness. Not only do the hurdles constitute a reason to reject the settlement in this case, they provide an added reason to discredit any argument that the lack of objectors signals the class members' approval of the settlement.

CONCLUSION

For the forgoing reasons, the settlement cannot be approved. It asks class members to surrender their

individual claims in exchange for a few million dollars being given to unrelated third parties, many of whom have prior relationships to the defendant or class counsel. The settlement does not afford effective notice to the class and makes objecting or opting out needlessly and artificially burdensome. The class itself is not certifiable, both because, if individual recoveries are genuinely impossible, then a class action is not superior to other methods of adjudication. If the Court decides to approve the settlement anyhow, it should drastically pare down the requested fee award.

Dated: August 8, 2014

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION

PALOMA GAOS; ANTHONY ITALIANO; GABRIEL PRIYEV, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

MELISSA ANN HOLYOAK; THEODORE H. FRANK,

Objectors-Appellants,

v.

GOOGLE, INC., a Delaware corporation,

Defendant-Appellee.

No. 15-15858

D.C. No. 5:10-cv-04809-EJD

OPINION

App. 2

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Argued and Submitted March 13, 2017
San Francisco, California

Filed August 22, 2017

Before: J. Clifford Wallace, M. Margaret McKeown, and Jay S. Bybee, Circuit Judges.

Opinion by Judge McKeown;
Partial Concurrence and Partial Dissent by Judge Wallace

COUNSEL

Theodore H. Frank (argued), Melissa A. Holyoak, and Adam Ezra Schulman, Competitive Enterprise Institute, Center for Class Action Fairness, Washington, D.C., for Objectors-Appellants.

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OPINION

McKEOWN, Circuit Judge

Google's free Internet search engine ("Google Search") processes more than one billion user-generated search requests every day. This case arises from class action claims that Google violated users' privacy by disclosing their Internet search terms to owners of third-party websites. We consider whether the district court abused its discretion in approving the $8.5 million *cy pres*–only settlement and conclude that it did not.

BACKGROUND

In these consolidated class actions, three Google Search users—Paloma Gaos, Anthony Italiano, and Gabriel Priyev (collectively "plaintiffs")—asserted claims for violation of the Stored Communications Act, 18 U.S.C. § 2701 et seq.; breach of contract; breach of the covenant of good faith and fair dealing; breach of implied contract; and unjust enrichment. The plaintiffs sought statutory and punitive damages and declaratory and injunctive relief for the alleged privacy violations.

The claimed privacy violations are the consequence of the browser architecture. Once users submit search terms to Google Search, it returns a list of relevant websites in a new webpage, the "search results page." Users can then visit any website listed in the search results page by clicking on the provided link.

When a user visits a website via Google Search, that website is allegedly privy to the search terms the user originally submitted to Google Search. This occurs because, for each search results page, Google Search generates a unique "Uniform Resource Locator" ("URL") that includes the user's search terms. In turn, every major desktop and mobile web browser (including Internet Explorer, Firefox, Chrome, and Safari) by default reports the URL of the last webpage that the user viewed before clicking on the link to the current page as part of "referrer header" information. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how "referrer headers" operate).[1]

The genesis of the plaintiffs' complaints is the application of the search protocol, coupled with Google's "Web History" service, which tracks and stores account holders' browsing activity on Google's servers.

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[1] For instance, if a user enters "2016 presidential election" into Google Search and clicks on a link to www.cnn.com/election on the search results page, the "referrer header" would tell CNN that the user found her way there via "http://www.google.com/search?q=2016+presidential+election."

Following mediation, the parties reached a settlement, which they submitted to the district court for preliminary approval in July 2013. The settlement provided that Google would pay a total of $8.5 million and provide information on its website disclosing how users' search terms are shared with third parties, in exchange for a release of the claims of the approximately 129 million people who used Google Search in the United States between October 25, 2006 and April 25, 2014 (the date the class was given notice of the settlement).

Of the $8.5 million settlement fund, approximately $3.2 million was set aside for attorneys' fees, administration costs, and incentive payments to the named plaintiffs. The remaining $5.3 million or so was allocated to six cy pres recipients, each of which would receive anywhere from 15 to 21% of the money, provided that they agreed "to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." The six recipients were AARP, Inc.; the Berkman Center for Internet and Society at Harvard University; Carnegie Mellon University; the Illinois Institute of Technology Chicago-Kent College of Law Center for Information, Society and Policy; the Stanford Center for Internet and Society; and the World Privacy Forum. Each of the recipients submitted a detailed proposal for how the funds would be used to promote Internet privacy.

After a hearing, the district court certified the class for settlement purposes and preliminarily approved the settlement. Notice was given to the class on April 25, 2014, via a website, toll-free telephone number, paid banner ads, and press articles. Thirteen class members opted out of the settlement, and five class members, including Melissa Ann Holyoak and Theodore H. Frank (collectively "Objectors"), filed objections.

Following a final settlement approval hearing at which the district court heard from both the parties and Objectors, the district court granted final approval of the settlement on March 31, 2015. With respect to the objections, the district court found that: (1) a cy pres–only settlement was appropriate because the settlement fund was non-distributable; (2) whether or not the settlement was cy pres–only had no bearing on whether Rule 23(b)(3)'s superiority requirement was met; (3) the cy pres recipients had a substantial nexus to the interests of the class members, and there was no evidence that the parties' preexisting relationships with the recipients factored into the selection process; and (4) the attorneys' fees were commensurate with the benefit to the class. The district court awarded $2.125 million in fees to class counsel and $15,000 in incentive awards to the three named plaintiffs. Objectors appealed.

ANALYSIS

The settlement at issue involves a *cy pres*–only distribution of the $5.3 million or so that remains in the settlement fund after attorneys' fees, administration costs, and incentive awards for the named plaintiffs are accounted for. *Cy pres*, which takes its name from the Norman French expression *cy pres comme possible* (or "as near as possible"), is an equitable doctrine that originated in trusts and estates law as a way to effectuate the testator's intent in making charitable gifts. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). In the class action settlement context, the *cy pres* doctrine permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class. *Id.*

Here, the cy pres recipients were six organizations that have pledged to use the settlement funds to promote the protection of Internet privacy. We review for abuse of discretion the district court's approval of the proposed class action settlement. *Id.* In addition, because the settlement took place before formal class certification, settlement approval requires a "higher standard of fairness." *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)), *cert. denied sub nom. Marek v. Lane*, 134 S. Ct. 8 (2013). Recognizing that, at this early stage of litigation, the district court cannot as effectively monitor for collusion and other abuses, we scrutinize the proceedings to discern whether the court sufficiently "account[ed] for

the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit." *Id.*

I. Appropriateness of the *Cy Pres*–Only Settlement

As an initial matter, we quickly dispose of the argument that the district court erred by approving a *cy pres*–only settlement. Notably, Objectors do not contest the value of the settlement nor do they plead monetary injury. To be sure, *cy pres*–only settlements are considered the exception, not the rule. *See Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (explaining that direct distributions to class members are preferable because "[t]he settlement-fund proceeds, having been generated by the value of the class members' claims," are "the property of the class"); *accord* William B. Rubenstein, Newberg on Class Actions § 12:26 (5th ed. 2017). However, they are appropriate where the settlement fund is "non-distributable" because "the proof of individual claims would be burdensome or distribution of damages costly." *Lane*, 696 F.3d at 819 (quoting *Nachshin*, 663 F.3d at 1038). We have never imposed a categorical ban on a settlement that does not include direct payments to class members.

The district court's finding that the settlement fund was non-distributable accords with our precedent. In *Lane*, we deemed direct monetary payments

"infeasible" where each class member's individual recovery would have been "*de minimis*" because the remaining settlement fund was approximately $6.5 million and there were over 3.6 million class members. *Id.* at 817–18, 820–21. The gap between the fund and a miniscule award is even more dramatic here. The remaining settlement fund was approximately $5.3 million, but there were an estimated 129 million class members, so each class member was entitled to a paltry 4 cents in recovery—a *de minimis* amount if ever there was one. The district court found that the cost of verifying and "sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class."

To begin, the district court found that the amount of the fund was appropriate given the shakiness of the plaintiffs' claims. Objectors do not contend that it would have been feasible to make a 4-cent distribution to every class member. Instead, they ask us to impose a mechanism that would permit a miniscule portion of the class to receive direct payments, eschewing a class settlement that benefits members through programs on privacy and data protection instituted by the *cy pres* recipients. Objectors suggest, for example, that "it is possible to compensate an oversized class with a small settlement fund by random lottery distribution," or by offering "$5 to $10 per claimant" on the assumption that few class members will make claims. Our review of the district court's settlement approval is not predicated simply on whether there may be "possible" alternatives; rather,

we benchmark whether the district court discharged its obligation to assure that the settlement is "fair, adequate, and free from collusion." *Lane*, 696 F.3d at 819 (quoting *Hanlon*, 150 F.3d at 1027). If we took their objections at face value, Objectors would have us jettison the teachings of *Lane*. Objectors would also have us ignore our prior endorsement of *cy pres* awards that go to uses consistent with the nature of the underlying action. *Nachshin*, 663 F.3d at 1039–40.[2]

Likewise, we easily reject Objectors' argument that if the settlement fund *was* non-distributable, then a class action cannot be the superior means of adjudicating this controversy under Rule 23(b)(3). "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (alteration in original) (quoting 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1779 (3d ed. 2005)). Not surprisingly, there is a relationship between the superiority requirement and the appropriateness of a *cy pres*–only settlement.

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[2] It bears noting, of course, that district courts are not precluded from approving other distribution methods that might benefit the class more directly under certain circumstances. However, the fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them. *See Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010) (per curiam) (holding that "[t]he abuse of discretion standard requires us to uphold a district court determination that falls within a broad range of permissible conclusions").

The two concepts are not mutually exclusive, since "[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Id.* The district court did not abuse its discretion in finding the superiority requirement was met because the litigation would otherwise be economically infeasible. This finding dovetails with the rationale for the *cy pres*–only settlement.[3]

II. The *Cy Pres* Recipients

We now turn to the crux of this appeal: whether approval of the settlement was an abuse of discretion due to claimed relationships between counsel or the parties and some of the *cy pres* recipients. We have long recognized that the *cy pres* doctrine, when "unbridled by a driving nexus between the plaintiff class and the *cy pres* beneficiaries[,] poses many nascent dangers to the fairness of the distribution process," because the selection process may then "answer to the

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[3] Objectors point to *In re Hotel Tel. Charges*, 500 F.2d 86, 91 (9th Cir. 1974), as an example of a case where we found the superiority requirement not met because "the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members." But *In re Hotel* did not involve a *cy pres* distribution or even a settlement. *See id.* Instead, we held that a class action was not the superior means of resolving the controversy because the class members' antitrust claims involved a "great variety" of individualized determinations. *Id.* at 90–91; *see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305–06 (9th Cir. 1990) (distinguishing *In re Hotel* on the basis that the case raised concerns regarding "individual proof of damages").

whims and self interests of the parties, their counsel, or the court." *Nachshin*, 663 F.3d at 1038–39; *see also Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308–39 (9th Cir. 1990). Due to these dangers, we require *cy pres* awards to meet a "nexus" requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members. *Nachshin*, 663 F.3d at 1039.

Objectors suggest that the district court rubberstamped the settlement, by "simply h[olding] that the Ninth Circuit and district courts have approved other all–*cy–pres* settlements and class members effectively had no right to complain about the parties' choice of compromise." That characterization is unfair and untrue. And oddly, despite this claim, Objectors do not dispute that the nexus requirement is satisfied here.

The district court found that the six *cy pres* recipients are "established organizations," that they were selected because they are "independent," have a nationwide reach and "a record of promoting privacy protection on the Internet," and "are capable of using the funds to educate the class about online privacy risks." Although the district court expressed some disappointment that the recipients were the "usual suspects," it recognized that "failure to diversify the list of distributees is not a basis to reject the settlement . . . when the proposed recipients otherwise qualify under the applicable standard." Accordingly, the district court appropriately found that the *cy pres* distribution

addressed the objectives of the Stored Communications Act and furthered the interests of the class members. Previous *cy pres* distributions rest on this same understanding of the nexus requirement. *See, e.g.*, *Dennis*, 697 F.3d at 866–67 (no nexus between false advertising claims relating to the nutritional value of Frosted Mini-Wheats® and charities providing food for the indigent); *Lane*, 696 F.3d at 817, 820–22 (nexus between Facebook privacy claims and charity giving grants promoting online privacy and security); *Nachshin*, 663 F.3d at 1039–41 (no nexus between breach of privacy, unjust enrichment, and breach of contract claims relating to AOL's provision of commercial e-mail services and the Legal Aid Foundation of Los Angeles, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center Foundation); *Six (6) Mexican Workers*, 904 F.2d at 1307–09 (no nexus between Farm Labor Contractor Registration Act claims and foundation operating human assistance projects in areas where plaintiffs resided).

Nonetheless, Objectors take issue with the choice of *cy pres* recipients because Google has in the past donated to at least some of the *cy pres* recipients, three of the *cy pres* recipients previously received Google settlement funds, and three of the *cy pres* recipients are organizations housed at class counsel's *alma maters*. *See In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011). The Objectors point to a comment from the American Law Institute's ("ALI") Principles of the

Law of Aggregate Litigation which suggests that "[a] *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." Principles of the Law of Aggregate Litig. § 3.07 cmt. b (Am. Law Inst. 2010) (emphasis added).[4]

The benchmark for "significant prior affiliation" is left undefined. *Id.* Of course it makes sense that the district court should examine any claimed relationship between the *cy pres* recipient and the parties or their counsel. But a prior relationship or connection between the two, without more, is not an absolute disqualifier. Rather, a number of factors, such as the nature of the relationship, the timing and recency of the relationship, the significance of dealings between the recipient and the party or counsel, the circumstances of the selection process, and the merits of the recipient play into the analysis. The district court explicitly or implicitly addressed this range of considerations.

We do not need to explore the contours of the "significant prior affiliation" comment because in the context of this settlement, the claimed relationships do not "raise substantial questions about whether the selection of the recipient was made on the merits." *See*

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[4] This statement is found in a comment that is unsupported by any illustration, case law, or other authority. *Id.* § 3.07 cmt. b.

id. § 3.07 cmt. b.[5] As a starting premise, Google's role as a party in reviewing the *cy pres* recipients does not cast doubt on the settlement. In *Lane*, we approved a *cy pres*–only settlement in which the distributor of the settlement fund was a newly-created entity run by a three-member board of directors, one of whom was defendant Facebook's Director of Public Policy. 696 F.3d at 817. We rejected the claim that this structure created an "unacceptable conflict of interest," explaining that "[w]e do not require . . . that settling parties select a *cy pres* recipient that the court or class members would find ideal" since "such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process." *Id.* at 820–21. Instead, we recognized that, as the "'offspring of compromise,'" settlement agreements "necessarily reflect the interests of both parties to the settlement." *Id.* at 821 (quoting *Hanlon*, 150 F.3d at 1027). Thus, we concluded that Facebook's ability to have "its say" in the distribution of *cy pres* funds was "the unremarkable result of the parties' give-and-take negotiations" and acceptable so long as the nexus requirement was satisfied. *Id.* at 821–22.

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[5] Other circuits have endorsed § 3.07's preference for direct distribution to class members over the use of *cy pres* awards where practicable. *See In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064–65 (8th Cir. 2015); *Klier*, 658 F.3d at 475 n.16. And though we have not adopted § 3.07, we too have expressed a similar preference. *See Nachshin*, 663 F.3d at 1036. However, no circuit has yet adopted § 3.07 comment b's "significant prior affiliation" reference.

Given the burgeoning importance of Internet privacy, it is no surprise that Google has chosen to support the programs and research of recognized academic institutes and nonprofit organizations. Google has donated to hundreds of third-party organizations whose work implicates technology and Internet policy issues, including university research centers, think tanks, advocacy groups, and trade organizations.[6] These earlier donations do not undermine the selection process employed to vet the *cy pres* recipients in this litigation. The district court conducted a "careful[] review" of the recipient's "detailed proposals" and found a "substantial nexus" between the recipients and the interests of the class members. Notably, some of the recipient organizations have challenged Google's Internet privacy policies in the past.[7] Most

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[6] *See Transparency – U.S. Public Policy – Google*, Google.com, https://www.google.com/publicpolicy/transparency.html (last visited July 21, 2017) (listing third-party organizations Google has supported in the past).

[7] At least one of the recipients, World Privacy Forum, has publicly criticized Google's lack of transparency regarding its privacy policies. *See* Joseph Menn, *Privacy Advocates Target Google*, L.A. Times (June 4, 2008), http://articles.latimes.com/2008/jun/04/business/fi-google4. And a complaint filed by the World Privacy Forum and a Stanford Center for Internet and Society study played a key role in the $17 million fine Google paid to the Federal Trade Commission for circumventing user's privacy choices in Apple's Safari Internet browser. *See* Kukil Bora, *FTC Appears Ready to Fine Google Millions Over Apple Safari Privacy Breach*, Int'l Bus. Times (May 5, 2012), http://www.ibtimes.com/ftc-appears-ready-fine-google-millions-over-apple-safari-privacy-breach-report-696537; Claire

importantly, there was transparency in this process, with the proposed recipients disclosing donations received from Google. Each recipient's *cy pres* proposal identified the scope of Google's previous contributions to that organization, and, unlike in *Lane*, explained how the *cy pres* funds were distinct from Google's general donations. *See Dennis*, 697 F.3d at 867–68 (casting doubt on the value of *cy pres* funds that a defendant "has already obligated itself to donate"). Citing *Lane*, the district court found that "[t]he chosen recipients and their respective proposals are sufficiently related so as to warrant approval; they do not have to be the recipients that objectors or the court consider ideal."

The objection that three of the *cy pres* recipients had previously received *cy pres* funds from Google does not impugn the settlement without something more, such as fraud or collusion. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). That "something more" is missing here. Indeed, the proposition that *cy pres* funds should not be awarded to previous recipients would be in some tension with our nexus requirements. As we have recognized, it is often beneficial for a *cy pres* recipient to have a "'substantial

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Cain Miller, *Google to Pay $17 Million to Settle Privacy Case*, N.Y. Times (Nov. 18, 2013), http://www.nytimes.com/2013/11/19/technology/google-to-pay-17-million-to-settle-privacy-case.html; Elinor Mills, *Privacy Brouhaha Reveals Google's Split Personality*, CNET (Feb. 17, 2012), http://www.cnet.com/news/privacy-brouhaha-reveals-googles-split-personality/. Both organizations are *cy pres* recipients here.

record of service,'" because such a record inspires confidence that the recipient will use the funds to the benefit of class members. *See Dennis*, 697 F.3d at 865 (quoting *Six (6) Mexican Workers*, 904 F.2d at 1308); *Lane*, 696 F.3d at 822. But in emerging areas such as Internet and data privacy, expertise in the subject matter may limit the universe of qualified organizations that can meet the strong nexus requirements we impose upon *cy pres* recipients. Given that, over time, major players such as Google may be involved in more than one *cy pres* settlement, it is not an abuse of discretion for a court to bless a strong nexus between the *cy pres* recipient and the interests of the class over a desire to diversify the pick via novel beneficiaries that are less relevant or less qualified. *See Nachshin*, 663 F.3d at 1040 (considering whether the *cy pres* distribution "provide[s] reasonable certainty that any member will be benefitted").

Finally, we reject the proposition that the link between the *cy pres* recipients and class counsel's *alma maters* raises a significant question about whether the recipients were selected on the merits. There may be occasions where the nature of the alumni connections between the parties and the recipients could cast doubt on the propriety of the selection process. But here, we have nothing more than a barebones allegation that class counsel graduated from schools that house the Internet research centers that will receive funds.

The claim that counsel's receipt of a degree from one of these schools taints the settlement can't be entertained with a straight face. Each of these schools graduates thousands of students each year. Objectors have never disputed that class counsel have no ongoing or recent relationships with their *alma maters* and have no affiliations with the specific research centers. Nor did the district court simply accept this concession or put the burden on the Objectors. The district court appropriately considered the substance of the objections and explained why those challenges did not undermine the overall fairness of the settlement. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377 (9th Cir. 1995). The court affirmatively analyzed the issue and was cognizant of the claim of a potential conflict. All class counsel swore that they have no affiliations with the specific research centers. Class counsel repeated that attestation at the final settlement approval hearing and added that they sit on no boards for any of the proposed recipients. As one class counsel put it, "I simply got my law degree [at Harvard], and that's simply the end of it."[8] The recipients are well-recognized centers focusing on the Internet and data privacy, and the district court conducted a "careful[] review" of the recipients' "detailed proposals" and found a "substantial nexus" between the recipients

[8] The dissent's suggestion that what is needed is a hearing with sworn testimony seems superfluous in view of the extensive hearing held by the district court, the specific queries to counsel about the *cy pres* recipients, and the submission of sworn declarations.

and the interests of the class members.[9] No one suggested that any of the centers acted with any impropriety, and the Objectors provided no alternative suggestions for other law schools with more qualified centers or institutes. The district court found "no indication that counsel's allegiance to a particular alma mater factored into the selection process," particularly since the identity of the recipients "was a negotiated term included in the Settlement Agreement and therefore not chosen solely by . . . alumni." Thus, the district court gave a "sufficient[ly] reasoned" response

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[9] The dissent challenges the inclusion of the Chicago-Kent College of Law Center for Information, Society and Policy ("CISP") as a recipient, noting that the center was only inaugurated in 2012. *See* CHICAGO-KENT MAG., Summer 2012, at 8, *available at* https://issuu.com/chicagokentlaw/docs/chicago-kent-magazine-2012. This judicial second-guessing does not bear scrutiny, particularly in a field that is developing quickly and where the record reveals a different story. CISP's *cy pres* proposal, which outlines a "privacy preparedness" project that would develop interactive materials to educate the public about ways to protect their Internet and data privacy, notes that the five faculty involved in the proposed project are respected leaders in the field of Internet and privacy law, that CISP has received other *cy pres* awards and grants, and that CISP has hosted five conferences on Internet and data privacy issues that have attracted hundreds of attendees and trained over a hundred journalists on data privacy. In addition, CISP conducts research in such areas as data aggregation, social networks and health information, and children and internet privacy; engages in policy advocacy, community outreach, and public education; and holds seminars on Internet and data privacy issues for law students. *See Center for Information, Society and Policy*, Kentlaw.iit.edu, https://www.kentlaw.iit.edu/institutes-centers/center-for-information-society-and-policy (last visited July 24, 2017).

to the objections as to the claimed preexisting relationships. *In re Pac. Enters. Sec. Litig.*, 47 F.3d at 377. We can hardly say that the alumni connections cloud the fairness of the settlement.

As an overarching matter, nothing in this record "raise[s] substantial questions about whether the selection of the recipient was made on the merits." *See* Principles of the Law of Aggregate Litig. § 3.07 cmt. b. We do not suggest, however, that a party's prior relationship with a *cy pres* recipient could not be a stumbling block to approval of a settlement. *Cf. Marek*, 134 S. Ct. at 9 (mem.) (statement of Roberts, C.J., respecting the denial of certiorari) (recognizing that given the "fundamental concerns surrounding" *cy pres* awards and their increasing prevalence, the Court "may need to clarify the limits on the use of such remedies" in the future). We hold merely that, under the circumstances here, the district court did not abuse its discretion in approving the *cy pres* recipients.

III. Attorneys' Fees

Turning to the issue of attorneys' fees, the district court did not abuse its discretion by approving $2.125 million in fees and $21,643.16 in costs. As an initial matter, there is no support for Objectors' view that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*–only. *See generally Lane*, 696 F.3d at 818 (acknowledging a 25% fee award that also involved a *cy pres*–only settlement).

Rather, the question is whether the amount of attorneys' fees was reasonable. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

In a settlement that produces a common fund for the benefit of the entire class, a court has discretion to employ either the "percentage-of-recovery" method or the "lodestar" method to calculate appropriate attorneys' fees, so long as its discretion is exercised so as to achieve a reasonable result. *See id.* at 942. Here, the district court found that the requested fees were appropriate under either metric.

Under the percentage-of-recovery method, the requested fee was equal to 25% of the settlement fund. According to the district court, this percentage was commensurate with the risk posed by the action and the time and skill required to secure a successful result for the class, given that class counsel faced three motions to dismiss and participated in extensive settlement negotiations. The district court also found that this percentage hewed closely to that awarded in similar Internet privacy actions. *See, e.g., In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *9–10 (N.D. Cal. Mar. 18, 2013); *see also In re Bluetooth*, 654 F.3d at 942 (noting that 25% is our "benchmark" for a reasonable fee award).

Although not required to do so, the district court took an extra step, cross-checking this result by using the lodestar method. *See In re Bluetooth*, 654 F.3d at

941–44 (checking the district court's percentage-of-recovery fees calculation against the lodestar method, which is "calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation . . . by a reasonable hourly rate for the region and the experience of the lawyer"). The district court found that class counsel provided sufficient support for its lodestar calculation that fees totaled $2,126,517.25.

AFFIRMED.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I concur in Sections I and III of the majority opinion. I agree that a *cy pres*-only settlement was appropriate in this case and do not contend that the district court abused its discretion in calculating class counsel's fees.

I dissent, however, from Section II of the opinion, in which the majority blesses the district court's approval of the settlement, despite the preexisting relationships between class counsel and the *cy pres* recipients. To me, the fact alone that 47% of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further in a case such as

this. The district court made no serious inquiry to alleviate that concern. Accordingly, I would vacate the district court's approval of the class settlement, and remand with instructions to hold an evidentiary hearing, examine class counsel under oath, and determine whether class counsel's prior affiliation with the *cy pres* recipients played *any* role in their selection as beneficiaries.

I.

As the majority opinion outlines, plaintiffs in this case alleged that Google violated class members' privacy rights by disclosing personal information (such as search terms) to unauthorized third parties. Google's practice allegedly violated the federal Stored Communications Act, along with various state laws. After several rounds at the motion to dismiss stage, the parties agreed to a class-wide settlement (before formal class certification by the district court). The parties estimated the size of the class to be 129 million people.

The settlement contained the following key terms: (1) Google agreed to pay $8.5 million into a settlement fund; (2) Google would provide notice of the settlement on its website; (3) each class representative would receive $5,000, claims administration costs would be $1 million, and attorney's fees would be $2.125 million (25% of the settlement fund); and (4) the remainder of the settlement fund (about $5 million) would go to six *cy pres* recipients. The six *cy pres*

recipients were to be Carnegie Mellon University (21% of the remainder), the World Privacy Forum (17%), Chicago-Kent College of Law Center for Information, Society and Policy (16%), the Stanford Center for Internet and Society (16%), the Berkman Center for Internet and Society at Harvard University (15%), and that the AARP Foundation (15%).

II.

We review a district court's approval of a class action settlement for an abuse of discretion. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). Here, however, the parties reached the settlement before the class certification stage. "Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

As stated above, three of the *cy pres* distribution payments in our case are to Chicago-Kent College of Law (16%), Stanford (16%), and Harvard (15%). Attorneys for the class attended all three of these institutions. We, along with other courts and observers, have pointed out the unseemly occurrence of *cy pres* funds being doled out to interested parties' alma maters. *See, e.g.*, *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011); *Securities & Exchange Comm'n*

v. Bear, Stearns & Co., Inc., 626 F.Supp.2d 402, 414–16 (S.D.N.Y. 2009); Adam Liptak, *Doling out Other People's Money*, N.Y. Times, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like").

In response to this all-too-common development, the American Law Institute has set forth, in its Principles of the Law of Aggregate Litigation, that "[a] *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." American Law Institute (ALI), Principles of the Law of Aggregate Litigation § 3.07 comment b (2010) (emphasis added). Although the majority tells us correctly that no circuit has adopted the specific "prior affiliation" language, circuits have endorsed § 3.07's guidance regarding scrutinizing *cy pres* disbursements. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064–65 (8th Cir. 2015) (vacating a *cy pres* settlement because "class counsel and the district court entirely ignored this now-published ALI authority"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (quoting ALI § 3.07, comment a (2010)); *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012) (citing to ALI § 3.07 and asserting that "[c]ourts have generally agreed with the ALI Principles").

I conclude that our circuit should adopt the ALI's guidance as set forth in § 3.07. District courts should be required to scrutinize *cy pres* settlements when the proffered recipients of the funds have a "prior affiliation" with counsel, a party, or even the judge, especially when one of those players is a loyal alumni of a *cy pres* recipient. I do not mean to suggest that class counsel's alma mater can never be a *cy pres* beneficiary. Rather, I propose that the burden should be on class counsel to show through sworn testimony, in an on-the-record hearing, that the prior affiliation played *no role* in the negotiations, that other institutions were sincerely considered, and that the participant's alma mater is the proper *cy pres* recipient.

The majority responds to this line of argument by asserting that "here, we have nothing more than a barebones allegation that class counsel graduated from schools that house the Internet research centers that will receive funds." The majority then salutes the district court's conclusion that there is "no indication that counsel's allegiance to a particular alma mater factored into the selection process," and stresses that the *cy pres* recipients were a negotiated term, not chosen solely by alumni. In essence, the majority holds that despite the nascent dangers posed by apportioning *cy pres* funds to the distributing parties' alma maters, the burden is entirely on the objectors to show that the settlement might be tainted.

I disagree fundamentally with this analysis. Our precedent requires that district courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947. In our case, we have a *cy pres*-only settlement. That alone raises a yellow flag. Furthermore, we have a class settlement before formal class certification. That raises another yellow flag. Lastly, we have almost half of the settlement fund, several million dollars, being given to class counsel's alma maters. To me, that raises a red flag. I am especially dubious of the inclusion of the Center for Information, Society and Policy at Chicago-Kent Law School (a law school attended by class counsel), which center appears to have inaugurated only a year before the parties herein agreed to their settlement. Even with these red and yellow flags, under the majority's holding, the burden is still on the objectors to prove more, despite the objectors' lack of access to virtually any relevant evidence that would do so.

I would hold that the combination of a *cy pres*-only award, a pre-certification settlement, and the fact that almost half the *cy pres* fund is going to class counsel's alma maters, is sufficient to shift the burden to the proponents of the settlement to show, on a sworn record, that nothing in the acknowledged relationship was a factor in the ultimate choice. Here, the only sworn-to items in the record on this issue are boiler plate, one-line declarations from class counsel stating

"I have no affiliation" with the subject institutions. While the majority asserts that the district court conducted a "careful review," these terse declarations are the only shred of sworn-to evidence in the record. There was essentially nothing for the district court to review—carefully or not. Although there was some discussion between counsel and the district court during the hearings on the settlement, this was nothing more than unsworn lawyer talk during an oral argument.[1]

I still have many questions surrounding how these universities were chosen, such as: What other institutions were considered? Why were the non-alma mater institutions rejected? What relationship have counsel had with these universities? Have counsel donated funds to their alma maters in the past? Do counsel serve on any alma mater committees or boards? Do counsel's family members? How often do counsel visit their alma maters? There are many questions still lingering that have not been answered under oath. Here, as we have directed before, "the district court should have pressed the parties to substantiate their bald assertions with corroborating evidence." *Id.* at 948.

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[1] I disagree with the majority's assertion that "sworn testimony seems superfluous" because counsel submitted one-line boilerplate declarations and the district court heard some unsworn argument from the lawyers. My experience as a trial judge taught me to be skeptical of unsworn statements from lawyers, especially when it comes to conflict of interest issues. To me, there is a significant difference between sworn and unsworn testimony.

Although I would vacate the parties' settlement, I express no opinion on the definitive fairness of the parties' agreement. It is not the province of appellate judges to "substitute our notions of fairness for those of the district judge." *Officers for Justice v. Civ. Serv. Commission of the City and County of San Francisco*, 688 F.2d 615, 626 (9th Cir. 1982) (internal citations omitted). Instead, I would remand the case to the district court for further fact finding in accordance with the concerns I have expressed.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION	Case No. 5:10-cv-04809-EJD **ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; GRANTING MOTION FOR ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS** Re: Dkt. Nos. 65, 66

This consolidated internet privacy litigation against Defendant Google Inc. ("Google") returns for final approval of a class action settlement. *See* Docket Item No. 65. Representative Plaintiffs Paloma Gaos, Anthony Italiano and Gabriel Priyev ("Plaintiffs") also seek an order approving their request for attorneys fees, costs and incentive awards. *See* Docket Item No. 66.

Federal jurisdiction arises pursuant to 28 U.S.C. § 1331. Having carefully considered the written brief-

ing along with the arguments of counsel at the hearing on this matter, the court has determined the motions should be granted for the reasons explained below.

I. FACTUAL AND PROCEDURAL BACKGROUND

The court previously described the factual allegations underlying this lawsuit and repeats them again here. According to the Consolidated Class Action Complaint ("CCAC"), "searching" is one of the "most basic activities performed in the Internet," and Google's website offers "the most-used search engine in the world." *See* CCAC, Docket Item No. 50, at ¶¶ 15, 16. This case focuses on that proprietary search engine. Plaintiffs allege Google operated its search engine in a manner that violated their Internet privacy rights by disclosing personal information to third parties.

Specifically, Plaintiffs allege that Google's search engine intentionally and by default included the user's search terms in the resulting URL of the search results page. *Id.* at ¶ 56. Thus, when a user of Google's search engine clicked on a link from the search results page, the owner of the website subject to the click receives the user's search terms in the "referrer header" from Google. *Id.* at ¶ 57. This information is then disseminated further, since several web analytics services parse search query information from web server logs, or otherwise collect the search query from the

referrer header transmitted by each user's web browser. *Id.* at ¶ 58. Indeed, Google's own analytics product provides webmasters with this information in the aggregate. *Id.*

According to Plaintiffs, the problem with Google's disclosure of users' search information to the third parties is that the referrer header - which displays the user's search terms - can sometimes contain certain personal information often subject to search queries, including "users' real names, street addresses, phone numbers, credit card numbers, social security numbers, financial account numbers and more, all of which increases the risk of identity theft." *Id.* at ¶ 3. "User search queries can also contain highly-personal and sensitive issues, such as confidential medical information, racial or ethnic origins, political or religious beliefs or sexuality, which are often tied to the user's personal information. *Id.* at ¶ 3.

Based on these allegations, Plaintiffs assert the following causes of action against Google: (1) violation of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) breach of implied contract; (5) unjust enrichment; and (6) declaratory and injunctive relief.

Gaos initiated an action in this court on October 25, 2010, and Priyev filed an action on February 29, 2012, in the Northern District of Illinois. On April 30,

2013, the cases were consolidated after the Priyev action was transferred to this court. On March 26, 2014, the court granted the parties motion for preliminary approval of the settlement, certified a settlement class and appointed counsel. These motions were filed upon completion of the notice plan.

The court received four written objections to the settlement from Kim Morrison, David Weiner, Melissa Holyoak, Theodore H. Frank, and Cameron Jan. A hearing addressing final approval was held on August 29, 2014.

II. LEGAL STANDARD

A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties to a putative class action reach a settlement agreement prior to class certification, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

"Approval under 23(e) involves a two-step process in which the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004). At the final approval stage,

the primary inquiry is whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Having already completed an preliminary examination of the agreement, the court reviews it again, mindful that the law favors the compromise and settlement of class action suits. *See, e.g.*, *Churchill Village, LLC. v. Gen. Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Ultimately, "the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants and their strategies, positions, and proof." *Hanlon*, 150 F.3d at 1026.

III. DISCUSSION

A. Continuing Certification of Settlement Class

This analysis begins with an examination of whether class treatment remains appropriate. The court found at the preliminary approval stage that Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequate protection by the named representatives were satisfied. As to those issues, Plaintiffs anticipated a class comprised of approximately 129 million individuals who all share a common injury. The existence of this injury for each class

member could be determined by resolving one question: whether Google's system-wide practice and policy of storage and disclosure of their search query information was unlawful. Plaintiffs' claims were also typical, if not identical, to that of other class members. For that reason, there was no indication that Plaintiffs' interest would conflict with that of the class, and Plaintiffs and their counsel had proven a desire to vigorously pursue class claims as evidenced by prior motion practice.

As to Rule 23(b), the court found that common questions predominate and that the class action mechanism was a superior process for this litigation. The alternatives to class certification - millions of separate, individual and time-consuming proceedings or a complete abandonment of claims by a majority of class members - were not preferable. Moreover, class treatment was appropriate because Defendant's policy was directed at all of its users as whole rather than at particular users of its search engine. Since an adequate showing was made as to all of the Rule 23 factors, the court conditionally certified the class for settlement purposes.

The filings related to this motion do not compel an alteration to the prior findings under Rule 23. Although Objectors Frank and Holyoak argue the class should be decertified unless the class members receive direct payments from the settlement fund, such an argument is unpersuasive under these circum-

stances. Frank and Holyoak appear to generally contend that the only acceptable benefit is some form of monetary compensation. If it is too costly to distribute settlement funds to class members, then Frank and Holyoak believe the class action mechanism is an inferior method of resolution under Rule 23(b).

This argument directed at the superiority element of Rule 23(b) is misplaced. Within the context of a class action settlement, the superiority inquiry focuses on "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. Here, the primary objective of the class action procedure - to enable litigation where it would otherwise be economically infeasible - is achieved in this case. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). As noted, the alternatives to a class action are not preferable since they involve either thousands of individual cases or a complete abandonment of millions of claims. *Hanlon*, 150 F.3d at 1023 (holding that a superiority determination "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution.").

Moreover, a class-wide resolution is not rendered inferior simply because the settlement agreement calls for an indirect rather than a direct benefit to the

class. Assuming the circumstances support it, a settlement calling for a cy pres remedy can be approved. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (recognizing that federal courts frequently use the cy pres doctrine where proof of individual claims would be overly-burdensome or distribution of damages too costly.); *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (affirming approval of class action settlement providing for $6.5 million distribution of funds to cy pres recipients where direct monetary payments to class members would be de minimis). This case is distinguishable from the one relied upon by Frank and Holyoak, *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), because, while the Court discussed the issue of de minimis recovery versus extraordinary costs of administration, the possibility of a cy pres distribution in place of direct payments to the class was not considered.

Accordingly, the objection of Frank of Holyoak on this topic is overruled. The class shall remain certified for settlement purposes.

B. Appropriateness of the Notice Plan

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." However, individual notice is not always practical. When that is the case, publication or some similar mechanism can be sufficient to provide notice to the individuals that will be

bound by the class action judgment. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

On the issue of appropriate notice, the court previously recognized the uniqueness of the class asserted in this case, since it could potentially cover most internet users in the United States. On that ground, the court approved the proposed notice plan involving four media channels: (1) internet-based notice using paid banner ads targeted at potential class members (in English and in Spanish on Spanish-language websites); (2) notice via "earned media" or, in other words, through articles in the press; (3) a website decided solely to the settlement (in English and Spanish versions); and (4) a toll-free telephone number where class members can obtain additional information and request a class notice. In addition, the court approved the content and appearance of the class notice and related forms as consistent with Rule 23(c)(2)(B).

The court again finds that the notice plan and class notices are consistent with Rule 23, and that the plan has been fully and properly implemented by the parties and the class administrator.

C. Fairness of the Settlement

The court now reexamines the fairness of the proposed settlement, this time with the benefit of notice having been provided to the class. The settlement agreement contains the following major components:

- Google will pay a total amount of $8.5 million, which will constitute the entirety of the settlement fund. All payments will be made from this fund, including: (1) distributions to cy pres recipients, (2) attorneys fees and costs awards, (3) incentive awards to named plaintiffs, and (4) administration costs, including the costs due to the claims administrator. Funds that remain after all payments are made will not revert to Google.

- Google will maintain information on its website under the "FAQ," "Key Terms," and "Privacy FAQ for Google Web History" webpages which discloses how information concerning users' search queries are shared with third parties. Specifically, the "FAQ" webpage will include an answer to the question "Are my search queries sent to websites when I click on Google Search results?" which notifies users that search terms may be disclosed to the destination webpage in the referrer header. In conjunction, the "Key Terms" webpage will include a definition of "HTTP Referrer," and the "Privacy FAQ for Google Web History" webpage will direct users to the Privacy Policy FAQ for more information on how Google handles search queries generally. Importantly, however, Google is not required to make changes to its homepage, www.google.com, or to practices or functionality of Google Search, Google AdWords, Google Analytics or Google Web History.

- As to particular payments to be made from the settlement fund, Plaintiffs request that each of the three representative plaintiffs receive incentive awards $5,000, and anticipate up to $1 million in claims administration costs. They also request the court approve their counsel's request for $2.125 million in fees and $21,643.16 in costs.

- After all contemplated payments are made from the fund, the balance will be distributed to the cy pres recipients previously approved by the court. To that end, Plaintiffs propose that Carnegie Mellon University receive 21% of the remainder, that the World Privacy Forum receive 17%, that Chicago-Kent College of Law Center for Information, Society and Policy receive 16%, that the Stanford Center for Internet and Society receive 16%, that the Berkman Center for Internet and Society at Harvard University receive 15%, and that the AARP Foundation receive 15%.

To determine whether a class action settlement is fair, adequate and reasonable, the court must balance a series of factors, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experi-

ence and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.*

When, as here, settlement occurs before formal class certification, approval requires a higher standard of fairness in order to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. *Lane*, 696 F.3d at 819.

i. Strength of Plaintiffs' Case

To assess strength of the case, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). There is no "particular formula by which that outcome must be tested," (*Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)), and the district court is not required to render specific findings on the strength of all claims. *Lane*, 696 F.3d at 823. Instead, the court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm Mutual Auto. Ins. Co.*, No. 08-CV-1365-CW, 2010 U.S. Dist. LEXIS 49477, at *24, 2010 WL 1687832 (N.D. Cal. April 22, 2010).

Here, Plaintiffs readily state that the alleged privacy violation underlying all of their claims is novel and was potentially one of first impression in this circuit. Thus, from the outset, there was no guarantee that any claims would survive pre-trial challenges if adversarial litigation had continued. Indeed, by the time the parties reached a settlement, some of the claims were facing a third motion to dismiss and the one claim that had survived the second dismissal motion, the SCA claim, was subsequently invalidated by the Ninth Circuit in a case presenting a similar theory. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1107 (9th Cir. 2014) (rejecting a claim under the SCA based on webpage disclosures in a referrer header).

Plaintiff also faced challenges had the case proceeded to trial. In light of the technology involved, the jury would have been required to review complex technical evidence about the inner-workings of Google's search engine, leaving significant opportunity for misunderstanding. Furthermore, success at trial would not have equated to an ultimate success for the class. This is because the calculation of damages based on a potentially unquantifiable privacy injury would have posed a serious challenge to Plaintiffs in obtaining some type of valuable relief, and any meaningful monetary amount awarded to each class member would have resulted in an astronomical judgment far exceeding the value of Google, given the size of the class. For that reason, the judgment would undoubtedly have been met with a remittitur motion and an appeal.

This factor weighs strongly in favor of the settlement. Without a compromise, there was little guarantee of any benefit to the class without a substantial amount of further litigation.

ii. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

This case was a particularly risky one for counsel because the type of privacy injury asserted by Plaintiffs renders it legally unproven, technically complex and potentially of little value. It also would have been expensive to litigate and try since expert testimony would be necessary to explain the referrer header technology and establish a basis for damages in an untested area.

Moreover, Google's denial of liability means Plaintiffs would continue to face "serious hurdles," including a motion for summary judgment, *Daubert* challenges, and inevitable appeals that would "likely prolong the litigation, and any recovery by class members, for years." *Rodriguez*, 563 F.3d at 966. Because a negotiated resolution provides for a certain recovery in the face of an uncertain legal theory, this factor favors the settlement. *Curtis-Bauer v. Morgan Stanley & Co.*, Inc., No. 06-C-3903 TEH, 2008 U.S. Dist. LEXIS 85028, at *13, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.").

iii. The Risk of Maintaining Class Action Status

Although a class can be certified for settlement purposes, the notion that a district court could decertify a class at any time is an inescapable and weighty risk that weighs in favor of a settlement. *See Rodriguez*, 563 F.3d at 966 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). Here, there is little doubt that Google would have vigorously opposed class certification at every opportunity before the district and appellate courts. In addition, the sheer size of the class - essentially covering all persons in the United States who submitted a search query to Google for a period of years - all but invites challenges to class certification based on overbreadth or management difficulties, some of which could be considered meritorious. Thus, the very real risk of never obtaining or losing class status in the absence of settlement weighs in favor of approval.

iv. The Amount Offered in Settlement

This settlement has a monetary component requiring Google to pay $8.5 million into a common fund and an injunctive component obligating certain disclosures on the Google website. After court-approved payments, the remainder of the fund will be distributed to identified cy pres recipients in proportions designated by Plaintiffs' counsel.

In support of final approval, Plaintiffs point out that the amount of the agreed-upon settlement fund

compares favorably to that of other similar class actions. *See, e.g., In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *3-4 (N.D. Cal. June 2, 2011) (approving $8.5 million settlement fund for unauthorized disclosure of email contact lists; *Lane*, 696 F.3d at 818 (approving $9.5 million settlement fund for unauthorized disclosure of online behavior); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 U.S. Dist. LEXIS 372862013, at *16-18, WL 1120801 (N.D. Cal. March 18, 2013) (approving $ 9 million settlement fund for unauthorized storage of personal information). This comparison is instructive because, like those cases, the potential value of this case far exceeds that of the settlement fund. But also like those cases, a theoretical value in the trillions of dollars does not preclude approval here since a fund of $8.5 million is significant given the substantial legal obstacles to a recovery through litigation.

Plaintiffs also believe that a distribution of the settlement funds to cy pres recipients is appropriate in this case. Cy pres payments like those proposed for this case can be approved when actual funds are "non-distributable," or "'where the proof of individual claims would be burdensome or distribution of damages costly.'" *Nachshin*, 663 F.3d at 1038 (quoting *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)). But due to a heightened potential for collusion at the expense of absent class members, this form of settlement must be examined to ensure it is the "next best" remedy to direct payments to the class. *See id.*; *see also Lane*, 696 F.3d at

819 (holding that a class settlement should not be approved unless it was evaluated "to account for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit."). A district court should not approve a cy pres distribution "unless it bears a substantial nexus to the interests of the class members" such that it accounts for the nature of the lawsuit, the objectives of the underlying statutes, and the interests of the non-appearing class members. *Lane*, 696 F.3d at 821.

On this issue, the court echoes the comments it made at preliminary approval describing why a cy pres remedy is the "next best" result here. First, the settlement fund, while sizeable, is "non-distributable." Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, review and then verify. Similarly, the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.

Second, the cy pres distribution accounts for the nature of this suit, meets the objectives of the SCA, and furthers the interests of class members. The recipients are established organizations chosen by Plaintiffs' counsel after considering whether they are independent and free from conflict, have a record of promoting privacy protection on the Internet, reach

and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online privacy risks.[1] Having carefully reviewed the proposals submitted by counsel, the court is satisfied that the proposed cy pres distribution "bears a substantial nexus to the interests of the class

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[1] Some of the proposed cy pres recipients are "usual suspects," or organizations that routinely receive distributions from class action settlements. At the two approval hearings held in this case, the court expressed a concern with using the same list of cy pres recipients in every internet privacy class action and observed that this practice discourages the development of other worthy organizations. This practice also raises questions about the effectiveness of those organizations that have received prior distributions. The court was somewhat surprised at the final list of distributees, since Plaintiffs' counsel suggested the selection process would potentially cast a wider net. *See* Tr. of Proceedings on Aug. 23, 2013, Docket Item No. 57, at p. 14:25-15:4 ("We are raising the bar, and I think raising the bar for all cy pres settlements like this to follow. We're treating the cy pres allocation more like a grant making organization would treat grant - prospective grant recipients.").

Despite this concern, the court recognizes that failure to diversify the list of distributees is not a basis to reject the settlement, particularly when the proposed recipients otherwise qualify under the applicable standard. *See Lane*, 696 F.3d at 820-21 ("We do not require... that settling parties select a cy pres recipient that the court or class members would find ideal ....such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process."). However, if class action counsel truly seeks to raise the bar for cy pres settlements, they should consider contributing to organizations other than the same typical few.

members," as required by the Ninth Circuit. *Id.* at 821.

Aside from the cy pres portion of the settlement, the court must also comment on the fact that Google's allegedly unlawful practice will not change as a result of this case. Instead, Google will be obligated to make certain "agreed-upon disclosures," or changes to certain portions of its website, the purpose of which is to better inform users how their search terms could be disclosed to third parties through a referrer header. It was noted previously that this relief is not the best result when compared to that sought in the CCAC, since the order contemplated by that pleading would have required Google to stop disclosing search queries altogether.

At the same time, a class action settlement does not need to embody the best possible result to be approved. The court's role is not to advocate for any particular relief, but instead to determine whether the settlement terms fall within a reasonable range of possible settlements, giving "proper deference to the private consensual decision of the parties" to reach an agreement rather than to continue litigating. *Hanlon*, 150 F.3d at 1027; *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Considering all of the circumstances which led to a compromise here, the relief obtained for the class falls within a reasonable range of possible settlements since it was entirely possible that nothing would be obtained if the case were to proceed further. Under

the terms of the parties' agreement, and contrary to what the objectors argue, future users of Google's website will receive something from the injunctive relief: the capability to better understand Google's disclosure practices before conducting a search on its website, and the ability to make a better informed choice based on that information.

In sum, this factor favors settlement.

v. The Extent of Discovery Completed and the Stage of the Proceedings

Prior to reaching a settlement, the parties had engaged in extensive document exchange and had fully briefed three motions to dismiss. They also met in person numerous times and engaged an experienced neutral to assist them in reaching a negotiated resolution. The extent of Plaintiffs' counsel factual investigation and the amount of pre-compromise litigation shows they "had a good grasp on the merits of their case before settlement talks began." *Rodriguez*, 563 F.3d at 967. As such, this factor weighs in favor of the settlement.

vi. The Experience and Views of Counsel

"Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Id.* Consequently, "'[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *In re Omnivision Techns., Inc.*, 559

F. Supp. 2d 1036, 1043 (N.D. Cal. 2009) (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)). Given the extensive experience of Plaintiffs' counsel with complex class action lawsuits of a similar size to the instant case, this factor favors approval of the settlement.

vii. The Presence of a Governmental Participant

The Class Action Fairness Act, or "CAFA," requires that notice of a settlement be given to state and federal officials and provides those officials a window of time to comment. 28 U.S.C. § 1715(b). "Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." *Garner*, 2010 U.S. Dist. LEXIS 49477, at *37. Here, the Class Administrator complied with the CAFA notice requirement on August 8, 2013. No objections from a government official have been received. Thus, this factor favors the settlement.

viii. The Reaction of Class Members

A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval. *See Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the

class presents at least some objective positive commentary as to its fairness."); *see also Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at 529 ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). Here, out of a class of more than 100 million individuals, the Class Administrator received thirteen requests for exclusion and four written objections from five class members. These low rates of exclusion and objection can be characterized as, at most, a favorable reaction by the class, or at least, as an absence of an overwhelming negative reaction. This factor does weigh in favor of approval, albeit without significant force.

In sum, all of the applicable factors weigh in favor of finally approving the settlement.

IV. ATTORNEYS FEES, COSTS AND INCENTIVE AWARDS

When attorneys fees and costs are requested by counsel for the class, "courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011).

"Where a settlement produces a common fund for the benefit of the entire class, courts have discretion

to employ either the lodestar method or the percentage-of-recovery method." *Id.* at 942. The former method is routinely used when "the relief sought - and obtained - is often primarily injunctive in nature and thus not easily monetized." *Id.* The figure is calculated "by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Id.* The court can "adjust [the figure] upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment." *Id.* at 941-42 (internal quotations omitted). "Foremost among these considerations, however, is the benefit obtained for the class." *Id.* at 942.

Under the latter method, the court awards as fees a percentage of the common fund in lieu of the lodestar amount. *Id.* "[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *Id.* Relevant factors to a determination of the percentage ultimately awarded include: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *Tarlecki v. bebe Stores, Inc.*, No. C 05-1777 MHP, 2009

U.S. Dist. LEXIS 102531, at *10, 2009 WL 3720872 (N.D. Cal. Nov. 3, 2009).

"Though courts have discretion to choose which calculation method they use, their discretion must be exercised so as to achieve a reasonable result." *Id.*

A. Percentage of the Fund

Plaintiffs' counsel seek a fee award of $2.125 million, which is equal to 25% of the settlement fund. According to counsel, the combination of monetary distributions and injunctive relief obtained in the settlement is an excellent result for the class because they "work in concert . . . reshape the landscape of Internet privacy protections" and "enact a regime of informed consent for Google Search users, who can now access complete and truthful information about the ways Google handles user search queries before deciding whether to use Google Search, Google Encrypted Search, or a competing search engine."

Plaintiffs' counsel also believe they undertook substantial risk by agreeing to litigate this case on a purely contingent basis given the unsettled legal issues, and, for that reason, spent considerable time and money with no guarantee of payment. In addition, they assert the novel nature of this case coupled with an opponent armed with substantial defenses and resources required sophisticated litigation and negotiation skills. Finally, counsel points out that the award requested is consistent with that awarded in other similar cases.

Having considered the relevant factors, the court agrees with Plaintiffs' counsel that this action posed a substantial risk and required significant time and skill to obtain a result for the class. This case was not one where settlement was easily secured; to the contrary, Plaintiffs' counsel was required to defend their claims against three motions to dismiss. An agreement only materialized after extensive in-person negotiations, first without and then including a professional neutral. Moreover, counsel's request is not disproportionate to the class benefit and is comparable to awards approved in other similar internet privacy class actions, including one previously approved by this court. *See In re Netflix Privacy Litig.*, 2013 U.S. Dist. LEXIS 372862013, at *29 (approving benchmark award of $2.25 million). Accordingly, a benchmark fee award of amounting to 25% of the settlement fund is appropriate.

B. Lodestar Comparison

The Ninth Circuit encourages district courts "to guard against an unreasonable result" by cross-checking attorneys fees calculations against a second method. *In re Bluetooth*, 654 F.3d at 944. Since a 25% benchmark award might be reasonable in some cases but arbitrary in cases involving an extremely large settlement fund, the purpose of the comparison is to ensure counsel is not overcompensated. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 103 F.3d 602, 607 (9th Cir. 1997).

Here, Plaintiffs' counsel calculates a lodestar figure of $966,598.75 for 2085.6 billing hours from four law firms, to which they apply a 2.2 multiplier for a total amount of $2,126,517.25. They also seek compensation for total costs of $21,643.16. These amounts are attributable to each firm as follows:

Firm	Fees	Expenses	Total Cost
Aschenbrener Law, P.C.	$321,184.00	$5,844.54	$327,028.54
Nassiri & Jung LLP	$253,776.50	$4,464.95	$258,241.45
Progressive Law Group	$331,967.25	$7,551.27 (+ $22.40)	$339,540.92
Edelson PC	$59,671.00	$3,760.00	$63,431.00
Totals	$966,598.75	$21,643.16	$988,241.91

Among the participating law firms, the hourly rates charged by attorneys range from $300 to $685. The hourly rate for law clerks is $75, and for paralegals is $125. Altogether, the average hourly rate for all work performed is $463.

Plaintiff's counsel has provided sufficient support for its proposed lodestar calculation. The amount of hours and other costs attributed to this case are reasonable in light of the efforts required to litigate and ultimately engage in a lengthy settlement process. In

addition, the hourly rates charged fall within the range of those approved in other similar cases, and the suggested lodestar multiplier of 2.2 is comparable to that previously permitted by other courts in similar internet privacy cases. Accordingly, the lodestar cross-check confirms the reasonableness of the percentage-based calculation.

C. Incentive Awards

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. To determine the appropriateness of incentive awards a district court should use "relevant factors includ[ing] the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions . . . the amount of time and effort the plaintiff expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace retaliation." *Id.* (internal quotation marks omitted).

The Settlement Agreement provides that the named Plaintiffs may receive incentive awards of up to $5,000 each. In this district, that amount is presumptively reasonable. *Jacobs v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, No. C 07-00362 MHP, 2009 U.S. Dist. LEXIS 101586, at *13-14, 2009 WL 3562871 (N.D. Cal. Oct. 27, 2009). Since the named plaintiffs assumed the responsibilities and burdens of acting as representatives in this lawsuit, including

providing documents, verifying allegations, and consulting with counsel, the court finds the incentive awards reasonable in light of the eligibility factors set forth in *Staton*.

V. OBJECTIONS

The court now addresses the points raised in the four written objections, keeping in mind that objectors to a class action settlement bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990).

The objectors have not satisfied this burden. To begin, all four objectors take issue with the cy pres character of this settlement, or with cy pres settlements in general. These arguments overlook both the law of this circuit which permits cy pres settlements such as this one, and the indirect benefit provided by a cy pres settlements. *See Lane*, 696 F.3d at 819. In addition, the court has explained why Plaintiffs made a sufficient showing that the cost of distributing this or really any settlement fund to the class members would be prohibitive.

The objectors similarly argue that the size of the settlement fund is insufficient in comparison to the value of the case, and believe that a fair settlement would have resulted in an end to Google's "unlawful" practices. This contention is misguided, however, because the objectors do not account for the significant and potentially case-ending weakness in the SCA

claim brought about by the Ninth Circuit's decision in *Zynga Privacy Litigation*. In light of this development, whether or not Google's practice of disclosing search queries can actually be characterized as unlawful is questionable. In the end, the parties fashioned a settlement in consideration of the favorable and unfavorable aspects of each side's case. And it is the parties themselves, as opposed to the court or the objectors, who are in the best position to assess whether a settlement "fairly reflects" their "expected outcome in litigation." *In re Pac. Ents. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Just because a settlement could be improved does not mean it is not fair, reasonable or adequate. *Hanlon*, 150 F.3d at 1027. Here, there is no reason to believe the settlement is inadequate when viewed against the diminished strength of the claims.

Objectors also argue that the cy pres recipients are unrelated to the subject matter of this case, and one claims there is a conflict of interest because some of the attorneys representing Plaintiffs attended Harvard University. The court rejects these arguments. The chosen recipients and their respective proposals are sufficiently related so as to warrant approval; they do not have to be the recipients that objectors or the court consider ideal. *Lane*, 696 F.3d at 820-21. Additionally, while the potential for a conflict of interest is noted, there is no indication that counsel's allegiance to a particular alma mater factored into the selection process. Indeed, the identity of potential cy pres recipients was a negotiated term included in the

Settlement Agreement and therefore not chosen solely by Harvard alumni.

Some objections challenge the notice plan or the contents of the notice and describe alternative ways that notice could have been provided to the class. It may be true that other methods of notice exist. But here, the court approved one specific plan that satisfied the standard Rule 23(c)(2)(B) standard. Although the plan did not call for individual notice, that type of notice is not required in all cases. *See Mullane*, 339 U.S. at 315.

Finally, the objectors challenge the provisions of the Settlement Agreement which provide for attorney's fees and incentive awards. The court does not agree that the fees and incentive awards are inconsistent with the value of the class benefit, and notes that the approved amounts are consistent with the relevant Ninth Circuit authority on this topic.

For these reasons, the court is unpersuaded by the objections. They are each overruled.

VI. CONCLUSION AND ORDER

Based on the preceding discussion, the court finds that the terms of the settlement, including the awards of attorneys fees, costs, and incentive awards, is fair, adequate, and reasonable; that it satisfies Federal Rule of Civil Procedure 23(e) and the fairness and adequacy factors; and that it should be approved and implemented.

The Motion for Final Approval (Docket Item No. 65) and the Motion for Attorneys Fees and Costs (Docket Item No. 66) are therefore GRANTED. The Clerk shall close this file upon entry of Judgment.

IT IS SO ORDERED.

Dated: March 31, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

PALOMA GAOS, ANTHONY ITALIANO, AND GABRIEL PRIYEV individually and on behalf of others similarly situated, Plaintiffs, v. GOOGLE, INC., a Delaware corporation, Defendant.	CASE No. 5:10-cv-04809-EJD CLASS ACTION ~~[PROPOSED]~~ **FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE** Judge: Edward J. Davila

Pending before the Court is Plaintiffs' Motion for Final Approval of the Class Action Settlement (Dkt. 65) and Plaintiffs' Motion for Attorneys' Fees, Costs, and Incentive Awards (Dkt. 66). Having reviewed the papers filed in support of the Motion, heard argument of counsel, and good cause appearing therein, Plaintiffs' Motions are hereby GRANTED and it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Any terms and phrases in this Order shall have the same meaning as the Settlement Agreement reached by the Parties.

2. This Court has appropriate subject matter jurisdiction over this action and over all Parties to the Action, including all Settlement Class Members.

3. The Court affirms certification of the Class and gives final approval to the Settlement and finds the Settlement is fair, adequate, and reasonable, and in the best interests of the Class. The Settlement Agreement is the result of arms-length negotiations and was overseen by a neutral mediator. The Class Representatives and Class Counsel appropriately represented the Settlement Class for purposes of entering into and implementing the Settlement. Accordingly, the Settlement Agreement is finally approved in all respects, and the Parties are directed to perform its terms.

4. The Court-approved Notice Plan to the Class was the best practicable under the circumstances and included substantial Internet advertising and a website comprehensively detailing the terms of the Settlement. The Notice Plan was successfully implemented and satisfies the requirements of Due Process and Federal Rule of Civil Procedure 23.

5. The Court finds that the Parties properly and timely notified the appropriate state and federal officials to alert them to the Settlement, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1714 ("CAFA"). The Court reviewed the substance of this notice and accompanying materials and finds that they complied with all necessary CAFA requirements.

6. Subject to the terms and conditions of the Settlement, this Court dismisses the action on the merits and with prejudice.

7. Twelve individuals timely and validly excluded themselves from the Settlement.

8. Plaintiffs and each member of the Class, fully, finally, completely, and forever release, acquit, and discharge Google from any and all claims that were raised in this litigation, as further described in the Settlement Agreement.

9. This release of claims and the Settlement Agreement will be binding on and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and all other Class Members, and their heirs, executors, and administrators, successors, and assigns. All Class Members who have not been properly excluded from the Settlement are hereby permanently barred and enjoined from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on or arising out of the released claims.

10. The Court awards $2,125,000 in fees to Class Counsel and $21,643.16 in expenses for costs incurred.

11. The Court will distribute the awarded fees according to the following formula:

a. 39% of fees awarded to Nassiri & Jung LLP;

b. 39% of fees awarded to Aschenbrener Law, P.C.; and

c. 22% of fees awarded to Progressive Law Group, LLC.

12. Costs and expenses awarded to Class Counsel shall be distributed as follows: Aschenbrener Law is entitled to $5,844.54; Nassiri & Jung is entitled to $4,464.95; and Progressive Law Group is entitled to $7,551.27; Edelson PC is entitled to $3,760.00; and Diemer, Whitman & Cardosi LLP is entitled to $22.40.

13. The Court awards $5,000 to each of the three Class Representatives (Plaintiff Gaos, Plaintiff Italiano, and Plaintiff Priyev) for a total of $15,000 in incentive awards.

14. Defendant shall pay the Fee Award and Incentive Award pursuant to and in the manner provided by in the terms of the Settlement Agreement.

15. The Court directs entry of final judgment based on the Court's finding that there is no just reason for delay of enforcement or appeal of this judgment, notwithstanding the Court's retention of jurisdiction to oversee the implementation and enforcement of the Settlement.

16. Without affecting the finality of this judgment, the Court shall continue to have jurisdiction over (a)

the implementation, enforcement, and administration of the Settlement; (b) the resolution of any disputes concerning class membership or entitlement to benefits under the terms of the Settlement; and (c) all Parties, for the purpose of enforcing and administering the Settlement and this litigation until each act agreed upon amongst the Parties is performed pursuant to the Settlement.

IT IS SO ORDERED.

Dated: April 2, 2015

/s/ Edward J. Davila

EDWARD J. DAVILA
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GOOGLE REFERRER HEADER PRIVACY LITIGATION PALOMA GAOS; et al., Plaintiffs-Appellees, v. MELISSA ANN HOLYOAK; THEODORE H. FRANK, Objectors-Appellants, v. GOOGLE, INC., a Delaware corporation, Defendant-Appellee.	No. 15-15858 D.C. No. 5:10-cv-04809-EJD Northern District of California, San Jose ORDER

Before: WALLACE, McKEOWN, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

Judge McKeown and Judge Bybee vote to deny the petition for rehearing en banc. Judge Wallace recommends granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

SETTLEMENT AGREEMENT AND RELEASE

This Class Action Settlement Agreement and Release ("Agreement") is made by and between Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev (the "Class Representatives" or the "Plaintiffs"), on behalf of themselves and others similarly situated (collectively, the "Class"), on the one hand, and Google Inc. ("Google" or "Defendant," and together with Plaintiffs, the "Parties"), on the other hand. The Parties intend this Agreement to fully, finally, and forever resolve, discharge, and settle the Released Claims (as the term is defined below), subject to the terms and conditions of this Agreement, and subject to final approval of the Court.

WHEREAS, on October 25, 2010, Plaintiff Gaos brought a putative class action against Google in the Northern District of California, captioned *Gaos v. Google Inc.*, Case No. 5-10-CV-04809, that was initially assigned to Chief Judge Ware (the "Gaos Action"), alleging violations of certain federal and state laws;

WHEREAS, following the April 7, 2011 dismissal of that initial complaint, Plaintiff Gaos filed the First Amended Complaint on May 2, 2011, alleging similar claims;

WHEREAS, the case was re-assigned from Chief Judge Ware to Judge Davila;

WHEREAS, following the March 29, 2012 dismissal of the First Amended Complaint's state-law claims for lack of standing, Plaintiff Gaos, together with Plaintiff Italiano (the "Gaos Plaintiffs"), filed the operative Second Amended Complaint ("Gaos Complaint") alleging (i) violations of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq.*; (ii) breach of contract; (iii) violations of California's Unfair Competition Law, Cal. Bus. & Prof Code § 17200; and (iv) unjust enrichment;

WHEREAS, Google's motion to dismiss the Gaos Complaint is still pending before this Court;

WHEREAS, on February 29, 2012, Plaintiff Priyev brought a putative class action in the United States District Court, Northern District of Illinois, Eastern Division, against Google, formerly captioned *Priyev v. Google Inc.*, Case No. 12-CV-01467 (the "Priyev Action" and, together with the Gaos Action, the "Actions"), alleging violations of certain federal and state laws;

WHEREAS, following Google's April 30, 2012 motion to dismiss the Priyev Action, Plaintiff Priyev twice sought and obtained leave to amend his initial complaint, and on August 10, 2012 filed the operative Second Amended Class Action Complaint ("Priyev Complaint") alleging (i) breach of contract; (ii) breach of contract by breach of covenant of good faith and fair dealing; (iii) breach of contract implied in law; (iv) violations of the Electronic Communications Privacy

Act; (v) violations of California's Unfair Competition Law; and (vi) seeking declaratory judgment and corresponding injunctive relief;

WHEREAS, on August 28, 2012, the Priyev Action was transferred from the Northern District of Illinois to the Northern District of California and is now docketed as Case No. 5-13-00093, and, after Plaintiff Priyev declined consent to assignment to Magistrate Judge Grewal, the case has been assigned to Judge Koh;

WHEREAS, Priyev intends to file a notice of related case to the Gaos Action to seek transfer of the Priyev Action to Judge Davila, and both Google and the Gaos Plaintiffs intend to support the transfer request;

WHEREAS, the Parties engaged in direct negotiations during 2012 in each of the Actions and participated in an all-day mediation before Randall Wulff of Wulff, Quinby & Sochynsky on January 28, 2013;

WHEREAS, Plaintiffs have conducted meaningful investigation and analyzed and evaluated the merits of the claims made to date against Google in the Actions, and the impact of this Agreement on Plaintiffs and the Class, and based upon that analysis and the evaluation of a number of factors, and recognizing the substantial risks of continued litigation, including the possibility that the Actions, if not settled now, might not result in any recovery whatsoever for the Class,

or might result in a recovery that is less favorable to the Class, and that any such recovery would not occur for several years, Plaintiffs are satisfied that the terms and conditions of this Agreement are fair, reasonable, and adequate, and that this Agreement is in the best interest of the Class; and

WHEREAS, Google has denied and continues to deny each allegation and all charges of wrongdoing or liability of any kind whatsoever asserted or that could have been asserted in the Actions; and

WHEREAS, while Plaintiffs believe these claims possess substantial merit and while Google vigorously disputes such claims, without in any way agreeing as to any fault or liability, the Parties have agreed to enter into this Agreement as an appropriate compromise of the Class claims to put to rest all controversy and to avoid the uncertainty, risk, expense, and burdensome, protracted, and costly litigation that would be involved in prosecuting and defending the Actions;

NOW, THEREFORE, it is hereby agreed by the Parties that, in consideration for the undertakings, promises, and payments set forth in this Agreement and upon the entry by the Court of a Final Order and Judgment approving and directing the implementation of the terms and conditions of this Agreement, the Actions shall be settled and compromised upon the terms and conditions set forth below.

1. DEFINITIONS

Whenever the following capitalized terms are used in this Agreement and in the attached exhibits (in addition to any definitions elsewhere in this Agreement), they shall have the following meanings:

1.1 "Actions" means both the Priyev Action and the Gaos Action, as those terms are defined below.

1.2 "Agreed-Upon Disclosures" means the additional disclosures that Google has agreed to make to its "FAQs" webpage currently located at http://www.google.com/policies/privacy/faq/, the "Key Terms" webpage currently located at http://www.google.com/policies/privacy/key-terms/, and the "Privacy FAQ for Google Web History" web page currently located at https://support.google.com/accounts/bin/answer.py?hl=en&answer=54050, pursuant to Paragraph 3.1.

1.3 "Agreement" means this Settlement Agreement and Release, including all exhibits.

1.4 "Class" means all Persons in the United States who submitted a search query to Google at any time during the period commencing on October 25, 2006, up to and including the date of the Notice of Proposed Class Action Settlement pursuant to the Notice Plan. This term wholly encompasses, but is not limited to, the Classes set forth in Paragraph 72 of the

Priyev Complaint and in Paragraphs 97, 98, and 99 of the Gaos Complaint, respectively.

1.5 "Class Administrator" means a third-party class action settlement administrator to be selected by the Parties' mutual agreement and whose responsibilities will include overseeing and implementing the Notice Plan and managing the dissemination of funds from the Common Fund until all financial obligations under this Agreement have been satisfied and no funds remain in the Common Fund.

1.6 "Class Counsel" means Kassra Nassiri of Nassiri & Jung LLP, Michael Aschenbrener of Aschenbrener Law, P.C., and Ilan Chorowsky of Progressive Law Group, LLC.

1.7 "Class Member" means any person who qualifies under the definition of "Class," excluding: (i) Google, its subsidiaries and affiliates, officers, and directors; (ii) the judge(s) to whom these cases are assigned and any member of the judge's or judges' immediate family; (iii) Persons who have settled with and released Google from individual claims substantially similar to those alleged in the Gaos Complaint and the Priyev Complaint; and (iv) Persons who submit a valid and timely Request for Exclusion pursuant to Paragraph 6.1.

1.8 "Class Representatives" or "Plaintiffs" means named Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev, acting either individually or through Class Counsel.

1.9 "Combined Action" means the action consolidating the Gaos Action and the Priyev Action, as set forth in Paragraph 2.3.

1.10 "Court" means the United States District Court for the Northern District of California.

1.11 "*Cy Pres* Recipients" means any of the following entities (and any other mutually-agreed upon entity) that is approved by the Court for a *cy pres* distribution pursuant to Paragraph 3.3: Berkman Center for Internet and Society (Harvard Law School), Center for Internet and Society (Stanford Law School), MacArthur Foundation, and AARP, Inc.

1.12 "Day" or "days" refers to calendar days.

1.13 "Effective Date" means the first date after a Final Order and Judgment is entered in the Action granting approval to the terms of this Agreement without modification (unless any modification is accepted by all Parties to this Agreement, pursuant to Paragraph 13.3) *and* either of the following events also has occurred (i) the date upon which the time to appeal the Final Order and Judgment expires with no appeal having been filed; or (ii) the date upon which any such appeal of the Final Order and Judgment is

successfully resolved such that, in either case, the Final Order and Judgment approving this Agreement is no longer subject to any challenge on direct appeal.

1.14 "Fee Award" means any attorneys' fees, reimbursement of expenses, and other costs awarded by the Court to Class Counsel.

1.15 "Final Approval Hearing" means the hearing before the Court where (i) the Parties request that the Court approve this Agreement as fair, reasonable, and adequate; (ii) the Parties request that the Court enter its Final Order and Judgment in accordance with this Agreement; and (iii) Class Counsel request approval of their petition for reasonable attorneys' fees and expenses, as well as any requested incentive award to the Class Representatives.

1.16 "Final Order and Judgment" means the order entered by the Court, in a form that is mutually agreeable to the Parties, approving this Agreement as fair, reasonable, adequate, and in the best interest of the Class as a whole, and making such other findings and determinations as the Court deems necessary and appropriate to effectuate the terms of this Agreement, without modifying any terms of this Agreement that either Party deems material.

1.17 "Gaos Action" means *Gaos v. Google Inc.*, No. 5-10-CV-04809, filed on October 25, 2010 in the United States District Court for the Northern District of California.

1.18 "Gaos Complaint" means the Second Amended Complaint filed in the Gaos Action on May 1, 2012 and available on the online docket at ECF No. 39.

1.19 "Google" means Google Inc. and its affiliates, agents, assigns, attorneys, directors, divisions, employees, officers, or other representatives.

1.20 "Google AdWords" means Google's advertising service currently described at http://adwords.google.com.

1.21 "Google Analytics" means Google's web analytics service currently described at http://www.google.com/analytics/.

1.22 "Google Releasees" means Google and any of Google's current or former administrators, affiliates, agents, assigns, attorneys, beneficiaries, branches, contractors, directors, divisions, employee benefit plans, employees, insurers, investors, joint venturers, members, officers, parents, predecessors, related entities, representatives, servants, shareholders, subsidiaries, successors, trustees, units, and all other individuals and entities acting on Google's behalf.

1.23 "Google Search" means the search engine accessible at www.google.com.

1.24 "Google Web History" means a product available to Google account holders, currently described at http://support.google.com/accounts/bin/topic.py?hl=en&topic= 14148.

1.25 "Incentive Award" means any amount awarded by the Court to the Class Representatives for their time and effort in bringing these Actions and for serving as Class Representatives.

1.26 "Notice Plan" means the content of the notice of this Agreement and the agreed upon program by which that notice will be disseminated.

1.27 "Notice of Proposed Class Action Settlement" means the notice as described in the Notice Plan.

1.28 "Opt-Out Deadline" means the deadline for a Class Member to properly submit a Request for Exclusion as set forth in Paragraph 6.1 of this Agreement and in the Preliminary Approval Order and which shall be no more than sixty (60) days from the completion date of the Notice of Proposed Class Action Settlement.

1.29 "Party" means any one of the Plaintiffs or Google, and "Parties" means Plaintiffs and Google.

1.30 "Person" means an individual or legal entity, including an association, or his, her, or its respective successors or assigns.

1.31 "Preliminary Approval Order" means the order issued by this Court (i) granting preliminary approval of this Agreement; (ii) provisionally certifying the Class for settlement purposes; (iii) appointing Plaintiffs as Class Representatives and their counsel as Class Counsel; (iv) approving the form and manner of the Notice Plan and appointing a Class Administrator; (v) approving the proposed *Cy Pres* Recipients; (vi) establishing deadlines for Requests for Exclusion and the filing of objections to the proposed settlement contemplated by this Agreement; (vii) finding that Google has complied with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715; and (viii) scheduling the Final Approval Hearing.

1.32 "Priyev Action" means *Priyev v. Google Inc.*, No. 12-CV-01467, initially filed on February 29, 2012 in the United States District Court for the Northern District of Illinois and now transferred to the United States District Court for the Northern District of California.

1.33 "Priyev Complaint" means the Second Amended Class Action Complaint filed in the Priyev Action on August 10, 2012 and available on the online docket at ECF No. 40.

1.34 "Released Claims" means any and all claims that any Class Member may now or at any time have up to the date of preliminary approval of this Agreement, whether or not known or existing at

the time of this Agreement, arising out of the subject matter giving rise to the claims in the Actions.

1.35 "Releasing Party" means Plaintiffs and all Class Members.

1.36 "Request for Exclusion" means the form attached as Exhibit B to this Agreement which must be completed and returned in the manner and within the time period specified in Paragraph 6.1.

1.37 "Settlement Amount" means the total sum that Google will pay in connection with this Agreement, as described in Paragraph 3.2.

1.38 "Settlement Website" means the third-party website, referred to in Paragraph 5.5, created and maintained by the Class Administrator to provide, among other things, Notice of Proposed Class Action Settlement and containing the operative complaint(s), and neutral information about this Agreement and the Notice of Proposed Class Action Settlement.

2. SETTLEMENT PURPOSES ONLY

2.1 This Agreement is for settlement purposes only, and to the fullest extent permitted by law, neither the fact or content of this Agreement or its attachments, nor any action based on it, shall constitute, be construed as, or be admissible in evidence as an admission of the validity of any claim, of any fact

alleged by Plaintiffs in the Actions or in any other pending or subsequently filed action, or of any wrongdoing, fault, violation of law, or liability of Google. Likewise, neither the fact or content of this Agreement, nor any action based on it, shall constitute, be construed as, or be admissible in evidence as an admission by any of the Parties of the validity or lack thereof of any claim, allegation, or defense asserted in these Actions, the Combined Action, or in any other action.

2.2 Subject to approval by the Court, Google conditionally agrees and consents to certification of the Class for settlement purposes only and within the context of this Agreement only. If this Agreement, for any reason, is not approved or is otherwise terminated, Google reserves the right to assert any and all objections and defenses to certification of a class, and neither this Agreement nor any order or other action relating to this Agreement shall be offered as evidence in support of a motion to certify a class for a purpose other than settlement pursuant to this Agreement.

2.3 The Parties agree that, within ten (10) days of all Parties signing this Agreement, Plaintiffs in the Gaos Action and the Priyev Action will seek to consolidate the Actions into a single Combined Action, with Plaintiffs filing a consolidated complaint to the extent appropriate to encompass the definition of the Class (and not reducing the scope of the substantive allegations from those set forth in the Actions).

3. RELIEF

3.1 Google agrees to make certain Agreed-Upon Disclosures concerning search queries on or before the date of Notice of Proposed Class Action Settlement pursuant to the Notice Plan. These Agreed-Upon Disclosures will appear on Google's "FAQs" webpage currently located at http://www.google.com/policies/privacy/faq/, "Key Terms" webpage currently located at http://www.google.com/policies/privacy/key-terms/, and the "Privacy FAQ for Google Web History" webpage currently located at https://support.google.com/accounts/bin/answer.py?hl=en&answer=54050, as further described in Exhibit A. If a subsequent change to Google's services renders the Agreed-Upon Disclosures inaccurate, Google may make future changes to its disclosures to ensure continued accuracy. Likewise, Google may change the form or placement of the disclosures as part of future changes to its privacy policies, provided that the substance remains substantially the same and that it is incorporated into the applicable terms of service or privacy policy and is reasonably accessible to the user. Google will not be required or requested to make any changes to its homepage www.google.com or to the practices or functionality of Google Search, Google Ad Words, Google Analytics or Google Web History.

3.2 Google agrees to and shall deposit in an interest-bearing bank account designated and controlled by the Class Administrator (the "Common

Fund") the total sum of eight million five hundred thousand dollars ($8,500,000.00) (the "Settlement Amount"). That Settlement Amount will represent the full payment to be made by Google under this Agreement, and the Class Administrator will draw from the Common Fund to cover all obligations with respect to costs related to this Agreement, including the expenses of the Class Administrator, the Notice Plan, payments to *Cy Pres* Recipients, any Incentive Awards, the Fee Award, and any other administrative fees and expenses in connection with this Agreement; provided, however, that the Parties must approve any payments to the Class Administrator. The first installment, of one million dollars ($ 1,000,000.00) shall be deposited within fourteen (14) business days of entry of the Preliminary Approval Order. The remainder shall be deposited within twenty-one (21) days of the Effective Date. If this Agreement is terminated pursuant to Section 11, the Class Administrator shall return all funds to Google within ten (10) days of the termination date; provided, however, that the Class Administrator need not return any funds already spent on notice and on reasonable Class Administrator expenses before the termination date. Other than the Settlement Amount, Google shall have no financial obligations to Plaintiffs, the Class, the *Cy Pres* Recipients, or the Class Administrator under this Agreement.

3.3 The *cy pres* amount will consist of the Settlement Amount, including any accrued interest, and minus any expenses for the Class Administrator, the

Notice Plan, the Fee Award, any Incentive Award, and any other administrative and notice costs or other expenses in connection with this Agreement. As a condition to receiving the payment, each *Cy Pres* Recipient must agree to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet. If any *Cy Pres* Recipient does not agree to these conditions, then its portion will be distributed pro rata to the other identified recipients; if no recipient agrees to the conditions, or if the Court so requires, the Parties shall meet and confer to identify other appropriate recipients. The Class Administrator shall make payments to the *Cy Pres* Recipients within sixty (60) days after the Effective Date.

3.4 Because the *Cy Pres* Recipients will receive the remaining amounts due after all other payment obligations listed in Paragraph 3.2 are met, no portion of the Settlement Amount or interest thereon will revert to Google.

3.5 Under no circumstances will Google have any liability for taxes or the tax expenses of any Person that receives a portion of the Settlement Amount under this Agreement to the extent permitted by applicable law.

4. SUBMISSION FOR PRELIMINARY APPROVAL

4.1 Within the later of thirty (30) days of the execution of this Agreement by both Parties and ten (10) days after an order consolidating the Actions, Class Counsel shall submit this Agreement to the Court and request that the Court enter the Preliminary Approval Order in a form mutually agreed to by all parties.

4.2 Class Counsel will take any acts reasonably necessary to carry out this Settlement Agreement's expressed intent.

5. NOTICE OF PROPOSED CLASS ACTION SETTLEMENT

5.1 The Class Administrator will be allocated up to one million dollars ($1,000,000.00) out of the Settlement Amount to implement a Notice Plan, subject to the Parties' agreement in consultation with the Class Administrator and further subject to Court approval as part of the Preliminary Approval Order and consistent with the requirements of due process. The Parties shall agree to the Notice Plan before submission of this Agreement for preliminary approval. The Notice Plan will not take the form of a bulk email message to Class Members.

5.2 The specific text and content of the Notice Plan and Notice of Proposed Class Action Settlement

will be mutually agreed upon by the Parties, subject to Court approval.

5.3 The Class Administrator will oversee and implement the Notice Plan. Although the Class Administrator may purchase commercial services at standard rates from Google as part of the Notice Plan, Google has no obligation to otherwise facilitate delivery of the Notice of Proposed Class Action Settlement. For example, Google will have no obligation to send bulk email messages to any Person or group of Persons. All costs associated with the Notice Plan and Class Administrator will be paid by Google as part of the overall payment obligation in Paragraph 3.2.

5.4 The Notice Plan will be implemented, and all announcements at least initially posted on the Settlement Website, within thirty (30) days of entry of the Preliminary Approval Order.

5.5 The Settlement Website shall (i) post, without limitation, the operative complaint(s), this Settlement Agreement, and Long Form Notice and Opt-Out Form; (ii) notify Class Members of their rights to object or opt out; (iii) inform Class Members that they should monitor the Settlement Website for developments; and (iv) notify Class Members that no further notice will be provided to them once the Court enters the Final Order and Judgment, other than through updates on the Settlement Website. The Settlement Website will remain active until at least thirty (30)

days after the Final Settlement Date. The Class Administrator will establish an email account and P.O. Box to which Class Members may submit questions regarding the Settlement. The Class Administrator will monitor the email account and P.O. Box and respond promptly to administrative inquiries received from Class Members and may direct substantive inquiries to Class Counsel.

5.6 Within ten (10) days after filing of this Settlement Agreement with the Court, the Class Administrator shall notify the appropriate state and federal officials of this Agreement pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715.

6. CLASS MEMBERS' RIGHT OF EXCLUSION/INCLUSION

6.1 A Class Member may request exclusion from the Class up until the Opt-Out Deadline. To request exclusion, the Class Member must complete, sign, and mail to the Class Administrator a Request for Exclusion, using the form attached as Exhibit B. The Request for Exclusion must be signed by the Class Member seeking exclusion under penalty of perjury. The Request for Exclusion must be postmarked on or before the Opt-Out Deadline. Any Person who submits a valid and timely Request for Exclusion shall not be entitled to relief under, and shall not be affected by, this Agreement or any relief provided by this Agreement.

6.2 The Parties shall have the right to challenge the timeliness and validity of any Request for Exclusion. The Court shall determine whether any contested exclusion request is valid.

6.3 Within ten (10) days after the Opt-Out Deadline, the Class Administrator will provide the Parties a list of all Persons who opted out by validly requesting exclusion.

7. OBJECTIONS

7.1 Any Class Member who does not submit a valid and timely Request for Exclusion may object to the fairness, reasonableness, or adequacy of this Agreement. Class Members may not seek to exclude themselves from the Class ***and*** submit an objection to this Agreement.

7.2 No later than twenty-one (21) days before the Final Approval Hearing, any Class Member who wishes to object to any aspect of this Agreement must send to the Class Administrator, Class Counsel and Google's counsel, and file with the Court, a written statement of the objection(s). The written statement of the objection(s) must include (i) a detailed statement of the Class Member's objection(s), as well as the specific reasons, if any, for each objection, including any evidence and legal authority the Class Member wishes to bring to the Court's attention and any evidence the Class Member wishes to introduce in support of his/her objection(s); (ii) the Class Member's full

name, address and telephone number; and (iii) information demonstrating that the Class Member is entitled to be included as a member of the Class.

7.3 Class Members may raise an objection either on their own or through an attorney hired at their own expense. If a Class Member hires an attorney other than Class Counsel to represent him or her, the attorney must (i) file a notice of appearance with the Court no later than twenty-one (21) days before the Final Approval Hearing or as the Court otherwise may direct, and (ii) deliver a copy of the notice of appearance on Class Counsel and Google's counsel, no later than twenty-one (21) days before the Final Approval Hearing. Class Members, or their attorneys, intending to make an appearance at any hearing relating to this Agreement, including the Final Approval Hearing, must deliver to Class Counsel and Google's counsel, and file with the Court, no later than twenty-one (21) days before the date of the hearing at which they plan to appear, or as the Court otherwise may direct, a notice of their intention to appear at that hearing.

7.4 Any Class Member who fails to comply with the provisions of the preceding subsections shall waive and forfeit any and all rights he or she may have to appear separately and/or object, and shall be bound by all the terms of this Agreement and by all proceedings, orders, and judgments in the Actions.

8. EXCLUSIVE REMEDY; DISMISSAL OF ACTIONS; JURISDICTION OF COURT

8.1 This Agreement shall be the sole and exclusive remedy for any and all Released Claims. Upon entry of the Final Order and Judgment, each Class Member shall be barred from initiating, asserting, or prosecuting any Released Claims against Google. If any Class Member attempts to prosecute an action in contravention of the Final Order and Judgment and this Agreement, counsel for any of the Parties may forward this Agreement and the Final Order and Judgment to such Class Member and advise him, her, or it of the releases provided pursuant to this Agreement.

8.2 Upon entry of Final Order and Judgment, the Combined Action shall be dismissed with prejudice.

8.3 The Court retains exclusive and continuing jurisdiction over the Combined Action and all Parties and Class Members to interpret and enforce the terms, conditions, and obligations of this Agreement.

9. RELEASES

9.1 Upon entry of the Final Order and Judgment, and regardless of whether any Class Member executes and delivers a written release, each Plaintiff and each Class Member (each of whom is a Releasing

Party) shall be deemed to waive, release and forever discharge Google and the Google Releasees from all Released Claims, whether or not known. Each Releasing Party is deemed to provide the waiver, release and discharge on his, her, or its own behalf, as well as on behalf of any administrators, affiliates, agents, assigns, attorneys, beneficiaries, contractors, dependents, descendants, directors, employees, executors, heirs, insurers, investors, joint venturers, members, officers, parents, predecessors, related entities, representatives, servants, shareholders, subsidiaries, successors, underwriters, units, and anyone else who could bring any Released Claim on his, her, or its behalf or based on a transfer of rights—by law, contract, or otherwise—from any Releasing Party.

9.2 The release described in Paragraph 9.1 is, and shall remain, a full and complete release, notwithstanding the discovery or existence of any additional or different facts or claims existing before the Effective Date. The Releasing Parties shall, by operation of the Final Order and Judgment, expressly waive the provisions of California Civil Code § 1542 (and all other similar provisions of law) to the full extent that these provisions may be applicable to this release. California Civil Code § 1542 provides:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,**

WHICH IF KNOWN TO HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Releasing Parties shall, by operation of the Final Order and Judgment, be deemed to assume the risk that facts additional, different, or contrary to the facts which each believes or understands to exist, may now exist or may be discovered after the release set forth in this Agreement becomes effective, and the Releasing Parties shall, by operation of the Final Order and Judgment, be deemed to have agreed that any such additional, different, or contrary facts shall in no way limit, waive, or reduce the foregoing releases, which shall remain in full force and effect.

9.3 Nothing in this Agreement shall be construed in any way to prejudice or interfere with any Releasing Party's ability to pursue his, her, or its rights under any applicable insurance policies.

10. CLASS COUNSEL FEES AND COSTS AND INCENTIVE AWARDS

10.1 Plaintiffs may apply to the Court seeking a reasonable proportion of the Settlement Amount as payment of any reasonable attorneys' fees and costs ("Fee Award"). The Fee Award will be paid as part of the Settlement Amount specified in Paragraph 3.2. It is not a condition of this Settlement that any particu-

lar amount of attorneys' fees, costs or expenses or incentive awards be approved by the Court, or that such fees, costs, expenses or awards be approved at all. Any order or proceeding relating to the amount of any award of attorneys' fees, costs, or expenses or inventive awards, or any appeal from any order relating thereto, or reversal or modification thereof, shall not operate to modify, terminate or cancel this Settlement Agreement, or affect or delay the finality of the Final Order and Judgment, except that any modification, order or judgment cannot result in Google's overall obligation exceeding the Settlement Amount specified in Paragraph 3.2. The Class Administrator will distribute from the Common Fund any Fee Award approved by the Court within thirty-one (31) days of the Effective Date. The Class Administrator shall wire the amount awarded in the Fee Award to the trust account of Nassiri & Jung LLP, on behalf of all Class Counsel; Nassiri & Jung LLP shall be responsible for distributing the Fee Award among Class Counsel.

10.2 In recognition of Plaintiffs' efforts on behalf of the Class, and subject to Court approval, Class Counsel may apply to the Court for an award for each Plaintiff of up to $5,000 each, as appropriate compensation for their time and effort expended in serving as Class Representatives. The Incentive Award will be paid as part of the Settlement Amount specified in Paragraph 3.2. It shall be paid contemporaneously and in the same manner as any Fee Award, as specified in § 10.1.

10.3 Except as otherwise provided in this section, each Party will bear its own costs, including attorneys' fees, incurred in connection with the Actions.

11. TERMINATION OF THE AGREEMENT

11.1 The performance of this Agreement is expressly contingent upon achieving the Effective Date. This includes both (i) the entry of the Preliminary Approval Order approving this Agreement, including the Notice Plan and the selection of the *Cy Pres* Recipients, and the Final Order and Judgment approving this Agreement and the expiration of all appeal periods and appeal rights without modification to the Final Order and Judgment that any Party deems material. If the Court fails to issue either (i) the Preliminary Approval Order or (ii) the Final Order and Judgment approving this Agreement without modification that any Party deems material following conclusion of the Final Approval Hearing, or if the circumstances in Paragraph 11.2 are met, this Agreement will be deemed terminated.

11.2 If the Final Order and Judgment is vacated, modified in a manner deemed material by any Party, or reversed, in whole or in part, this Agreement will be deemed terminated (except with respect to rulings on any Fee Award), unless all Parties who are adversely affected thereby, in their sole discretion within thirty (30) days of receipt of such ruling, provide written notice through counsel to Class Counsel

and Defendant of their intent to proceed with this Agreement as modified by the Court or on appeal.

11.3 If this Agreement is deemed terminated pursuant to any provision in Paragraph 11, it will have no force or effect whatsoever, shall be null and void, and will not be admissible as evidence for any purpose in any pending or future litigation in any jurisdiction.

12. CONFIDENTIALITY

12.1 Other than responses to inquiries from governmental entities or as necessary to comply with federal and state tax and securities laws, no Party shall initiate any publicity relating to or make any public comment regarding this Agreement until a motion seeking the Preliminary Approval Order is filed with the Court.

12.2 Unless and until all Parties execute this Agreement and present it to the Court in a motion seeking the Preliminary Approval Order, the Parties agree that all terms of this Agreement will remain confidential and subject to Federal Rule of Evidence 408.

13. MISCELLANEOUS PROVISIONS

13.1 Google will provide Plaintiffs with confirmatory discovery no later than thirty (30) days after Preliminary Approval. The confirmatory discovery

shall consist of a declaration from the appropriate Google personnel consisting of an explanation of when search queries are transmitted to third parties via referrer headers, any differences for users signed in to a Google account or using SSL, and when those differences arose.

13.2 This Agreement, including all attached exhibits, shall constitute the entire agreement among the Parties (and covering the Parties and the Class) with regard to the subject matter of this Agreement and shall supersede any previous agreements and understandings between the Parties.

13.3 This Agreement may not be changed, modified or amended except in writing signed by Class Counsel and Google's counsel, subject to Court approval if required.

13.4 Each Party represents and warrants that it enters into this Agreement of his, her, or its own free will. Each Party is relying solely on its own judgment and knowledge and is not relying on any statement or representation made by any other Party or any other Party's agents or attorneys concerning the subject matter, basis, or effect of this Agreement.

13.5 This Agreement has been negotiated at arm's length by Class Counsel and Google's counsel. In the event of any dispute arising out of this Agreement, or in any proceeding to enforce any of the terms of this Agreement, no Party shall be deemed to be the

drafter of this Agreement or of any particular provision or provisions, and no part of this Agreement shall be construed against any Party on the basis of that Party's identity as the drafter of any part of this Agreement.

13.6 The Parties agree to cooperate fully and to take all additional action that may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

13.7 This Agreement shall be binding upon and inure to the benefit of all the Parties and Class Members, and their respective representatives, heirs, successors, and assigns.

13.8 The headings of the sections of this Agreement are included for convenience only and shall not be deemed to constitute part of this Agreement or to affect its construction.

13.9 The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to this Agreement.

13.10 Prior to pursuing relief or submitting any dispute relating to this Agreement or the Actions to the Court, the Parties and Class Counsel agree to mediate the dispute before Randall Wulff of Wulff, Quinby & Sochynsky, located at 1901 Harrison Street, Suite 1420, Oakland, California, 94612.

13.11 All claims arising out of or relating to this Agreement will be litigated exclusively in the federal or state courts of Santa Clara County, California, U.S.A. The Parties (i) irrevocably submit to the personal jurisdiction of; (ii) waive any objection to venue in; and (iii) waive any objection to the convenience of litigating in the above courts in any claim arising out of or related to this Agreement.

13.12 Any notice, instruction, court filing, or other document to be given by any Party to any other Party shall be in writing and delivered personally or sent by registered or certified mail, postage prepaid, or overnight delivery service to the respective representatives identified below or to other recipients as the Court may specify. As of the date of this Agreement, these respective representatives are as follows:

For the Class:

NASSIRI & JUNG LLP
c/o Kassra P. Nassiri
47 Kearny Street, Suite 700
San Francisco, CA 94108

For Google:

MAYER BROWN LLP
c/o Edward D. Johnson
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112

13.13 The Parties agree to work in good faith to effectuate the settlement proposed in this Agreement. This Agreement shall be dissolved, and shall be null and void, if the Parties do not execute this Agreement, if the Court does not preliminarily or finally approve this Agreement, or if this Agreement does not become final and effective due to any ruling on any appeals or remand from any appeals. If the Court does not approve this Agreement in its entirety (except as provided in Paragraph 10.1), or if the approval is not upheld in its entirety on any appeals and remand from any appeals, this Agreement cannot be enforced against either Party; in other words, this Agreement's terms are not separable unless otherwise subsequently agreed in writing or except as provided in Paragraph 10.1.

13.14 The Parties each represent and warrant that they have not sold, assigned, transferred, conveyed, subrogated, or otherwise disposed of any claim or demand covered by this Agreement. If a Class Member has sold, assigned, transferred, conveyed, subrogated or otherwise disposed of any claim or demand, the Person that acquired such claim or demand is bound by the terms of this Agreement to the same extent as the Class Member would have been but for the sale, assignment, transfer, conveyance, or other disposition.

13.15 The signatories to this Agreement represent that they have been duly authorized to execute this Agreement on behalf of the Parties they purport

to represent. This Agreement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Dated: March 16, 2013 Plaintiff Paloma Gaos

/s/ Paloma Gaos
Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

Individually and in his representative capacity

Dated: March 15, 2013 NASSIRI & JUNG LLP

/s/ Kassra Nassiri
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano.

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

_____

Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____

Individually and in her
representative capacity

Dated: March 15, 2013 Plaintiff Anthony Italiano

/s/ Anthony Italiano
Individually and in his
representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____

Individually and in his
representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

_____

Kassra Nassiri
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

_____

Michael Aschenbrener
on behalf of Plaintiffs
Paloma Gaos and Anthony
Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____

Individually and in her
representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

_____

Individually and in his
representative capacity

Dated: March 16, 2013 Plaintiff Gabriel Priyev

/s/ Gabriel Priyev
Individually and in his representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

Individually and in his representative capacity

Dated: March 15, 2013 NASSIRI & JUNG LLP

/s/ Kassra Nassiri
Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 ASCHENBRENER LAW, P.C.

Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March __, 2013 Plaintiff Paloma Gaos

_____

Individually and in her representative capacity

Dated: March __, 2013 Plaintiff Anthony Italiano

_____

Individually and in his representative capacity

Dated: March __, 2013 Plaintiff Gabriel Priyev

_____

Individually and in his representative capacity

Dated: March __, 2013 NASSIRI & JUNG LLP

_____

Kassra Nassiri
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March 15, 2013 ASCHENBRENER LAW, P.C.

/s/ Michael Aschenbrener
Michael Aschenbrener
on behalf of Plaintiffs Paloma Gaos and Anthony Italiano

Dated: March 15, 2013 PROGRESSIVE LAW GROUP, LLC.

/s/ Ilan Chorowsky
Ilan Chorowsky
on behalf of Plaintiff Gabriel Priyev

Dated: March __, 2013 GOOGLE, INC.

Kent Walker
SVP and General Counsel

Dated: March __, 2013 PROGRESSIVE LAW GROUP, LLC.

/s/ Ilan Chorowsky
Ilan Chorowsky
on behalf of Plaintiff Gabriel Priyev

Dated: March 15, 2013 GOOGLE, INC.

/s/ Kent Walker
Kent Walker
SVP and General Counsel

EXHIBIT A TO SETTLEMENT AGREEMENT

1. Content for Disclosure on Google's "FAQ" webpage:

A disclosure in substantially the same content and form as the following shall be included on Google's "FAQ" webpage currently located at https://www.google.com/policies/privacy/faq/:

"Are my search queries sent to websites when I click on Google Search results?

In some cases, yes. When you click on a search result in Google Search, your web browser also may send the Internet address, or URL, of the search results page to the destination webpage as the HTIP Referrer [preceding term will be a hyperlink to the Key Terms page, located at https://www.google.com/intl/en/policies/privacy/key-terms/]. The URL of the search results page will sometimes contain the search query you entered. If you are using SSL Search (Google's encrypted search functionality) or if you are logged in to your Google Account, under most circumstances your search terms will not be sent as part of the URL in the HTTP Referrer. There are some exceptions to this behavior. For example, if you click on an ad appearing on the search results page, your browser will continue to send the search terms in the HTIP Referrer to help advertisers to improve the relevancy of the ads they present to you. More information on SSL Search can be found

here [preceding term will be a hyperlink to: http://suppo1t.google.com/websearch/bin/answer.py?hl=en&answe1= 173733]. Google may provide Google Analytics users with the search query or with the information contained in the HTTP Referrer."

2. Content for Disclosure on Google's "Key Terms" webpage:

A disclosure in substantially the same content and form as the following shall be included on Google's "Key Terms" webpage currently located at https://www.google.com/intl/en/policies/privacy/key-terms/:

"HTTP Referrer"

An HTTP Referrer is information transmitted to a destination webpage by a web browser, typically when you click a link to that webpage. The HTTP Referrer contains the URL of the last webpage the browser visited."

3. Content for Disclosure on Google's "Privacy FAQ for Google Web History" webpage:

A disclosure in substantially the same content and form as the following shall be included on the "Privacy FAQ for Google Web History" webpage currently located at https://support.google.com/accounts/bin/an-

swer.py?hl=en&answet=54050 in a separate paragraph set off from the existing answer to the FAQ: "How do you use the information you collect when I use Google Web History":

"For more information on how Google handles search queries generally, see the Privacy Policy FAQ." [preceding term will be a hyperlink to the Privacy Policy FAQ (available at available at https://www.google.com/policies/privacy/faq/)].

Theodore H. Frank (SBN 196332)
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW
No. 236
Washington, DC 20036
Voice: (703) 203-3848
Email: tfrank@gmail.com

Attorneys for Objectors Melissa Holyoak and Theodore H. Frank

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION	Case No. 5:10-cv-04809-EJD
	OBJECTION OF MELISSA HOLYOAK AND THEODORE H. FRANK
MELISSA HOLYOAK and THEODORE H. FRANK,	Date: August 29, 2014
Objectors.	Time: 9:00 a.m.
	Courtroom: 4
	Judge: Hon. Edward J. Davila

INTRODUCTION

Plaintiffs filed a complaint alleging trillions of dollars in statutory damages on behalf of a class consisting of more than one hundred million people, and then settled it for $8.5 million, of which the class members will see not one penny. Instead, the entire net settlement fund will go third-party "*cy pres*" recipients, even though it would be practicable to allow class members to recover through a claims-made process and/or a sampling lottery method. Moreover, several of the proposed *cy pres* recipients have prior relationships with class counsel or defendants. Preexisting relationships with the defendant undermine the value of the settlement to the class. Preexisting relationships with class counsel qualify as improper conflicts of interest. These defects render the settlement substantively unfair. *See infra* §§ III-IV.

Procedurally, notice to the class is inadequate under this proposed settlement because it fails to directly notify those class members for whom the defendant has contact information, thus depriving them of due process. The settlement makes objecting or opting out of the settlement artificially and needlessly burdensome by requiring paper-mail printouts from a class of internet users. *See infra* §§ VII-VIII.

The proposed settlement structure suggests that class certification is untenable. If in fact distributions to class members are impossible, then a class action

is not superior to other methods of adjudicating the dispute. *See infra* § V.

Finally, in the alternative, if the Court overrules all the above objections, the Rule 23(h) request is excessive and should be reduced. *See infra* § VI.

I. The objectors are members of the class.

Objectors Theodore H. Frank and Melissa Holyoak are United States residents who have submitted at least one search query to Google between October 26, 2006 and the present. *See* Declaration of Theodore H. Frank ¶3; Declaration of Melissa Holyoak ¶3. They are therefore members of the settlement class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5).

Frank's mailing address is 1718 M Street NW, #236, Washington DC 20036, his phone number is (703) 203-3848, and his email address is tfrank@gmail.com. Frank Decl. ¶2. Holyoak's mailing address is 1718 M Street NW, #236, Washington DC 20036, her phone number is (573) 823-5377, and her email address is melissaholyoak@gmail.com. Holyoak Decl. ¶2. Frank represents Holyoak, and himself *in pro per*. As discussed in their contemporaneously-filed Notice of Intent to Appear, Frank plans to attend the fairness hearing in this case, where he wishes to discuss matters raised in this objection. Objectors do not intend to call any witnesses at the fairness hearing,

but reserve the right to make use of all documents entered on to the docket by any settling party or objector. Objectors reserve the right to cross-examine any witnesses who testify at the hearing in support of final approval. Objectors join the objections of any other objectors or *amici* to the extent those objections are not inconsistent with this one.

II. The court has a fiduciary duty to the unnamed members of this class.

A district court must act as a "fiduciary for the class," "with a jealous regard" for the rights and interests of absent class members. *In re Mercury Interactive Corp.*, 618 F.3d 988, 994–95 (9th Cir. 2010) (internal quotation and citation omitted); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 623 (1997) ("Rule 23(e) protects unnamed class members from 'unjust or unfair settlements' agreed to by 'faint-hearted' or self-interested class 'representatives.'")). "Both the class representative and the courts have a duty to protect the interests of absent class members." *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). *Accord Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989) ("The district court must ensure that the representative plaintiff fulfills his fiduciary duty toward the absent class members").

There should be no presumption in favor of settlement approval: "[t]he proponents of a settlement bear the burden of proving its fairness." *True v. American Honda Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal.

2010) (*citing* 4 Newberg on Class Actions § 11:42 (4th ed. 2009)). *Accord* American Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05(c) (2010) ("*ALI Principles*") ("In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.").

"[W]here the court is '[c]onfronted with a request for settlement-only class certification,' the court must look to the factors 'designed to protect absentees.'" *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (*quoting Amchem*, 521 U.S. at 620). "[S]ettlements that take place prior to formal class certification require a higher standard of fairness." *Molski*, 318 F.3d at 953. "[P]re-certification settlement agreements require that we carefully review the entire settlement, paying special attention to 'terms of the agreement contain[ing] convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of the negotiations.'" *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (*quoting Staton v. Boeing*, 327 F.3d 938, 960 (9th Cir. 2003)). Where the Court confronts a pre-certification settlement, consideration of the eight *Churchill*[1] factors "alone is not enough to survive appellate review." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

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[1] *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

It is insufficient that the settlement happened to be at "arm's length" without express collusion between the settling parties. Because of the danger of conflicts of interest endemic to class action procedure, third parties must monitor the reasonableness of the settlement as well. *Bluetooth*, 654 F.3d at 948 (*quoting Staton*, 327 F.3d at 960). Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests ... to infect the negotiations." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (quoting *Dennis*, 697 F.3d at 864).

III. The settlement improperly favors third party charities over class members through its *cy pres* provision.

It is a foundational premise that the plaintiff-class itself as a legal entity "is not the client. [Rather,] the class attorney continues to have responsibilities to each individual member of the class even when negotiating a settlement." *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 834-35 (9th Cir. 1976).

The legal construct of *cy pres* (from the French "*cy pres comme possible*"—"as near as possible") has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). Imported

to the class action context, it has become an increasingly popular method of distributing settlement funds to non-class third parties. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting the denial of certiorari) ("*Cy pres* remedies...are a growing feature of class action settlements" that raise "fundamental concerns"); *Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing en banc).

Despite its growing popularity among some members of the class action bar, *cy pres* distributions are non-compensatory, disfavored among both courts and commentators alike, and remain an inferior avenue of last resort. *See e.g., Klier*, 658 F.3d at 475 ("[The *cy pres*] option arises only if it is not possible to put those funds to their very best use: benefitting the class members directly."); *Dennis*, 697 F.3d at 868 (*cy pres* settlement can easily become "a paper tiger"); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) ("[A] growing number of scholars and courts have observed, the *cy pres* doctrine...poses many nascent dangers to the fairness of the distribution process") (citing authorities); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) ("*Cy pres* distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory"); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else."); Martin H. Redish, Peter Julian, & Samantha

Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617 (2010).

One variety of class action *cy pres* is *ex ante cy pres*. It can be defined as an award "that was designated as part of a settlement agreement or judgment where: (1) an amount *and* at least one charity was named as a recipient of part of the fund from the outset and the charity's receipt of the award was not contingent on there being remaining/unclaimed funds in the settlement fund, or (2) the entire award was given to at least one charity with no attempt to compensate the absent class. Redish et al., *Cy Pres Relief and Pathologies*, 62 FLA. L. REV. 617, 657 n.171. The relief here is a clear example of (2). Settlement Agreement (Dkt. 52-3) § 3. It provides that the entire $8.5 million settlement fund will be disbursed to non-class member charities, with no payments to the vast majority of class members who are not stakeholders in those charities.

As compared with *ex post cy pres*—third-party awards made only after class members fail to cash checks that are distributed—*ex ante cy pres* stands on even shakier footing. *See Molski*, 318 F.3d at 954-55 (rejecting all *cy pres* settlement as inadequate substitute to individual compensation); *Fraley v. Facebook*, No. C 11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at *4-*7 (N.D. Cal. Aug. 17, 2012) ("*Fraley I*") (questioning propriety of an all *cy pres* settlement); *Zapeda v. Paypal*, No. C 10-2500 SBA, 2014 U.S. Dist LEXIS

24388, at *21 (N.D. Cal. Feb. 24, 2014) (expressing concern "that the only persons receiving any funds are persons *other than* class members" and denying settlement approval) (emphasis in original). "This form of *cy pres* stands on the weakest ground because *cy pres* is no longer a last-resort solution for a problem of claims administration. The concern for compensating victims is ignored (at least unless the indirect benefits of the *cy pres* award flow primarily to the victims)." Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767, 770-71 (2013).

Cy pres is improper when it is feasible to make distributions to class members, at least where there is no other compelling reason for preferring non-class members. This "last-resort rule" is a well-recognized principle of law. §3.07(a) of the *ALI Principles* succinctly states the limitation: "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members."[2] The last-resort rule follows from the

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[2] Numerous other courts have also endorsed §3.07 to a greater or lesser degree. *Nachshin*, 663 F.3d at 1039 n.2; *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 689-690 (7th Cir. 2013); *In re Lupron Mktg and Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012); *Klier*, 658 F.3d at 474-75 & nn. 14-16; *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citing draft version); *Baby Prods.*, 708 F.3d at 173 (agreeing in part); *Better v. YRC Worldwide Inc.*, No. 11-cv-2072- KHV, 2013

precept that "[t]he settlement-fund proceeds, generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (5th Cir. 2011) (citing *ALI Principles* §3.07 cmt. (b)).

While it may be true that the full statutory damages that would be owed to every class member in the event that plaintiffs were to prevail at trial would be greater than the market capitalization of Google, that is not the relevant question. The relevant question is whether it would be practicable to distribute the available $8.5 million settlement fund to class members through a lottery or claims-made process. The answer is yes. *See Fraley v. Facebook, Inc.*, 966 F. Supp. 2d. 939 (N.D. Cal. 2013) ("*Fraley II*"). In *Fraley*, the class of Facebook users numbered in the hundreds of millions, and the parties proposed a *cy pres*-only settlement to the court alleging that class distributions "[are] simply not practicable in this case, given the size of the class." *Fraley I.*, 2012 U.S. Dist. LEXIS 116526, at *6. Judge Seeborg refused to accept the proposal because "[m]erely pointing to the infeasibility of dividing up the agreed-to $10 million recovery...is insufficient...to justify resort to purely cy pres payments." 2012 U.S. Dist. LEXIS 116526, at *5. After the court denied approval, the agreement was

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U.S. Dist. LEXIS 163569, at *19-*21 (D. Kan. Nov. 18, 2013) (rejecting settlement for non-compliance with §3.07); *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087 BTM (KSC), 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (same).

then restructured as a claims-made settlement disbursing cash directly to class members. *See Fraley II*. Claimants under the amended agreement were so few in fact that the court would have been able to double the baseline $10 awards and did actually augment the awards by 50%. *Id.* at 944. Here too, the percentage of the 100+ million person class that will submit claims is likely low enough that a claims-made settlement would not be impracticable.

Recently, a well-respected settlement administration company conducted a wide-ranging survey that concluded "settlements with little or no direct mail notice will almost always have a claims rate of less than one percent (1%)." *Poertner v. The Gillette Co.*, No. 6:12-v-00803-GAP-DAB, Declaration of Deborah McComb re Settlement Claims (Dkt. 156) ¶5. Recent data points reveal that this is true in low-stakes settlements with or without direct notice. *In re Livingsocial Mktg. and Sales Practices Litig.*, 298 F.R.D. 1, 19 (D.D.C. 2013) (0.25% claims rate with direct email notice); *Spillman v. RPM Pizza, LLC*, No. 10-349-BAJ-SCR, 2013 U.S. Dist. LEXIS 72947, at *8 (M.D. La. May 23, 2013) (0.27% claims rate for $15 max claim); *Lagarde v. Support.com, Inc.*, No. 12-0609 JSC, 2013 U.S. Dist. LEXIS 67875, at *7 (N.D. Cal. May 13, 2013) ("[A] mere 1,259 timely claims were submitted for the $10 refund, which represents 0.17% of the total number of class members and 0.18% of the total number of class members who received notice."); *Pearson v. Nbty, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *22 (N.D. Ill. Jan. 3, 2014) (0.25%

claims rate overall where maximum claim was $12 without proof of purchase and $50 with proof of purchase). *Fraley* is the proof; even where a class numbers over one-hundred million, that a claims-made device can be feasible.

Even if it were not possible to distribute $8.5 million through a claims-made process, there is no legitimate reason why the parties should not randomly sample the class and/or accept claims submission, and then make payouts on a lottery basis. *See* Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011).

Which alternate method the parties elect is not crucial; what matters is that non-compensatory *cy pres* remains the last resort. As discussed thoroughly in the Third Circuit's *Baby Products* opinion, for individual class members, direct payment matters. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." 708 F.3d at 178; *id.* at 178-79 (counsel has "responsibility to seek an award that adequately prioritizes direct benefit to the class" and fees should reflect that fact). "Barring sufficient justification, *cy pres* awards should generally represent a small percentage of total settlement funds." *Id.* at 174. If *cy pres* is an excessive share of the total relative to direct class recovery, a district court should consider whether to

> urge the parties to implement a settlement structure that attempts to maintain an appropriate balance between payments to the class and *cy pres* awards. For instance, it could condition approval of a settlement on the inclusion of a mechanism for additional payouts to individual class members if the number of claimants turns out to be insufficient to deplete a significant portion of the total settlement fund.

Id.

Furthermore, it is perhaps the case that some of the *cy pres* recipients are class members. There is no reason to favor those recipients in an uncertified subclass over other class members, and even less reason to favor non-class members over the actual class members.

Where there is a will, there is a way. But class counsel did not negotiate for using the fund to compensate class members, either on a claims-made, lottery, or some combination thereof basis. Rather, in dereliction of their fiduciary obligations, class counsel proposes to give that money away to non-class entities.[3] The bare legitimacy of *cy pres* in the class action

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[3] If it was apathy toward class members or—worse yet—preference for non-class third-parties that drove the decision to prioritize *cy pres* distributions, that casts even further doubt on the

context is controvertible with good reason. *See Klier*, 658 F.3d at 480-82 (Jones J., concurring); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 358 (3d Cir. 2010) (Weis, J., concurring and dissenting); *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1105-12 (D.N.M. 2012) (collecting sources); Redish et al., *supra*. Although *cy pres* has been given a narrow berth in the Ninth Circuit, settled law requires that this application of *cy pres* be rejected for the foregoing reasons.

IV. The Court must consider the pre-existing relationships between the cy pres recipients, class counsel and the defendant.

The proposed *cy pres* recipients include institutions with prior relationships with both the defendant and class counsel. "A *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits." *ALI Principles* §3.07 cmt. (b). Where, as here, class counsel are the alumni of several of the *cy pres* recipients, there is the appearance of divided loyalties of class counsel. And where

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adequacy of class representation. *See Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998) ("The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members.").

the defendant is already an established donor to certain of the *cy pres* recipients, there is the significant risk that the value of the settlement will be less beneficial to the class than it would appear.

A. Cy pres beneficiaries should not have a pre-existing relationship with class counsel.

"The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1167 (9th Cir. 2013) (internal quotation omitted). "Cy pres distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations." *Dennis*, 858 F.3d at 867.

Yet undisclosed to the class is the fact that two of the three class attorneys who signed the settlement agreement, Kassra Powell Nassiri and Michael Aschenbrener, are alumni of three of the *cy pres* recipients. Settlement 16-17. Nassiri has a master's degree from Stanford and a juris doctorate from Harvard. Nassiri and Jung, LLP, http://njfirm.com/kassra-nassiri/ (last visited July 23, 2014). Aschenbrener received his juris doctorate from the Chicago-Kent College of Law. Aschenbrener Law, http://aschenbrenerlaw.com/michael-aschenbrener/ (last visited July 23, 2014). Harvard, Stanford, and

Chicago-Kent are three of the four proposed university recipients. Preliminary Approval Order (Dkt. 63) ("PAO") at 8. These are not recipients that are "independent and free from conflict." *Id.* at 11 n.7; Motion for Final Approval (Dkt. 65) at 14 n.2.

In *Nachshin*, the Ninth Circuit criticized *alma mater cy pres* distributions, suggesting that such dispensations present exactly the sort of conflicts of interest that are problematic. 663 F.3d at 1039. Other commentators are in accord, specifically identifying the *alma mater* problem as the type of conflict that is objectionable. *E.g.*, George Krueger & Judd Serotta, Op-Ed, *Our Class-Action System is Unconstitutional*, WALL ST. J., Aug. 6, 2008 ("Judges...have occasionally been known to order a distribution to some place like their own alma mater ..."); Adam Liptak, *Doling out Other People's Money*, N.Y. TIMES, Nov. 26, 2007 ("Lawyers and judges have grown used to controlling these pots of money, and they enjoy distributing them to favored charities, alma maters and the like."). In *Nachshin*, the court cited each of these three sources approvingly. 663 F.3d at 1039, 1039 n.2.

"Courts are wary of distributing cy pres funds to organizations that have a close relationship with class counsel given the appearance of a conflict of interest." *Weeks v. Kellogg Co.*, No. CV-0908102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *69 n.102 (C.D. Cal. Nov. 23, 2011); *see also Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F. Supp. 2d 574, 577 n.2 (E.D.

Pa. 2005) (noting the appearance of impropriety in selecting a beneficiary (the University of Pennsylvania) with long established ties to the Eastern District bench). *Weeks* properly refused to ratify such a conflict. 2011 U.S. Dist. LEXIS 155472, at *70-*71. *Accord In re Linerboard Antitrust Litig.*, MDL No. 1261, 2008 U.S. Dist. LEXIS 77739, at *14-*15 (E.D. Pa. Oct. 3, 2008) (rebuffing proposed *cy pres* awards to institutions with preexisting relationships to class counsel); *but see In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1050-51 (S.D. Cal. 2013), *appeal pending* No. 13-55373 (9th Cir.) (overruling objection where one of three university *cy pres* recipients had *alma mater* affiliation with class counsel). This objection may have only scratched the surface; who knows what conflicts lurk deeper? Before the Court approves any award, it should require the parties to certify that the beneficiaries have no ties to the parties or the lawyers. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 1361, 2005 U.S. Dist. LEXIS 11332, at *4 (D. Me. June 10, 2005). This Court should not approve any settlement afflicted by such a conflict of interest.[4]

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[4] An all too rare best practice that mitigates this problem is to poll class members— efficiently done through the settlement website—as to which charities should be designated *cy pres* beneficiaries. *See, e.g., In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1197 (N.D. Cal. 1998) (Walker, J.) ("The fact remains that this money belongs to class members, and it is they who should decide whether and to whom to donate it."); *see generally* Alexandra Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1961-63 (2011) (recommending polling the class as a "modest proposal" to increase class members' voice).

B. Pre-existing relationships between the defendant and the cy pres recipients undermine the value of the settlement.

As the Ninth Circuit has warned, "[t]he issue of the valuation of [the *cy pres*] aspect of a settlement must be examined with great care to eliminate the possibility that it serves only the "self-interests" of the attorneys and the parties, and not the class, by assigning a dollar number to the fund that is fictitious." *Dennis*, 697 F.3d at 868. Google is already a donor to Berkman Center for Internet and Society at Harvard University; Stanford Center for Internet and Society; AARP; and Chicago-Kent. *See* http://cyber.law.harvard.edu/about/support (last visited July 23, 2014);
http://cyberlaw.stanford.edu/about-us (last visited July 23, 2014).
http://www.google.com/publicpolicy/transparency.html (AARP) (last visited August 8, 2014); http://www.alumni.kentlaw.edu/s/815/index.aspx?sid=815&gid=1&pgid=773 (last visited August 8, 2014). When the defendant is already a regular contributor to the proposed *cy pres* recipient, there is no demonstrable value added by the defendant's agreement to give money to that institution. *See Dennis*, 697 F.3d at 867-68. Google is agreeing to do something that it was in all likelihood going to do anyway. Such an agreement is of little or no incremental value to the class. *See Reynolds v. Beneficial Nat'l*

Bank, 288 F.3d 277, 286 (7th Cir. 2002) (it is the "*incremental* benefits" that matter, not the "total benefits") (emphasis in original)); *see also In re Hydroxycut Mktg. and Sales Practices Litig.*, No. 09-md-2087 BTM (KSC), 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (rejecting *cy pres* that provided not additional benefit to class members beyond the status quo); American Law Institute, Principles of the Law of Aggregate Litig. § 3.13 (settlement benefit does not include gratuitous inclusion of actions that defendant was conducting pre-settlement). This Court should require additional disclosures from Google, as they are likely to have preexisting relationships with the other two *cy pres* recipients that are not readily publicly available.

Recently, a divided panel of the Ninth Circuit affirmed a *cy pres* distribution over an objector's challenge to the fact that the beneficiary was closely affiliated with the defendant. *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012), *rehearing en banc den'd*, 709 F.3d 791 (2013), *cert den'd sub nom* 134 S. Ct. 8 (2013). In that case, however, the objectors argued that there was a per se conflict of interest when the defendant had a pre-existing relationship with a *cy pres* recipient. The rationale by which the *Lane* court sanctioned the *cy pres* award—that the terms of the settlement are "the offspring of compromise" that "necessarily reflect the interest of **both** parties"—has no application to this objection, where the assertion is that Google's promise to give money to organizations to which it was already giving money simply is

not worth the release of individual class members' claims, nor commensurate with the attorneys' fees request. 696 F.3d at 821 (emphasis added).[5] *Cf. Webb v. Carter's*, 272 F.R.D. 489, 504 (C.D. Cal. 2011) (rejecting class certification where the manufacturer of children's tagless clothes was already offering the relief sought by the putative class members).

C. Frank further objects to AARP as a recipient.

The AARP takes political positions opposed by many class members, including Frank. They should not be receiving *cy pres* funds.

V. In the alternative, if distributions to individual class members are impracticable, then a class action is not superior to other available methods of adjudicating the controversy.

One prerequisite of class certification is that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). If a *cy pres*-only settlement is necessary because it would be too costly to distribute the settlement funds to individual class members,

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[5] *Lane* also has no application to a distribution that unjustifiably favors non-party class counsel. *See supra* § IV.A. Settlement concessions should reflect the interest of "both parties" —the class members themselves and the defendant—but not the interest of class counsel.

then a class action is not an efficient and superior means of adjudicating this controversy. *Supler v. FKAACS, Inc.*, No.. 5-11-CV-00229-FL, 2012 U.S. Dist. LEXIS 159210, at *10-*11 (E.D.N.C. Nov. 6, 2012) (holding that, because "benefits to putative class members" from *cy pres* payments "are attenuated and insignificant..., class certification does not...promote judicial efficiency.") (internal quotations, ellipses, and citations omitted). The Ninth Circuit came to a similar conclusion in *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974). There, the court reasoned that "[w]henever the principal, if not the only, beneficiaries to the class action are...not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute," and that, "[w]hen, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected." *Id.* at 91-92. In this case, the proposed settlement falls into that category. It provides at most an indirect and attenuated benefit to the class, justified on the grounds that individual distributions would be too costly because of the size of the class. PAO at 10-11.

If true, then these claims should proceed as individual actions. Under such actions, class members can seek statutory damages of up to $10,000. 18 U.S.C. § 2520(c)(2)(B) (authorizing statutory damages for violations of the Electronic Communications Pri-

vacy Act). No matter how slim the possibility of attaining such damages, that possibility is superior to releasing those claims for no compensation. *See Brown v. Wells Fargo & Co.*, No. 11-1362 (JRT/JJG), 2013 U.S. Dist. LEXIS 181262, at *16-*17 (D. Minn. Dec. 30, 2013) (concluding that superiority was not satisfied where individuals would be "entitled to between $100 and $1,000 dollars in statutory damages" in successful individual litigation, but only $55 as a class member); *Sonmore v. CheckRite Recovery Servs.*, 206 F.R.D. 257, 265-66 (D. Minn. 2001) (holding that the discrepancy between the $25 that class members could recover and the $1000 in statutory damages they could recover individually meant that a class action was not superior); *cf. also Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234 n.5 (9th Cir. 1974) (finding no superiority where individual recoveries could have amounted to $1,875 and attorneys' fees and costs were statutorily recoverable); *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 716 (9th Cir. 2010) ("We think it clear that the Rule 23(b)(3) superiority analysis must be consistent with the congressional intent in enacting a particular statutory damages provision.").

Superiority must be contemplated from the perspective of putative absent class members, among other angles. *Bateman*, 623 F.3d at 713 (quoting *Kamm v. California City Development Co.*, 509 F.2d 205, 212 (9th Cir. 1975)). What is best for them? This settlement intends to release their rights in exchange for no compensatory relief. From the perspective of a

class member, that cannot be a superior method of adjudicating this controversy. *Cf. Daniels v. Aeropostale West*, No. C 12-05755 WHA, 2014 U.S. Dist. LEXIS 74081, at *8 (N.D. Cal. May 29, 2014) ("No one should have to give a release and covenant not to sue in exchange for zero (or virtually zero) dollars. The collective-action opt ins would be better off simply walking away from this lawsuit with their rights to sue still intact."). A *cy pres* settlement, in which many of the beneficiaries are already receiving donations from the defendant, is not be superior in either fairness or efficiency to other methods of adjudication.

VI. If the Court approves the certification and settlement, it should decline to award the $2.125 million attorneys' fees requested.

For several reasons, the settlement is substantively unfair (*see supra* §§ III-IV), procedurally unfair (*see infra* §§ VII-VIII), and premised on a theory that makes class certification untenable (*see supra* § V). Nevertheless, if this Court disagrees with each of those propositions, it should still deem unreasonable the $2.125 million fee requested by plaintiffs. *See* Motion for Approval of Fees and Costs ("Fee Motion") (Dkt. 66).

Plaintiffs believe that the Ninth Circuit's 25% benchmark approach applies equivalently regardless of whether the defendant is obligated by a settlement to pay class members $8.5 million or obligated to pay

non-class member third parties $8.5 million. Fee Motion at 2-4. Plaintiffs' belief is wrong as a matter of law and would be disastrous as a matter of public policy.[6]

As a matter of law, class members are simply "not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178. When "class counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class," it is "appropriate for the court to decrease the award." *Id.* at 178-79 (citing, *inter alia*, two Ninth Circuit decisions and *ALI Principles* §3.13); *accord* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV.__ (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstractid=2413951 (advocating for "presumptive reduction of attorneys' fees" where settlement includes

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[6] One principle on which objectors can agree with plaintiffs is that any hypothetical value of the prospective injunctive relief should not be included in the denominator for purposes of making a percentage fee award. *See Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) ("Precisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund. We hold, therefore, that only in the unusual instance where the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees."); *compare* Fee Motion at 2 (seeking a percentage upon "only the cash portion of the total recovery").

significant *cy pres* component). Although obligating Google to donate to third parties may impose a cost on Google,[7] the Ninth Circuit has been clear that compensable value "is not how much money a company spends on purported benefits, but the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944 (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)).

A dollar that goes to *cy pres* is less valuable than a dollar that goes directly to a class member. So, although plaintiffs reference a number of district court decisions that disregard this reality (*see* Fee Motion at 3 (citing cases)), plenty of courts have wisely concluded otherwise and have refused to value *cy pres* donations the same as a dollar to the class. *E.g.*, *In re Heartland Payment Sys., Inc.*, 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (discounting *cy pres* by 50% for purposes of awarding fees); *In re Livingsocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 19, 22 (D.D.C. 2013) (cutting fees to 18% in consideration of "proportion of the award that is going to *cy pres*."); *Weeks v. Kellogg Co.*, No. CV 09-08102 (MMM) (RZx), 2011 U.S. Dist. LEXIS 155472, at *111 (C.D. Cal. Nov. 23, 2011) (awarding 16.2% "in light of the fact that almost half of the settlement's value is guaranteed not to directly benefit individual class members."); *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 n.9 (E.D.

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[7] Of course, it also may not impose very much of a cost at all. *See supra* § IV.B.

Pa. 2005) (excluding *cy pres* and non-economic injunctive relief benefits entirely). More importantly, the only Ninth Circuit case mustered by the plaintiffs, *Lane*, did not confront the question of whether the fee award in that case was excessive, nor whether the Ninth Circuit's benchmark should apply identically to *cy pres* only settlements. Rather, the objectors in *Lane* focused their attack solely on the substantive fairness of the settlement, not the fee award. 696 F.3d at 818, 820.

The "key consideration in determining a fee award is reasonableness in light of the benefit *actually conferred*." *In re HP Inkjet Printer Litig.*, No. 5:05–cv-3580 JF, 2011 WL 1158635, at *10 (N.D. Cal. Mar. 29, 2011), *rev'd on other grounds* 716 F.3d 1173 (9th Cir. 2013) (emphasis in original) (internal citation and quotation omitted); *accord* Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (in awarding fees the "fundamental focus is the result actually achieved *for class members*") (emphasis added). For this reason, where actual benefit is slim, courts will deviate downward from the 25% benchmark. *Pearson v. Nbty, Inc.*, No. 11-cv-7972, 2014 U.S. Dist. LEXIS 357, at *21-*27 (N.D. Ill. Jan. 3, 2014) (reducing 25% benchmark to 9.6% based on "low claims rate in combination with funds being remitted to *cy pres* in an amount greater than the actual benefit to the Class"); *Tarlecki v. Bebe Stores, Inc.*, No. C 05-1777 MHP, 2009 WL 3720872, 2009 U.S. Dist. LEXIS 102531, at *12 (N.D. Cal. Nov. 3, 2009) (reducing fee award to less than 13%) (cited by Fee Motion at 4).

If this Court endorses a rule that makes class counsel financially indifferent between a settlement that awards cash directly to class members and a *cy pres* only settlement, the parties will always agree to the *cy pres* arrangement and unnamed class members will be permanently left out in the cold. The reason that the parties will incline toward the *cy pres* arrangement is because of reasons related to those discussed *supra* at 9-10: defendants will prefer to make payments to third parties to whom they are already donating money rather than payments to absent class members. Donations may engender good will, and often merely replace or supplement donations that are already in the pipeline, or which the defendant has a habit of making: in the latter case, then the "relief" to the class is even more illusory, because it merely reflects a shift in accounting entries. Coupled with the class counsel's financial indifference, the defendant's preference *for* charitable donations means that the easy way of reaching settlement will be agreeing to *cy pres* only settlements.

The percentage of recovery/ benchmark is the prevailing Ninth Circuit methodology because it aligns the incentives of class counsel and the class much better than does the competing lodestar method. *In re Apple Iphone/Ipod Warranty Litig.*, No. C 10-1610 RS, 2014 U.S. Dist. LEXIS 52050, at *8-*9 (N.D. Cal. Apr. 14, 2014) ("[A]pplying the lodestar to common fund cases does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work

and protracting the litigation. It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process.") (internal quotation and ellipsis omitted); *see generally* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 TUL. L. REV. 1809 (2000) (observing "solid consensus that the contingent approach minimizes conflicts more efficiently than the lodestar"). To apply the benchmark equally regardless of whether the class actually recovers funds is to undermine its core benefit and to again misalign the interests of class counsel and its clients.

Put simply, "courts need to consider the level of direct benefit provided to the class in calculating attorneys' fees." *Baby Prods.*, 708 F.3d at 170. If the court it inclined to approve the settlement and certification, to comply with Rule 23(h), it should reduce the fee award to no more than 10% of the $8.5 million *cy pres* fund.

VII. The notice plan is inadequate because it does not include direct notice for class members for whom Google has contact information.

The principle of disclosure through notice has been referred to as the "first and perhaps most important principle for class action governance." Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 118 (2003).

While "direct notice to class members by mail, e-mail or other electronic individualized means [may be] impractical" for the entirety of the class, it is obligatory for those class members for whom the defendant has contact information. PAO at 12. And yet the notice plan here is publication only. *Id.*

Google would have contact information at least for all class members who have gmail accounts. According to AYTM Market Research, 74% of all consumers use Google as their primary search engine, and 60% of all consumers use Google's gmail as their primary email service, suggesting that, if an even higher percentage of class members (Google's search engine users) have gmail accounts, Google has contact information for approximately perhaps 80% of the class or more. *74 Percent of Consumers Use Google Search, 60 Percent Own Gmail Accounts*, Brafton (Apr. 9, 2012), http://www.brafton.com/news/74-percent-of-consumers-use-google-search-60-own-gmail-accounts (last visited July 25, 2014).

The *Mullane* constitutional imperative is that the settlement notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As *Mullane* held, "[w]here the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to

means less likely than the mails to apprise them of its pendency." *Id.* at 318.

Likewise, in *Eisen v. Carlisle and Jacquelin*, the Supreme Court held that "individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case....each class member who can be identified through reasonable effort must be notified." 417 U.S. 156, 176 (1974). There, the class numbered approximately 6 million, with only a minority, 2.25 million, being identifiable to the defendant. *Id.* at 166-67. Nevertheless, the large size of the class and the expense of the notice did not obviate the need for individual notice where the requisite information was in the possession of the defendant. *Id.* at 175-76.

Following these decisions, the Ninth Circuit holds that "[t]o comply with the spirit of [Rule 23 notice provisions], it is necessary that the notice be given in a form and manner that does not systematically leave an identifiable group without notice." *Mandujano*, 541 F.2d 832, 835. Class members for whom Google has contact information are just such an identifiable group. Even where only a limited percentage of the class can be reached through direct notice, direct notice is still mandatory for those class members. *Eisen, supra*; *Smith v. Levine Leichtman Capital*, 2012 U.S. Dist. LEXIS 163672, at *7-*8 (N.D. Cal. Nov. 15, 2012) (holding that "[n]otice to class...must be 'the best...practicable under the cir-

cumstances, including individual notice to all members who can be identified through reasonable effort,'" and that even where only 75-85% of the class could be reached through direct mail, direct mail was still required.) (quoting *Amchem*); *Fraser v. Asus Computer Int'l*, 2012 U.S. Dist. LEXIS 181315, at *10-*12 (N.D. Cal. Dec. 21, 2012) (concluding that postal notice is required even when only would reach 30% of class, publication is not sufficient).

The fact that class members will not recover any money for themselves under this settlement in no way negates their right to direct notice. *Hecht v. United Collection Bureau*, 691 F.3d 218, 225 (2d Cir. 2012) (repudiating argument that "the negligible amount of money to be awarded per person under the...settlement justified lesser notice.") "A cause of action for damages is a property right, and thus cannot be taken without due process." *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir. 1989). In other words, at the very least whenever any monetary claims are released as part of a class action, the stringent due process standards of *Mullane* and *Eisen* apply. In this case, where the class members would be giving up their individual causes of action as part of the settlement, individual notice is necessary wherever possible.

Once it is established that the full rigors of due process notice apply, there should be no dispute that the publication only notice here is unacceptable when the defendant's records house class members' contact

information. *See, e.g., Larson v. AT&T Mobility LLC*, 687 F.3d 109, 122-31 (3d Cir. 2012) (reversing notice plan that did not require defendants to search through their record for the purpose of providing individual notice). "Plaintiffs' pocketbooks are not a factor—the mandatory notice requirement may not be relaxed based on the high cost of providing notice." *In re Motor Fuel Temperature Sales Practices Litig.*, 279 F.R.D. 598 (D. Kan. 2012) (citing *Amchem* and *Eisen*).

For the settling parties, meager notice means less resistance, and even more importantly, less cost to settlement. But for class members, it means an abridgment of statutory and constitutional rights. This Court should consider the wisdom of the Western District of New York in a recent decision. "If plaintiffs and their attorneys are acting like they have something to hide from the absent class members, perhaps it's because they do." *Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 408 (W.D.N.Y. 2013).

VIII. The parties have artificially burdened the right of objection and opt-out by requiring four separate paper-mail submissions for a class of internet users; no positive inference should be drawn from a low number of formal objectors.

Almost any given class action settlement, no matter how much it betrays the interests of the class, will

produce only a small percentage of objectors. The predominating response will always be apathy because objectors without counsel must expend significant resources on an enterprise that will create little direct benefit for themselves. *See Vought v. Bank of Am.*, 901 F. Supp. 2d 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors). Another common response from non-lawyers will be the affirmative avoidance, whenever possible, of anything involving a courtroom.

Class counsel argues that this understandable tendency to ignore notices or free-ride on the work of other objectors is best understood as acquiescence or even affirmative support for the settlement. Motion for Final Approval (Dkt. 65) at 18-19. This is wrong. Silence is simply *not* consent. *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001). "Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007).

Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual. "[A] combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (internal citation omitted). Moreover, "where notice of the class action is, again as in this case, sent simultaneously with the notice of the settlement itself, the class members are presented with what looks like a *fait accompli*." *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co..*, 834 F.2d 677, 680-81 (7th Cir. 1987).

"[T]he absence or silence of class parties does not relieve the judge of his duty and, in fact, adds to his responsibility." *Amalgamated Meat Cutters & Butcher Workmen v. Safeway Stores, Inc.*, 52 F.R.D. 373, 375 (D. Kan. 1971). The Court should draw no inference in favor of the settlement from the number of objections, especially given the vociferousness of the objectors that do appear. *GM Trucks*, 55 F.3d at 812-13; *Vought*, 901 F. Supp. 2d. at 1093. "One good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement." *Richardson v. L'Oreal USA, Inc.*, __F. Supp. 2d__, 2013 WL 5941486, at *14 (D.D.C. Nov. 6, 2013) (sustaining Ms. Holyoak's objection).

Yet more conducive to apathetic inaction, the parties have elected a process of objecting and opting out which is "unnecessarily burdensome." *Newman v. Americredit Fin. Servs.*, No. 11-cv-3041 DMS (BLM), 2014 U.S. Dist. LEXIS 15728, at *17 (S.D. Cal. Feb. 3, 2014) ("The Court is not inclined to approve a settlement which makes it unnecessarily burdensome to submit a claim or opt out. The class members are required to submit claim forms and opt out requests by mail, although the settlement administrator is obligated to provide a phone number and a website. The only justification offered for the mailing requirement is that the claim forms require an affirmation. Plaintiff does not explain why an affirmation could not be provided through an online form or by phone with adequate identification of the class member.") (internal citations omitted); *Galloway v. Kan. City Landsmen*, No. 4:11-1020-CV-W-DGK, 2012 U.S. Dist. LEXIS 147148, at *16 (W.D. Mo. Oct. 12, 2012) (denying settlement in part based on parties' failure to allow class members to opt out via email alone), *later proceeding reported at* 2013 U.S. Dist. LEXIS 92650, at *10-*11 (W.D. Mo. Jul. 2, 2013) (noting that after the initial settlement rejection "[t]he parties have simplified the opt-out provision so that in order to opt-out, class members need only send a single email to defense counsel."). The requirement that objectors print and post multiple copies of their objection/exclusion is both expensive and outdated in 2014. *E.g.*, *Newman*, *supra*; *Smith*, 2012 U.S. Dist. LEXIS 163672, at *8-*9 ("[T]he parties have made the procedures for filing objections unduly burdensome. There is no reason to

require...the objectors to mail their objections to three different locations.").

Rather than requiring class members to snail-mail an objection to four recipients, other cases permit the relatively efficient (indeed, close to costless) method of transmitting objections and by a single electronic submission. *See e.g., In re Motor Fuel Temperature Sales Practices Litig.*, No 07-md-01840-KHV-JPO, Order (Dkt. No. 3019), at 2 (D. Kan. Nov. 10, 2011) ("If Costco plans to proceed with email notification, it must allow class members to opt out of the class and object to the settlement electronically"); *Boring v. Bed Bath & Beyond*, No. 12-cv-05259-JST (N.D. Cal. Nov. 21, 2013) ("The Court notes that the filing of objections with the Court constitutes service upon counsel for the parties, as the parties' counsel are registered to receive filings through the Court's Electronic Case Filing system."). Likewise, there is no valid reason why a class member in this settlement should have to download, print, fill out and mail an exclusion in this day and age. *See, e.g.*, http://ebayfeaturedplus classaction.com/#qf (allowing email opt out); http://www.copyrightclassaction.com/exclusion.php3(online opt out); http://www.fraleyfacebook settlement.com/faq#Q14 (same)

Where electronic modes of opting-out and objecting are available, the "vast majority" of participating class members will use those avenues. *Motor Fuel Temperature*, 2012 U.S. Dist. LEXIS 57981, at

*76 (D. Kan. Apr. 24, 2012); *id.* at *74 n.13 (nearly three times more people opted-out electronically than by mail); *Fraley v. Facebook, Inc.*, No. 11-cv-01726 RS (N.D. Cal. Jun. 7, 2013), Declaration of Jennifer M. Keough Regarding Settlement Administration (Dkt. 341) at ¶12 (6,884 of 6,946 opt-out requests (99.1%) were submitted electronically via the settlement website when that option was available). This is especially true of course, when, as here, the class consists entirely of internet users. *See* Declaration of Richard W. Simmons (Dkt. 65-4) ¶16 ("By definition, all of the interaction between Google and class members occurred on-line.")

At the very least it is improper for the parties to require objectors to mail their objections to **four** different locations. *See* Procedural Guidance for Class Action Settlements, *available at* http://cand.uscourts.gov/ClassActionSettlementGuidance ("The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filing.").

Imposing a costly, inefficient alternative over affordable, seamless electronic processes can only give rise to the inference that the parties wished to undermine the autonomous decisions of class members. It has been known for at least a half-decade that "the ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class

member participation." Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727, 766 n. 251 (2008); Leslie, *The Significance of Silence*, 59 FLA. L. REV. at 128-29. Indeed, notice was almost entirely distributed via the internet, yet absent class members' expressions of dissent cannot be made in the same medium. Class counsel is not licensed to consign objectors or opt-outs to second class status.

"One hallmark of a reasonable settlement agreement is that it makes participation as easy as possible, whether class members wish to make a claim, opt out, or object." *McClintic v. Lithia Motors*, No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *17 (W.D. Wash. Jan. 12, 2012) (critiquing comparable opt-out and objection process and ultimately rejecting settlement). Together, the hurdles imposed on exclusion and objection do not appropriately respect class members' Fed. R. Civ. P. 23 rights. Moreover, the court loses the benefit of valuable adversarial perspectives that objectors can bring to the evaluation of a settlement's fairness. Not only do the hurdles constitute a reason to reject the settlement in this case, they provide an added reason to discredit any argument that the lack of objectors signals the class members' approval of the settlement.

CONCLUSION

For the forgoing reasons, the settlement cannot be approved. It asks class members to surrender their

individual claims in exchange for a few million dollars being given to unrelated third parties, many of whom have prior relationships to the defendant or class counsel. The settlement does not afford effective notice to the class and makes objecting or opting out needlessly and artificially burdensome. The class itself is not certifiable, both because, if individual recoveries are genuinely impossible, then a class action is not superior to other methods of adjudication. If the Court decides to approve the settlement anyhow, it should drastically pare down the requested fee award.

Dated: August 8, 2014

Respectfully submitted,

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No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CLASS RESPONDENTS IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether approval of this class-action settlement providing the class with *cy pres* relief directly and substantially relating to the complained-of harm as "fair, reasonable, and adequate" was an abuse of the district court's discretion.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants in the court of appeals, are Theodore H. Frank and Melissa Ann Holyoak.

Respondents, who were appellees in the court of appeals, are Paloma Gaos, Anthony Italiano, and Gabrial Priyev, on behalf of themselves and the settlement-certified class (plaintiffs-appellees), and Google, Inc. (defendant-appellee).

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INTRODUCTION

The petition proclaims that a square circuit conflict and important policy issues require this Court's immediate attention. Neither contention is true. The reality is more mundane. This case simply presents a commonplace dispute about the fairness of an arm's-length settlement, one that was overseen by a respected, neutral mediator and extensively scrutinized by the courts below.

Petitioners contend that, in the context of class action settlements, the Ninth Circuit's affirmance breaks with other circuits regarding the *cy pres* allocation of settlement benefits. But petitioners do not challenge the settlement's size or amount, do not argue monetary injury, and do not contest the award of attorneys' fees. And they identify no circuit split concerning the legal standards at issue. At bottom, petitioners challenge only the district court's factual findings that: (i) distributing the roughly $5.3 million net settlement fund to a class consisting of approximately 129 million people was not feasible, and (ii) that the *cy pres* recipients' use of funds was tethered to the alleged injury and interests of the class. On these factual questions, there is no circuit split.

Every circuit has approved the use of *cy pres* where direct distribution to class members is not feasible. The cases cited by petitioners are nothing more than distinguishable, fact-bound applications of well-established circuit law, and are consistent with the law applied by the Ninth Circuit in this case.

To create the appearance of a circuit split, petitioners advance the straw-man argument that the standard in the Ninth Circuit is that "it is not considered 'feasible' to provide any compensation to class members when it would be infeasible to compensate *all of them*." Pet. 17. The lower courts, however, did not announce or apply any such standard. Rather, like other circuits in cases cited by petitioners, the lower courts in this case found that the record supported a finding that the settlement fund was non-distributable and noted that the relatively small amount of the settlement fund equated to just 4 cents per class member before taking into account administration and distribution costs.

The underlying questions here are inherently case specific, requiring this Court to upset factual findings concerning the feasibility of direct distribution, the relationship between the *cy pres* remedies and the harm alleged, and the class benefit of the *cy pres* relief. And there is no cause to do so, because each of these findings was demonstrably correct.

Petitioners have not identified any disagreement among courts concerning the factors that should be considered when determining whether a *cy pres* provision is fair, reasonable, and adequate. The lower courts' fact-bound application of uniform standards does not warrant this Court's review.

STATEMENT OF THE CASE

This petition arises from the settlement of a consolidated class action between respondents in this Court. Plaintiffs-Respondents alleged that Defendant-Respondent Google, Inc. ("Google") improperly transmitted user search queries to third parties in order to enhance advertising revenue and profitability. Plaintiffs brought claims for breach of contract and violations of the Stored Communications Act ("SCA"), 18 U.S.C. § 2702(a), as well as claims under various California statutes and common laws. Pet. App. 3.[1] Plaintiffs sought statutory damages under the SCA and damages based on the value of the information misappropriated by Google.

The parties made several attempts to resolve the matter without success. SER 1:61.[2] On January 28, 2013—while Google's third motion to dismiss the consolidated complaint was under submission—the parties mediated the case before Randall Wulff, an experienced and well-respected mediator of class-action disputes. Pet. App. 71. After a full day of arm's-length negotiations, Mr. Wulff made a "mediator's proposal" for settlement based upon his review of the facts and applicable law. SER 1:62. All parties accepted this proposal and used it to form the material terms of the instant settlement agreement

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[1] "Pet. App." refers to the appendix to the instant petition for a writ of certiorari.

[2] "SER" refers to Plaintiff-Respondents' Supplemental Excerpts of Record filed with the Ninth Circuit. The SER are available via PACER for the Ninth Circuit at ECF 27-1, 27-2, and 27-3 (Case No. 15-15858).

("Agreement"), which was further negotiated for nearly two months before being fully executed on March 16, 2013. Pet. App. 69-111.

As part of the Agreement, Google agreed to make a total cash payment of $8,500,000 into a settlement fund, to be used for payment of settlement notice and administration expenses, *cy pres* distributions, any court-approved attorney fee or cost award to class counsel, and any court-approved incentive awards to the named Plaintiff-Respondents and class representatives. *Id.* None of the settlement funds would revert to Google under any circumstances.

In addition, Google agreed—for the first time—to disclose to users the ways in which it treats search queries entered in Google.com, so that users can make informed choices about whether and how to use Google search. *Id.* at 109-111. Google's obligation is permanent. *Id.* at 82. This relief is flatly ignored by petitioners, who misrepresent the settlement as containing "no alteration of defendant's allegedly injurious conduct." Pet. 1.[3]

The parties originally discussed more than twenty potential *cy pres* recipients. SER 2:385. As a result of the negotiations, the parties agreed to seven potential recipients, one of which (the MacArthur Foundation) later withdrew from consideration. SER 3:531.

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[3] Petitioners either mischaracterize or misunderstand plaintiff-respondents' claims below. The practice challenged here was not the practice of forward referring headers itself, but rather the failure to obtain user consent (or misleading consumers to believe that defendant would not forward referrer headers) before doing so.

The Settlement was designed to ensure that the *cy pres* recipients, each experienced in addressing privacy issues, could decide how to best spend the funds without influence from the parties. Google had no say whatsoever as to what any recipient would or could do with *cy pres* funds; its role in the *cy pres* process ended once the Agreement was executed. SER 2:383-85; 387-93.

In order to be considered for an award, each of the proposed *cy pres* recipients was required to demonstrate that it: (1) was independent and free from conflict; (2) had exemplary service records promoting public awareness and education, or support research, development, and initiatives related to protecting privacy on the Internet, with an emphasis on consumer-facing efforts; (3) would reach and target Internet users of all demographics across the country; (4) was willing to provide detailed proposals to the court and the class; and (5) was capable of using the funds to educate the class about risks attendant with disclosing personal information to Internet service providers, inform policy makers about the challenges associated with internet privacy and possible solutions, develop tools allowing consumers to understand and control the flow of their personal information to third parties, or develop tools to prevent third parties from exploiting consumer data. SER 1:63 n.1.

Far from distributing the money to *cy pres* recipients for "unspecified uses," as petitioners contend (Pet. 2), each potential *cy pres* recipient was required to and did submit a detailed grant-like proposal detailing exactly how the money would be

put to use.[4] Pet. App. 48, n.1. These proposals were publicly disclosed on a settlement website, along with the percentage of the $8.5 million (minus attorneys' fees and costs, any potential incentive awards, and administration costs) that each *cy pres* recipient would receive upon settlement approval.

The district court carefully reviewed these proposals at both preliminary and final approval. At the district court's request on preliminary approval, Plaintiff-Respondents submitted a supplemental declaration that provided further information about the selection process for *cy pres* recipients and what the recipients would do with proceeds, along with a revised proposed order and opt-out forms. SER 3:531. Seven months after the hearing, on March 26, 2014, the district court issued an order granting preliminary approval. Pet. App. 34.

The district court held a final fairness hearing on August 29, 2014. *Id.* It stated that it had "carefully reviewed" the "detailed" *cy pres* proposals (Pet. App. 48) and held the motions under submission for more than seven months before issuing its orders granting the motion for final approval and for attorneys' fees, costs, and incentive awards on March 31, 2015. Pet. App. 6.[5] The district court found that plaintiffs had made a sufficient showing that the cost of distributing the settlement fund to the class members would be prohibitive. Specifically, the district court found that:

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[4] The proposals are available in the SER 2:257-381.

[5] Although petitioners include argument about "clear sailing" attorney fee agreements (Pet. 2), the Agreement did not contain any clear sailing agreement.

> The settlement fund, while sizeable, is 'non-distributable.' Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, review and then verify. Similarly, the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.

Pet. App. 47. *See also id.* at 9.

The district court further found that "the *cy pres* distribution accounts for the nature of this suit, meets the objectives of the SCA, and furthers the interests of class members . . . Having carefully reviewed the proposals submitted by counsel, the court is satisfied that the proposed *cy pres* distribution 'bears a substantial nexus to the interests of the class members,' as required by the Ninth Circuit." Pet. App. 48-49.

Objector-petitioners timely filed a notice of appeal that ultimately led to the Ninth Circuit's affirmation of the district court's decisions on August 22, 2017.

REASONS FOR DENYING THE PETITION

The petition seeks review of a case-specific decision that applies settled and uniform law to the unique facts of a class-action settlement. Petitioners, who have identified no circuit conflict, object to the

district court's factual findings that: (1) the settlement fund was non-distributable, and (2) the *cy pres* recipients provided sufficiently detailed, line-item disclosures of how the money will be used to remediate the harms identified in the complaint. This Court should deny certiorari.

I. There Is No Circuit Conflict on the Legal Standard for when a *Cy Pres* Provision Is Fair, Reasonable, and Adequate.

Petitioners incorrectly argue that the Third, Fifth, Seventh, and Eighth Circuits apply a categorical rule that limit *cy pres* remedies to cases where direct distributions are "impossible," while the Ninth Circuit applies a legal standard permitting *cy pres* remedies whenever distribution to *all* class members is infeasible. Pet. 16-17. Petitioners misstate these legal standards. The reality is that in common-fund cases with a *cy pres* component, all circuits apply nearly identical factors to approval of *cy pres* remedies. Petitioners twist the uniform circuit law governing the approval of settlement with a *cy pres* component in order to create the appearance of a circuit conflict.

The Ninth Circuit recognized in this case that "*cy pres*–only settlements are considered the exception, not the rule." Pet. App. 8 (citing *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011)). The legal standard applied by the Ninth Circuit here was that a settlement fund is "non-distributable" where "the proof of individual claims would be burdensome or distribution of damages costly." *Id.*

Likewise, other circuit courts have recognized that *cy pres* distributions are permissible where direct distributions are infeasible or not economically viable:

- **First Circuit**: *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) (recognizing that *cy pres* is permissible when "distribution of all funds to the class can be infeasible, for example, when class members cannot be identified, when the class changes constantly, or when class members' individual damages—although substantial in the aggregate—are too small to justify the expense of sending recovery to individuals").

- **Second Circuit**: *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) ("The Second Circuit has recognized that *cy pres* distributions may be appropriate in 'circumstances in which direct distribution to individual class members is not economically feasible . . . .') (quoting the American Law Institute's Principles of the Law of Aggregate Litigation § 3.08 (Draft) ("ALI Principles")).

- **Third Circuit**: *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 169–72 (3d Cir. 2013) (recognizing that *cy pres* distributions are appropriate where "amounts involved are too small to make individual distributions economically viable . . ." and "[i]t may also be economically or administratively infeasible to distribute funds to class

members if, for example, the cost of distributing individually to *all* class members exceeds the amount to be distributed") (emphasis added).

- **Fifth Circuit**: *Klier*, 658 F.3d at 475 (a *cy pres* distribution is permissible when it is not economically viable to make direct distributions to the class).

- **Seventh Circuit**: *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784, (7th Cir. 2004) (*cy pres* is intended to accommodate the "infeasibility of distributing the proceeds of the settlement."). *See also Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675-78 (7th Cir. 2013) (where direct distribution infeasible, a "foundation that receives $10,000 can use the money to do something to minimize violations of the Electronic Funds Transfer Act; as a practical matter, class members each given $3.57 cannot").

- **Eighth Circuit**: *Marshall v. Nat'l Football League*, 787 F.3d 502, 521 (8th Cir. 2015) (recognizing the Eighth Circuit's approval of *cy pres* distributions where distributions are not sufficiently large enough to make individual distributions economically viable).

- **Tenth Circuit**: *Tennille v. W. Union Co.*, 809 F.3d 555, 560 (10th Cir. 2015) (recognizing that "[t]he *cy pres* doctrine allows a court to distribute unclaimed or

> non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries") (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011).

Similarly, the American Law Institute's Principles of Law of Aggregate Litigation, cited by petitioners (Pet. 25), specifically approve the use of an all-*cy pres*-settlement in class actions, with no direct payment to class members, "when distribution of the funds directly to class members is not feasible and the third party's interests approximate those of the class members." ALI Principles § 3.07 cmt. A (2010); *see also* 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:17 (4th ed. 2012) ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach.").

The ALI standard for determining feasibility of direct distribution is nearly identical to that applied by the Ninth Circuit here. "If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members." ALI Principles § 3.07(a). *See also* comment (b) (stating that direct distributions to class members are not feasible "either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable.")

Petitioners' cases do not illustrate any conflict in the legal standard applied by the circuit courts. Rather, each of those cases applies the same legal standards to a different set of facts, which accounts for the differences in the ultimate outcomes of each of those cases.

The Seventh Circuit's opinion in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) neither conflicts with the Ninth Circuit's decision nor counsels (let alone compels) disapproval of the settlement under review here. On the contrary, the *Pearson* decision merely recognized, like all other circuits, that a "*cy pres* award is supposed to be limited to money that can't feasibly be awarded to the . . . class members." *Id.* at 784; *see Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (explaining that *cy pres* is permissible only when "'the proof of individual claims would be burdensome or the distribution of damages costly'") (quoting *Nachshin*, 663 F.3d at 1038). Moreover, the Seventh Circuit in *Pearson* did not hold that *cy pres* awards never benefit the class; it simply found that the specific award in that settlement did not. *Pearson*, 772 F.3d at 784.[6]

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[6] Petitioners also misconstrue the reasoning in *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir. 2004). Pet. 2, 18, 23. The "careful scrutiny" cited by the court there refers not to whether the settlement fund could be distributed to the class, but to the adequacy of the *size* of the settlement fund in the first instance—emphasizing "the district judge's duty in a class action settlement situation to estimate the litigation value of the claims of the class and determine whether the settlement is a reasonable approximation of that value." *Id.* at 786. Here, petitioners do not contest the size of the settlement fund. Likewise, *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997), is inapposite. Pet. 18. In *Mace*, the district court denied

Nor is there any inconsistency between the Ninth Circuit Court's precedents and the Eighth Circuit's decision in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015). The Eighth Circuit noted that, like in every other circuit, a finding that a fund is non-distributable must be based on whether "amounts involved are too small to make individual distributions economically viable." *Id.* at 1065. On the facts before it, the Eighth Circuit found that the district court improperly ordered a *cy pres* distribution of residual funds because a second direct distribution of $2 million could be made to class members who had already received and cashed settlement checks, and that the further direct distribution would cost only $27,000. *Id.* at 1064.

The Eighth Circuit also expressly "agree[d] with the Ninth Circuit" that *cy pres* awards are permissible so long as they provide an "indirect class benefit" by going to "uses consistent with the nature of the underlying action." *Id.* at 1066-67 (citing *Nachshin*, 663 F.3d at 1040; other citations omitted). The court rejected the proposed *cy pres* award in *BankAmerica* because the single recipient—a Missouri legal-services organization—had an insufficient nexus to

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class certification on the grounds that the FDCPA claims brought by plaintiffs could not be certified on state-wide basis (which would have resulting in a projected $12 per class member), but instead required a nation-wide class (which would have resulted in a projected recovery of 20 cents per class member). The Seventh Circuit reversed, finding that a state-wide class (with its projected $12 per class member recovery) could be certified. The Seventh Circuit thus concluded that, unlike here, the projected $12 recovery "though small, would not be either difficult to assign or difficult to distribute." *Id.* at 345.

the securities fraud claims asserted by the nationwide class. *See In re BankAmerica*, 775 F.3d at 1067. No similar objections have been or could be raised against the targeted projects proposed by the *cy pres* recipients here, whose activities have nationwide scope and effects.

The Fifth Circuit's decision in *Klier* involved the unusual situation in which a district court *sua sponte* ordered *cy pres* distribution of unclaimed settlement funds to the detriment of one of the subclasses. *See Klier*, 658 F.3d at 476-77. In contrast to the settlement here, the settlement agreement in that case explicitly directed that any leftover funds in a subclass fund "'shall be distributed pro rata to all Claimants in that subclass.'" *Id.* at 476. That is, *Klier* involved a district court's attempt to override a settlement rather than approve or enforce it; "the district court's decision to distribute the unused funds via *cy pres* [found] no support in the text of the settlement documents." *Id.* at 476-77. In rejecting that reallocation of funds contrary to the agreement of the parties, the Fifth Circuit recognized the limitation of its holding and made clear that its decision did not "implicate the line of authority giving careful scrutiny to class settlement agreements in which the parties agree to a *cy pres* distribution." *Id.* at 478 n.29 (citing, inter alia, *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1304, 1307 (9th Cir. 1990)). It is that "line of authority" that governs review of the settlement at issue here; *Klier* is irrelevant.[7]

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[7] Notably, the *Klier* court found that it was not feasible to distribute $830,000 in leftover funds to 12,657 class members—or $65 per class member. *Id.* at 472-76.

The decisions below also do not conflict with the Third Circuit's *Baby Products* decision, which cited the Ninth Circuit's decision in *Lane* with approval in "join[ing] other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component." *Baby Prods.*, 708 F.3d at 172. *Baby Products* further explained that, although "*cy pres* distributions are most appropriate where further individual distributions [to class members] are economically infeasible," it declined to "hold that *cy pres* distributions are only appropriate in this context." *Id.* at 173. Instead, *cy pres* relief is permissible when it is "fair, reasonable, and adequate" under "the same framework developed for assessing other aspects of class action settlements." *Id.* at 174. That is, the Third Circuit rejected the inflexible rule petitioners press here, in a way that raises no questions about the order under review here.[8]

Petitioners' reliance on the Second Circuit's decision in *Masters* is also misplaced. In that case, the feasibility of direct distribution was not at issue. Rather, the district court ordered a *cy pres* distribution rather than further distributions to the class because it believed that the class had already been fully compensated, and further direct distributions would have resulted in an impermissible windfall. The Second Circuit expressed

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[8] In *Baby Prods.*, the court vacated certification of the antitrust settlement class because the district court "was apparently unaware of the amount of the fund that would be distributed to *cy pres* beneficiaries rather than being distributed directly to the class." 708 F.3d at 170.

concern that the district court may not have appreciated the "breadth of its discretion" under the specific settlement agreement, which empowered the court to "allocate [additional] funds to the members of the class as treble damages" rather than to *cy pres*. *Masters*, 473 F.3d at 435.

Each of the cases cited by petitioners applies the same general standard for when the use of *cy pres* is appropriate. These cases are simply fact-bound applications of settled circuit law, evaluating class-action settlements on their relative merits in the context of the particular litigation at hand. Each case turned on the court's fact-specific determination of whether, under the circumstances presented, resort to *cy pres* was fair, reasonable, and adequate. At bottom, these cases provide no support for petitioners' claim that there is any circuit split on the question of when a *cy pres* provision is fair, reasonable, and adequate. Petitioners have attempted to create a circuit split where none exists.[9]

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[9] The *amicus curiae* briefs present the additional argument, not contained in the petition or advanced below, that *cy pres* awards "implicate[] . . . First Amendment rights of class members because such settlement compel class members to subsidize speech." Brief of Center for Individual Rights, p. 1. Because this argument is not raised in the petition, and was not advanced in the court of appeals, this Court should not consider it on the petition for writ of certiorari. SUP CT. R. 14(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 114, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

There is no basis to find an abuse of discretion in the lower courts' findings that the settlement fund here was non-distributable. Petitioners do not present any basis to undermine the district court's conclusion that, in light of the enormous size of the class and the comparatively small value of the settlement fund, that fund is "nondistributable" directly to class members. Even if there were such a basis, this Court does not engage in error correction. SUP CT. R. 10.

Instead, petitioners contend that this Court should hold for the first time that, as a matter of law, a settlement must offer a mechanism to provide a windfall to a minuscule portion of class members—chosen either by lottery or by a claims process that petitioners themselves acknowledge is likely to have a very small claims rate—rather than providing an indirect benefit to the class as a whole through the *cy pres* mechanism.[10] Yet, petitioners do not explain why the interests of the class as a whole are better served by giving a windfall to a very few and nothing to the rest. Certainly nothing in any circuit precedent supports—much less requires—a rigid requirement favoring small payments to a tiny fraction of class

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[10] Petitioners present no evidence of any circuit conflict concerning the Ninth Circuit's statement below that its "review of the district court's settlement approval is not predicated simply on whether there may be 'possible' alternatives," or "the fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them." Pet. 14. Likewise, no circuit has ever held that if "any distribution to class members was infeasible, then that should call into question class certification, because it would not be, as Rule 23(b)(3) requires, superior to other available methods for fairly and efficiently adjudicating the controversy." Pet. 11.

members over payments to fund research, analysis, education, and advocacy on Internet privacy issues that, as the lower courts found here, will benefit a much greater proportion (and quite possibly all) of the class.[11]

II. This Case Does Not Provide a Proper Vehicle to Consider the Inclusion of *Cy Pres* Provisions in Settlement Agreements.

A. The Petition Presents a Fact-Bound Question of No Significance Beyond the Settlement of this Litigation.

This Court does not engage in correcting misapplication of law by lower courts, or in error correction, much less wade into the morass of the terms of a settlement agreement. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (declining to review concurrent findings of fact by two courts below absent "a very obvious and exceptional showing of error"); SUP. CT. R. 10.

This case presents nothing more than a dispute about the relative merits of the benefits of this class-action settlement. The settlement benefits were the subject of thorough factual findings by two courts below concerning its value to the class. Reversing approval of the Settlement would necessarily require

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[11] Petitioners do not mount a serious challenge to the lower courts' findings that the detailed *cy pres* proposals demonstrate a proper nexus between the *cy pres* recipient(s) and the class, as is uniformly required by every circuit.

this Court to substitute its own judgment about the facts for that of the courts below.

Petitioners' legal arguments are wholly predicated on facts directly contrary to those found by the courts below. Thus, prior to even reaching the questions petitioners ask the Court to review, this Court would have to comb the record and reverse two lower courts' (correct) findings of fact, including the factual findings that the settlement fund was non-distributable[12] and that the *cy pres* recipients had a substantial nexus to the interests of the class members.[13]

B. The Settlement Does Not Allow the Court to Address the Concerns Identified by Chief Justice Roberts.

In *Marek v. Lane*, 134 S. Ct. 8 (2013), Chief Justice Roberts agreed with the Court's decision to deny the petition for certiorari under facts and circumstances somewhat similar to the instant matter. Chief Justice Roberts also identified several concerns the Court may want to address when the right vehicle comes before it. This case is not that vehicle. Just as in *Marek*, "[petitioners'] challenge is focused on the particular features of the specific *cy pres* settlement at issue[,]" and thus does "not afford[] the Court an

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[12] The Ninth Circuit panel was unanimous in finding that the settlement fund was non-distributable. Pet. App. 8-11.

[13] Moreover, to the extent petitioners now contend that the requisite nexus is lacking, that argument is waived because it was not raised below. Pet. App. 12 ("Objectors do not dispute that the nexus requirement is satisfied here.")

opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation[.]" *Id.* at 9.

The first concern raised by Chief Justice Roberts is "when, if ever, such relief should be considered[.]" *Id.* If *Marek* was not the right case for the Court to consider this concern, then the instant matter is surely also not the right case. In *Marek*, the net settlement fund totaled $6.5 million and there were 3.6 million class members—approximately $1.81 per person. *See* Pet. App. 8-9. In the instant case, the net settlement fund totals $5.3 million and there are at least 129 million class members—approximately $0.04 per person before taking administration and distribution costs into account. *Id.* While no objector contested the size of the Settlement fund, the instant Settlement was even less feasibly distributable than the fund in *Marek*, making this Settlement less attractive as a vehicle to consider when *cy pres* is appropriate.

The second concern is "how to assess its fairness as a general matter[.]" *Marek*, 134 S. Ct. at 9. For the same reasons described above, this case does not present the opportunity Chief Justice Roberts seeks to evaluate *cy pres* relief. Here, the Ninth Circuit followed its own undisturbed precedent—which, as argued above, is consistent with precedent in other circuits—in affirming the district court's finding that the Settlement is "fair, reasonable, and adequate."

Third, this case does not concern "whether new entities may be established as part of such relief." *Id.* None of the *cy pres* recipients in the Settlement is a

new entity. In fact, the Ninth Circuit affirmed the district court's findings that the recipients are "established," "independent" organizations. *Id.*

Fourth, petitioners do not seriously object to the method by which the recipients were selected, so Chief Justice Roberts's concern regarding "how existing entities should be selected" is not at issue in this matter. *Id.*

Fifth, for the same reasons as described immediately above, this case does not present an optimal backdrop to address Chief Justice Roberts's concern regarding "what the respective roles of the judge and parties are in shaping a *cy pres* remedy[.]" *Id.*

Sixth and finally, Ninth Circuit precedent requires "*cy pres* awards to meet a 'nexus' requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members." Pet. App. 12 (quoting *Naschin*, 663 F.3d at 1039). The lower courts, on a detailed and voluminous factual record, found that the *cy pres* recipients were committed to using the funds in a manner closely corresponding to the interests of the class.

The Ninth Circuit noted that "the *cy pres* recipients were six organizations that have pledged to use the settlement funds to promote the protection of Internet privacy." Pet. App. 7. The Ninth Circuit went on to state that:

> "[t]he district court found that the six *cy pres* recipients are 'established

> organizations,' that they were selected because they are 'independent,' have a nationwide reach and 'a record of promoting privacy protection on the Internet,' and 'are capable of using the funds to educate the class about online privacy risks.'"

Pet. App. 12.

"Accordingly, the district court appropriately found that the *cy pres* distribution addressed the objectives of the Stored Communications Act and furthered the interests of the class members." Pet. App. 12-13.

Moreover, contrary to the assertions of petitioners, the funds were not to be used by the recipients for "unspecified" purposes or uses. Pet. 1. Rather, each *cy pres* recipient was required to submit proposals detailing how the *cy pres* funds would be used. *See, e.g.*, Pet. App. 47-48. The grant-like proposals were designed to address the alleged harm in this lawsuit and included detailed budgeting associated with each project. The funding covers projects aimed at:

- improving user privacy online, by: (1) furthering researchers' understanding of user privacy behaviors and online threats to users' privacy; (2) improving user-facing interfaces and technologies to increase users' understanding and control of their privacy; and (3) developing computational mechanisms to help ensure the systems and organizations adhere to privacy regulations

or policies (Carnegie Mellon) (SER 1:56; 2:284-97);

- a research project into third-party data flows to uncover consumer harms stemming from search queries typed into online search boxes; and (2) a national consumer education project focused on bringing online privacy education to all consumers, with a particular focus on vulnerable consumers who often miss online privacy educational campaigns due to financial, linguistic, education, medical, or other barriers (World Privacy Forum) (SER 1:56-57; 2:348-81);

- privacy preparedness, which will combine academic research, public education, and outreach to safeguard individuals' online privacy and to help users implement privacy protections when they interact with the Internet (Chicago-Kent College of Law Center for Information, Society, and Policy) (SER 1:57; 2:298-314);

- original research to advance best practices for mobile phone privacy; (2) controlled trials to improve existing Privacy Enhancing Technologies ("PETs") and develop new ones; (3) analysis of proposed privacy legislation; and (4) an educational speaker and public outreach series to educate, inform, and train users about online privacy risks and available tools to mitigate those risks (Stanford Law School

Center for Internet and Society) (SER 1:57; 2:315-47);

- develop concrete proposals for safeguarding Internet privacy more effectively via legal and policy reform, company action, technological innovation, targeted education, and user outreach (Berkman Center for Internet & Society at Harvard University) (SER 1:58; 2:263-83);

- develop a national initiative to educate and inform 1,000,000 individuals over a three-year period on how to protect their online privacy and proactively avoid the harmful impact of Internet fraud and identity theft (AARP Foundation) (SER 1:58; 2:257-62).

Petitioners contend that approval of the *cy pres* recipients was in error, but never once address these detailed proposals. The reason for this is clear: the recipients' proposals all require the funds to be spent on Internet privacy initiatives closely related to the harms alleged by the class. Thus, the concern regarding "how closely the goals of any enlisted organization must correspond to the interests of the class" simply cannot be addressed in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 9, 2018

No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT GOOGLE LLC

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QUESTION PRESENTED

Whether this Court should review the determination of the two courts below that it was infeasible to distribute $5.3 million in settlement funds to 129 million class members who had been unable to plead any concrete injury resulting from the challenged feature of Internet searches, so that the district court acted within its discretion in approving the settlement's *cy pres* awards to six organizations with established Internet privacy programs.

RULE 29.6 STATEMENT

Respondent Google LLC is a wholly owned subsidiary of XXVI Holdings Inc., which is a wholly owned subsidiary of Alphabet Inc., a publicly traded company. No publicly held corporation owns more than 10% of Alphabet Inc.'s stock.

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BRIEF IN OPPOSITION OF RESPONDENT GOOGLE LLC

Petitioners (and professional objectors) Ted Frank and Melissa Holyoak seek this Court's review based on a phony circuit split along with broad policy objections to aspects of *cy pres* settlements not present here.

Petitioners describe a conflict that does not exist. The courts of appeals agree on the legal standards governing review of *cy pres* settlements. They agree that, as the court below acknowledged, *cy pres* settlements are "the exception, not the rule." Pet. App. 8. And they agree on the narrow circumstance that justifies the exception: when direct distribution to class members is infeasible.

At bottom, then, the petition presents a case-specific disagreement with the findings below that distribution was infeasible in this case, with its class estimated at 129 million members. Although this Court "do[es] not overturn a finding of fact accepted by two lower courts," *Texas Dep't of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2544 (2015), petitioners' asserted conflict rests on their insistence that it is feasible to distribute a little over $5 million—an amount that petitioners concede is adequate to resolve the low-value claims in this case—to this enormous class. And while they ask this Court to depart from its established practice in order to overturn both lower courts' finding of infeasibility in this case, petitioners cannot offer even a speculative example of a case where distribution of a settlement fund would be infeasible under the legal standard uniformly prevailing in the courts of appeals.

Petitioners' restrictive approach would unduly constrain district courts and settling parties while providing no corresponding benefit to absent class members. The exacting standards applied by the courts of appeals to *cy pres* relief already protect against the abuses petitioners inveigh against, while appropriately permitting district courts to evaluate case by case whether generalized relief inuring to the entire class serves class interests more effectively than token payments to a tiny self-selected minority of class members.

Here, the *cy pres* payments will benefit the class as a whole by funding closely targeted projects that are directly connected to the Internet privacy issues raised by plaintiffs' claims. And because the recipient institutions are of the highest quality and specialize in Internet consumer issues, petitioners' quibbles with the district court's exercise of discretion in approving the recipients do not warrant this Court's attention. No more does petitioners' preference to provide nominal sums to a vanishingly small percentage of class members who were never harmed.

The circumstances of this case make it an especially inappropriate vehicle for changing the law to impose petitioners' vision. This case is unusually well-suited to a *cy pres* remedy because no class member appears to have been actually harmed by the challenged practices—as two district judges concluded in dismissing most of plaintiffs' claims. The case would have gone forward, if at all, based on the remote (and now-obsolete) prospect of obtaining a statutory damages award despite the absence of concrete injury. When this case settled, Ninth Circuit law permitted uninjured plaintiffs to pursue statutory damages, but this Court's decision in *Spokeo, Inc.*

v. *Robins*, 136 S. Ct. 1540 (2016), has since eliminated that risk. It is telling that neither petitioners, nor the usual suspects joining them as *amici*, engage with the obscure and hypertechnical claims, and lack of injury, in this case.[1]

As the standards of the courts of appeals reflect, parties should have the flexibility to compromise cases like this one that limp past the pleadings stage yet still pose a risk of huge liability based on uncertain substantive law at the time of settlement. The effectively black-and-white rule that petitioners ask this Court to consider would make these cases impossible to settle when the relatively low settlement value of the claims would yield a *de minimis* payment per class member. Instead, petitioners would impose on the parties and the judicial system the burden of continued litigation and continued risk. A perfect and friction-free system of class certification, liability determination, and award distribution might obviate the need for *cy pres* settlements, but the uncertainty of our own, entirely human legal system does not permit that rigid result.

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[1] For example, *amicus* Cato Institute submitted nearly identical arguments in *Frank* v. *Poertner*, No. 15-765, cert. denied 136 S. Ct. 1453 (2016). The same *amicus* joined a coalition of state attorneys general led by the Arizona Attorney General in support of the unsuccessful petition in *Blackman* v. *Gascho*, No. 16-364, cert. denied 137 S. Ct. 1065 (2017). Although they received notice of the settlement as the Class Action Fairness Act requires, none of the state attorneys' general now supporting the petition objected to the fairness of the settlement in either court below. See Pet. App. 51.

STATEMENT

Petitioners and their *amici* have almost nothing to say about *this* case—including the multiple dismissals of plaintiffs' complaints. Petitioners' two paragraphs (Pet. 8-9) omit the context of the settlement. Yet that context illuminates many of the deficiencies in the petition.[2]

A. Referrer headers and web history.

Respondent Google LLC operates a free Internet search engine, with over one billion user-generated search requests every day. SER 747, 749-750.[3] When users submit search terms on Google Search, within a fraction of a second Google returns to the user a list of relevant websites in a new web page, "the search results page." SER 749-750, 761-762.

To generate each search results page, Google's servers first generate a unique Uniform Resource Locator, or URL, that includes information about the user's search query used to generate that page. SER 761-762. Users can then click one of the links provided on the search results page, which will redirect the user to the desired site. SER 749-750.

In the normal course of operation, the user's web browser (*e.g.*, Internet Explorer, Firefox, Safari) transmits to that website what is known as "referrer header" information. See SER 760-762. The referrer header communicates the URL of the web page that

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[2] In light of the posture of the case at settlement, these facts are drawn largely from the allegations in plaintiffs' pleadings. Google does not admit the accuracy of these allegations.

[3] "ER __" refers to petitioners' Excerpts of Record in the court of appeals, and "SER __" refers to respondents' Supplemental Excerpts of Record.

the user last visited and by doing so informs the requested website how the user got to the page. SER 760-761; see also generally *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how referrer headers work). So if a user clicks on a website from Google's search results page, the referrer header generated by the user's web browser will communicate the URL of the search results page, which, according to plaintiffs, includes the user's search terms. SER 760-761.

Plaintiffs have also raised allegations about Google's "Web History" service, which Google provides for its authenticated account holders. SER 712, 717-718. The "Web History" service tracks and stores account holders' web browsing activity on Google servers. *Ibid.* This service allows account holders to search the full content of pages they have viewed in the past, and also allows those who so desire to personalize their web browsing experience by creating recommendations tailored to their individual user preferences. *Ibid.* Unlike referrer headers, which are transmitted to third-party website operators as a standard and default web browser function, only the account holder has access to his or her Web History. *Ibid.*

B. The *Gaos* and *Priyev* actions.

The plaintiffs alleged that Google violated their privacy rights when referrer headers were disclosed to the owners of third-party websites on which a user clicked from a Google search results page. The purported privacy violation resulted from the alleged inclusion of search terms in the URL of the search results page.

1. In 2010, respondent Paloma Gaos filed a putative class action complaint against Google in the Northern District of California. See 5:10-cv-04809-EJD (N.D. Cal.), Dkt. No. 1. Gaos asserted violations of the Stored Communications Act of 1986 ("SCA"), 18 U.S.C. §§ 2701 *et seq.*)), as well as several California state-law claims. *Ibid.* Judge Ware granted Google's motion to dismiss the initial complaint because Gaos had "failed to plead facts sufficient to establish Article III standing" for any of her claims. SER 799-800.

Gaos's First Amended Complaint raised largely the same claims. Google again moved to dismiss, and Judge Davila (to whom the case had been reassigned) dismissed all but Gaos's SCA claim, which alleged only that the content of search queries, not linked back to Gaos in any way, was disclosed in referrer headers.

Judge Davila reasoned, much as Judge Ware had, that "Gaos does not identify what injury resulted" from the alleged dissemination of search queries in referrer headers, and thus had failed to "allege[] injury sufficient for Article III standing with respect to her non-statutory causes of action." SER 791-792.

Judge Davila concluded that Gaos nonetheless had standing to pursue her SCA claim based on then-current Ninth Circuit law holding that asserting the bare violation of a statute was sufficient to establish Article III standing "without additional injury." SER 792-793 (citing *Edwards* v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed, 132 S. Ct. 2536 (2012)). Judge Davila further cautioned that "although Gaos ha[d] alleged sufficient injury for standing based on a violation of the SCA" in light of

Edwards, "this finding does not mean Gaos has properly stated a claim for relief under the SCA." SER 794.

Gaos, joined by additional plaintiff Anthony Italiano, filed a second amended complaint (SER 746-788) in an attempt to cure the defects identified by Judge Davila. That complaint speculated that a website operator or other unidentified third party could identify someone based on their search terms because Google's users, including plaintiffs, sometimes conduct "vanity searches"—*i.e.*, searches for their own name. SER 776. They further speculated that, although referrer headers do not specify a user's name, a hypothetical "adversary" could use the "Science of Reidentification" to "combine anonymized data" from Referrer Headers "with outside information to pry out obscured identities." SER 770-773.

Google again moved to dismiss, arguing that the plaintiffs still had failed to allege facts supporting Article III standing for any of their claims or for relief under them, and that the SCA preempted plaintiffs' state-law claims (which were in Italiano's name only). That motion had been fully briefed at the time of settlement, but was never decided.

2. In February 2012, respondent Gabriel Priyev filed a similar action in the Northern District of Illinois. See 12-CV-01467 (N.D. Ill.), Dkt. No. 1 (Feb. 29, 2012). Google moved to dismiss that complaint as well, contending, as in *Gaos*, that Priyev lacked Article III standing and failed to state a claim on which relief could be granted.

Rather than defend the original complaint, Priyev twice amended it. In the second amended complaint, Priyev, again like the plaintiffs in *Gaos*,

alleged that Google violated the SCA and asserted additional state-law claims. SER 708-745. He similarly speculated that unidentified third parties might be able to identify him from referrer headers because he "regularly engaged in vanity searches." SER 723. Priyev further alleged that, by including search terms in referrer headers, Google had disclosed account holders' Web Histories to third parties one search at a time, allegedly in violation of its privacy policies. SER 712, 717-718.

Before Google responded to the second amended complaint, the *Priyev* action was transferred to the Northern District of California and consolidated with *Gaos*. All of the plaintiffs then filed a consolidated class action complaint (SER 660-707), seeking to represent "[a]ll persons in the United States who submitted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification." SER 697 (emphasis omitted).

C. Settlement and approval proceedings.

After an all-day mediation session, the parties entered into a settlement agreement and release in March 2013. Pet. App. 69-111. The settlement class tracks the class definition in the consolidated complaint and is estimated to include approximately 129 million members. Pet. App. 5. Google agreed to pay $8.5 million, which was to be put into a settlement fund. After covering notice and administration costs, $5,000 incentive awards for each of the three named plaintiffs, and whatever amount of reasonable attorneys' fees and costs the district court awarded, the remainder (approximately $5.3 million) would be distributed proportionally among six *cy pres* recipients to fund projects specifically devoted to Internet privacy issues: Carnegie-Mellon University; World Pri-

vacy Forum; Chicago Kent College of Law Center for Information, Society, and Policy; Stanford Law School Center for Internet and Society; Berkman Center for Internet & Society at Harvard University; and AARP Foundation. Pet. App. 5.

Plaintiffs linked to each of the recipients' detailed proposals for the use of the *cy pres* distribution on the website created for class notice. SER 3, 56-58; see also SER 257-381. (A seventh proposed recipient, the MacArthur Foundation, withdrew from consideration during the settlement process. ER 142 n.3.) Upon reviewing the proposals, the district court compared them "to an application for a grant." ER 44.

Google also agreed to make additional disclosures on its website to better inform its users how referrer headers operate and to direct them to Google's privacy policies for more information on how Google handles search queries generally. Pet. App. 40, 82.

The district court granted preliminary approval of the settlement. ER 135-148. The court observed that "[t]his case is somewhat unique in that the size and nature of the class renders it nearly impossible to determine exactly who may qualify as a class member." ER 146. "In fact," it noted, "due to the popularity of Defendant's search engine and its rather ubiquitous position in American culture, this class potentially covers all internet users in the United States." *Ibid.* Under this circumstance, the court found, "the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class." ER 145.

Recognizing that direct notice to the settlement class was not feasible, the district court approved the parties' proposed notice campaign—which petitioners did not challenge below. The notice campaign consisted of (1) Internet-based notice using banner ads in both English and Spanish; (2) articles in the press; (3) a website dedicated solely to the settlement, with both English and Spanish versions; and (4) a toll-free telephone number where class members can obtain additional information and request a written class notice. Pet. App. 6, 39; see also SER 146-161 (declaration of the claims administrator explaining the design of the notice campaign and its implementation).

Despite this extensive campaign, only 13 of the 129 million putative class members—about one in ten million, or 0.00001%—opted out of the class, and only five class members (including the two petitioners) entered written objections. ER 17, 98-134.

After an extensive fairness hearing (ER 29-97), the district court granted final approval of the settlement (Pet. App. 31-61), holding that petitioners and the other objectors had not met their burden of demonstrating that the settlement is not fair, adequate, and reasonable. In particular, the court rejected, as inconsistent with Ninth Circuit precedent, petitioners' argument that a *cy pres*-only settlement class should never be certified. Pet. App. 37-38 (citing *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012); *Nachshin* v. *AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011)). The district court additionally noted that petitioners and the other objectors failed to overcome class counsel's showing that the "cost of distributing [the] settlement fund to the class members would be prohibitive" in light of the size of the

class and the administrative expense of direct distribution. Pet. App. 58.

The district court also recognized "the very real risk of never obtaining or losing class status in the absence of settlement." Pet. App. 45. And the court characterized the settlement amount as more than adequate in light of the "significant and potentially case-ending weakness in the SCA claim brought about by the Ninth Circuit's decision in *Zynga Privacy Litigation*." Pet. App. 58-59.

Finally, the court rejected the objectors' contention that the *cy pres* recipients were inappropriate due to alleged conflicts of interest. Having reviewed the recipients' proposals (Pet. App. 48; see also ER 44), the court observed that the recipients "have a record of promoting privacy protection on the Internet, reach and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online privacy risks." Pet. App. 47-48.

D. The Ninth Circuit affirms.

The Ninth Circuit affirmed. Pet. App. 1-23. The court first rejected petitioners' argument that *cy pres*-only settlements are categorically improper. It recognized that "*cy pres*-only settlements are considered the exception, not the rule." Pet. App. 8. That exception is appropriate "where the settlement fund is 'non-distributable' because 'the proof of individual claims would be burdensome or distribution of damages costly.'" *Ibid.* (quoting *Lane*, 696 F.3d at 819).

The Ninth Circuit upheld the district court's finding that the settlement fund was not distributable. The court observed that the fund amount to be

distributed ($5.3 million) to the class of 129 million individuals left a "paltry" sum of four cents per class member. Pet. App. 9. In addition, the court approved the district court's finding that trying to compensate even a nontrivial percentage of class members would consume the settlement fund: "'sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.'" *Ibid.* (quoting the district court).

The court of appeals further rejected petitioners' argument that the only permissible form of settlement is one that instead compensates a "miniscule portion of the class"—either through a "'random lottery distribution'" or by offering "'$5 or $10 per claimant' on the assumption that few class members will make claims." Pet. App. 9. The court recognized that this would amount to a categorical ban on *cy pres*-only settlements that would be inconsistent with its prior precedents. Pet. App. 10. And it noted that, although an alternative settlement of that kind may be technically "possible," it was not required so long as the actual settlement is fair, reasonable, and adequate under Rule 23(e) and the existing standards courts have adopted to scrutinize class-action settlements. Pet. App. 9-10.

The court then turned to the selection of the six *cy pres* recipients. It chastised petitioners for their "unfair and untrue" assertion that the district court "rubber-stamped the settlement." Pet. App. 12. Instead, the court of appeals held, the district court correctly found that the six *cy pres* recipients satisfy the "'nexus' requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members." Pet. App. 12-13. The court noted the rigorous "selection process employed to vet

the *cy pres* recipients in this litigation," and the district court's "careful review" of the "detailed proposals" submitted by the recipients. Pet. App. 16. And because the recipients met the exacting standards mandated by the court's precedents, Google's previous donations to some of the recipients and the fact that some of the recipients "are organizations housed at class counsel's *alma maters*" were not the "absolute disqualifier[s]" urged by petitioners. Pet. App. 12-16.

In other words, as the court put it in terms of petitioners' own proposed rule, petitioners had failed to "'raise substantial questions about whether the selection of the recipient[s] was made on the merits.'" Pet. App. 14 (quoting Principles of the Law of Aggregate Litigation § 3.07 cmt. b (Am. Law Inst. 2010)). The court observed, for instance, that "some of the recipient organizations have challenged Google's Internet privacy policies in the past," and that "[e]ach recipient's *cy pres* proposal identified the scope of Google's previous contributions to that organization, and * * * explained how the *cy pres* funds were distinct from Google's general donations." Pet. App. 16-17 & n.7. Likewise, the court concluded that because "[t]he recipients are well-recognized centers focused on the Internet and data privacy," petitioners' argument that the settlement should be invalidated based on the mere fact that class counsel have degrees from some of the institutions that house the recipients "can't be entertained with a straight face." Pet. App. 19.

Judge Wallace concurred in part and dissented in part. Pet. App. 23-30. He "agree[d]" with the majority "that a *cy pres*-only settlement was appropriate in this case," Pet. App. 23, and "express[ed] no opinion

on the definitive fairness" of the settlement, Pet. App. 30. Instead, he would have remanded to the district court for further fact-finding about the selection of the specific *cy pres* recipients. Pet. App. 24, 30.

The Ninth Circuit denied rehearing. Pet. App. 67.

REASONS FOR DENYING THE PETITION

The petition seeks review of a case-specific exercise of discretion applying settled legal standards to unique facts and circumstances. Further review is unwarranted for several reasons.

First, there is no circuit conflict. All circuits agree with the Ninth Circuit that a *cy pres*-only settlement is appropriate in the rare circumstance where direct distribution to class members is infeasible, and all insist on a close nexus between the *cy pres* remedy and the interests of settling class members. Both the district court and the Ninth Circuit followed these established standards in carefully scrutinizing the settlement here.

Second, petitioners and their *amici* are also flat wrong that *cy pres*-only settlements are on the rise; their own source confirms that, since Chief Justice Roberts' statement respecting the denial of certiorari in *Marek* v. *Lane*, 134 S. Ct. 8 (2013), the number of *cy pres*-only settlements has *dropped* dramatically. That trend is all the more likely to continue in light of this Court's decision in *Spokeo*, which requires courts to weed out at the pleadings stage the kind of no-injury claims most likely to lead to proposed *cy pres*-only settlements.

Third, this case is a poor vehicle for consideration of the new and rigid limits on *cy pres* settle-

ments urged by petitioners. This case is especially well-suited to a *cy pres* remedy because class members have not alleged any actual harm from the challenged practice—making any direct payment, however modest, a windfall rather than compensation. And none of petitioners' concerns about *cy pres* abuses is actually presented here—which is not surprising because the circuits now uniformly demand that district courts safeguard against abuse.

Finally, the decision below was correct. Petitioners do not dispute that the settlement amount was more than adequate, and they have no real challenge to the findings of both courts below that individual distributions of the $5 million settlement amount to a non trivial portion of the 129-million-member class would be infeasible. Petitioners also cannot deny that the district court thoroughly evaluated the detailed proposals submitted by the *cy pres* recipients and ensured that the *cy pres* distribution would be spent on privacy and security issues closely tied to the class claims. Given these circumstances, as well as "the shakiness of the plaintiffs' claims" (Pet. App. 9), the district court acted well within its discretion in finding the settlement "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the Ninth Circuit was correct to affirm that exercise of discretion.

A. The Purported Conflict Does Not Exist.

1. While petitioners rail against *cy pres* remedies, every circuit to address the issue has held that *cy pres* remedies may be appropriate in class action settlements. That's why, in one of the cases petitioners cite the most, the Third Circuit said that it "join[ed] other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy*

pres component." *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013).

In particular, the courts of appeals have allowed *cy pres* remedies where a cash distribution of all or part of a settlement fund would not be feasible—either because class members cannot be identified, or because the amounts at issue would produce a negligible payment per class member (or be entirely consumed by the administrative costs of distribution). In those rare circumstances, the circuits uniformly have held that the parties may direct the distribution to a charity aligned with the interests of the settlement class. See, *e.g.*, *Baby Products*, 708 F.3d at 173 (noting general agreement that "*cy pres* distributions are most appropriate where further individual distributions are economically infeasible"); *Klier* v. *Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 & n.15 (5th Cir. 2011) (*cy pres* awards are appropriate "when direct distributions to class members are not feasible"); *Mirfasihi* v. *Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting *cy pres* distribution where "there would be no reason for thinking distribution to the class members infeasible"); *Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (*cy pres* remedy available in "circumstances in which direct distribution to individual class members is not economically feasible"); *Powell* v. *Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997) (a "*cy pres* distribution is potentially appropriate" where "it would be extremely difficult to distribute the funds pro rata"); *New York* v. *Reebok Int'l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996) (approving *cy pres* distribution where the "impracticality of attempting to distribute the settlement proceeds among the multitude of unidentified possible claimants is obvious" and "distri-

bution 'would be consumed in the costs of its own administration'").

This uniformity reflects a consistent rationale. Rather than distribute negligible amounts to class members (or, as petitioners suggest, leaving almost all class members with nothing at all), the circuits reason that settlement funds are better used for projects that advance the interests of the class as a whole. See *Baby Products*, 708 F.3d at 172-73; *Powell*, 119 F.3d at 706; *Six Mexican Workers* v. *Ariz. Citrus Growers*, 904 F.2d 1301, 1305, 1307 (9th Cir. 1990). No court has joined petitioners in asking that federal class actions be turned into lottery where a tiny percentage of class members, either self-selected or selected by the court, receive payments that are not tied to any injury.

Petitioners try to fracture this uniformity by attacking a caricature of the decision below. Petitioners read the decision as adopting a new rule that a *cy pres*-only settlement is permissible whenever "it would be 'infeasible' to make payments to *every single class member*." Pet. 2; accord *id.* at 17. But the Ninth Circuit said no such thing. It pointed out the "4 cents in recovery" per class member to highlight the "dramatic" "gap" between the settlement fund and the size of the class. Pet. App. 9. And it upheld the district court's finding "that the cost of verifying and 'sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.'" *Ibid.* Petitioners have no answer to that dispositive "finding of fact accepted by two lower courts." *Texas Dep't of Housing*, 135 S. Ct. at 2544. That imbalance of costs and benefits remains even if the "millions of class members" receiv-

ing payments amount to less (even far less) than the full 129 million.

2. Sweeping away petitioners' mischaracterization of the decision below makes clear that the supposed conflict reflects only the application of the same legal standards to different facts.

To begin with, Judge Posner's opinion in *Pearson* v. *NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), adopted the same legal standard used below, recognizing that a "*cy pres* award is supposed to be limited to money that can't feasibly be awarded to the * * * class members." *Id.* at 784. The class in *Pearson* had only 4.72 million members (less than 4% of the class here)—notified at a cost of about 30 cents per person. *Ibid.* The much larger settlement amount in *Pearson* allowed all members of the much smaller class to be paid directly ($3 each by the court's calculation, less the incremental distribution expenses of processing the payments). *Ibid.* Thus, the parties "ha[d] not * * * demonstrated" that it was "infeasible to provide that compensation to the victims." *Ibid.*

Here, by contrast, both courts below found that it would be infeasible to pay directly a "unique[ly]" enormous class that "potentially covers all internet users in the United States." ER 146; see also Pet. App. 8-9, 46-47. And, in further contrast with *Pearson*, where there was no dispute that class members had purchased the product at issue at least potentially in reliance on the allegedly misleading labels, here no out-of-pocket injury is alleged. Indeed, as the

district court held, plaintiffs had not alleged any concrete injury at all. See SER 791-792.[4]

There also is no inconsistency between the decision below and the Eighth Circuit's decision in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015). The Eighth Circuit expressly "*agree[d]* with the Ninth Circuit" that *cy pres* awards are permissible so long as they provide an "indirect class benefit" by going to "uses consistent with the nature of the underlying action." *Id.* at 1066-67 (emphasis added; quotation marks omitted) (citing *Nachshin*, 663 F.3d at 1040). The court of appeals rejected the *cy pres* award proposed in *BankAmerica* because the single recipient—a Missouri legal-services organization—had an insufficient nexus to the securities fraud claims asserted by the nationwide class. See *id.* at 1067. No similar objections have been or could be raised against the targeted projects proposed by the *cy pres* recipients here, whose Internet privacy activities have nationwide scope and effects.

The Fifth Circuit's decision in *Klier* has nothing to do with the decision below. Indeed, the court in

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[4] Petitioners also rely (Pet. 18 n.4) on the Seventh Circuit's 2004 decision in *Mirfasihi* v. *Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004). But they fail to mention that the Seventh Circuit ultimately *affirmed* a *cy pres* distribution in that case on a rationale similar to the lower courts' here: that the underlying claims were of dubious value and presented significant litigation risks for the plaintiffs. *Mirfasihi* v. *Fleet Mortg. Corp.*, 551 F.3d 682, 686 (7th Cir. 2008). Just as the courts here questioned the applicability of the Stored Communications Act to plaintiffs' claims, see Pet. App. 58-59, the Seventh Circuit found the inapplicability of the federal Fair Credit Reporting Act to weigh in favor of the *cy pres* settlement. See 551 F.3d at 685-86.

that case explained that its decision did not "implicate the line of authority giving careful scrutiny to class settlement agreements in which the parties agree to a *cy pres* distribution." 658 F.3d at 478 n.29 (citing, *inter alia*, *Six Mexican Workers*, 904 F.2d at 1304, 1307). Rather, the district court in *Klier sua sponte* ordered a *cy pres* distribution of unclaimed settlement funds in direct violation of the settlement agreement's explicit direction that any leftover funds in a subclass fund "'shall be distributed pro rata to all Claimants in that subclass.'" *Id.* at 476. That is, *Klier* involved a district court's injection of *cy pres* in an attempt to override a settlement rather than approve or enforce it. *Id.* at 476-77.

The decision below does not conflict with the Third Circuit's *Baby Products* decision; nor are the two decisions "in tension," as petitioners half-heartedly assert in the alternative. Pet. 19. *Baby Products* approvingly cited the Ninth Circuit's decision in *Lane* in "join[ing] other courts of appeals in holding that a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component." 708 F.3d at 172. Although the court noted that "*cy pres* distributions are most appropriate where further individual distributions [to class members] are economically infeasible," it declined to "hold that *cy pres* distributions are only appropriate in this context." *Id.* at 173. Instead, *cy pres* relief is permissible when it is "fair, reasonable, and adequate" under "the same framework developed for assessing other aspects of class action settlements." *Id.* at 174.

Finally, there is no "tension" between the decision below and the Second Circuit's decision in *Masters*. Pet. 20. *Masters* cited with approval the Ninth

Circuit's infeasibility standard from *Six Mexican Workers*, but faulted the district court for directing funds to charities without even considering whether a distribution to the class would be possible and when "neither side contend[ed] that * * * individual distribution [was] economically impracticable." 473 F.3d at 435-36.

As these cases illustrate, there is no conflict among the circuits over the standards for judicial review of *cy pres* settlements. Courts applying these standards properly reach different outcomes based on different facts and circumstances. These outcomes present no conflict on any important question of federal law that could warrant this Court's review.

B. The Purported Issue Lacks Recurrent Importance Because *Cy Pres*-Only Settlements Are Sharply Declining And Reserved For Exceptional Cases.

There is a complete mismatch between petitioners' assertion that "*cy pres* settlements are increasingly prevalent" and the question presented, which asks this Court to review *cy pres-only* settlements—*i.e.*, ones that "provide[] no direct relief to class members." Pet. i, 31-32.

As explained in an article petitioners cite, the number of *cy pres*-only settlements is in fact sharply declining, with only *3 percent* of all *cy pres* settlements falling into that category from 2013 through 2016—down from 29 percent from 2000 through 2012. See Natalie Rodriguez, *Era of Mammoth Cases Tests Remedy of Last Resort*, Law 360 (May 2, 2017), https://www.law360.com/articles/918296/era-of-mammoth-cases-tests-remedy-of-last-resort (cited at Pet. 32; State AG Br. 7-8). As the article explains,

that drop is consistent with the view that Chief Justice Roberts's statement respecting the denial of review in *Lane* in November 2013 "mark[ed] a turning point for cy pres." *Ibid.* Since that time, the article summarizes, class action settlements have "mostly use[d] cy pres to get rid of so-called drippings—unclaimed funds and uncashed checks sent to class members." *Ibid.*[5]

Moreover, while 2016 was the most recent year covered in the analysis, the decline in the number of *cy pres*-only settlements is likely to continue further still in light of this Court's 2016 decision in *Spokeo*. *Spokeo* clarifies that Article III requires lower federal courts to weed out putative class actions seeking statutory damages in the absence of actual harm. These are the cases that are most likely to result in proposed *cy pres*-only settlements if they make it past the pleadings stage; settlements are naturally smaller when the presence of any injury is unlikely.

In short, empirical data confirm the Ninth Circuit's observation below that "*cy pres*-only settlements are considered the exception, not the rule." Pet. App. 8. Petitioners offer no compelling reason why this Court should review a perceived problem that is neither real (see pages 24-28, *infra*) nor widespread.

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[5] The article also notes the positive development of parties and courts using a "grant-like approach" to thoroughly vet potential *cy pres* recipients—precisely the approach followed in this case. See page 9, *supra*.

C. This Case Is An Exceedingly Poor Vehicle To Consider Unprecedented Limitations On *Cy Pres* Settlements.

1. Class members were unharmed and unlikely to receive anything from further litigation.

The petition again and again refers to class members who have not been "compensated" for their "injuries." *E.g.*, Pet. 2-3, 7, 19-20, 23, 25. The underlying premise is that a class is undercompensated unless some class members receive a direct distribution—no matter how few class members would be paid or how little they would receive.

But the circumstances in this case provide no opportunity to test that premise. That is because plaintiffs failed to allege *any* actual harm that they or class members suffered as a result of the challenged practices—which led both Judge Ware and Judge Davila to dismiss most of plaintiffs' claims for lack of "injury sufficient for Article III standing." SER 792; see also page 6, *supra*.

Before this Court decided *Spokeo*, however, Ninth Circuit law permitted plaintiffs to pursue their statutory claims under the Stored Communications Act in federal court without pleading or proving any actual, concrete harm. See SER 792-793 (citing *Edwards*, 610 F.3d at 517). Accordingly, the lack of harm was not an ironclad defense to liability at the time of settlement.

The district court further observed in approving the final settlement that Google would have had strong defenses to the SCA claims on the merits. Pet. App. 43 (citing *In re Zynga Privacy Litig.*, 750 F.3d at 1107, issued after the settlement here and reject-

ing a claim under the SCA based on purported disclosures in a referrer header). Yet given a class size of 129 million individuals and statutory damages of $1,000 (18 U.S.C. § 2707(c)), even the highly remote possibility of class-wide liability in a litigated class action at the time of settlement justified a compromise resolution of the case.

For these reasons, any direct payment to class members would have amounted to a windfall, not compensation for injuries resulting from Google's alleged conduct—making this case uniquely suited to a *cy pres* settlement. Indeed, the absence of any harm in this case helps explain why only 13 individuals out of a class of roughly 129 million—one in ten million class members—considered it worthwhile to opt out of the class and preserve their individual claims.[6] Accordingly, this case does not present the issue whether and to what extent *cy pres* remedies are appropriate when class members suffer actual harm.

2. This case implicates none of the cy pres *abuses that petitioners decry.*

None of the "five [actually six] specific concerns" petitioners raise about *cy pres* awards is actually presented by this case.

First, petitioners' complaint that "*cy pres* awards typically fail to redress class members' alleged injuries" (Pet. 23) is a red herring, because the class

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[6] The Cato Institute complains generally about notice in class-action settlements (Cato Inst. Br. 4-6), but does not address the notice campaign in this case. Nor have petitioners challenged the district court's finding that the multi-pronged notice campaign here satisfied the requirements of due process and Rule 23(c)(2)(B). Pet. App. 38-39.

members here had no actual injuries to redress for the reasons just discussed.

Second, there is no merit to petitioners' suggestion that the *cy pres* funds will be put to uses unconnected with the underlying claims. Pet. 24-25 & n.6. The Ninth Circuit and other circuits all account for this concern by uniformly requiring a nexus between the proposed *cy pres* recipients and the interests of the class, in order to ensure that the class receives some form of benefit for their claims. See *Koby* v. *ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017) (rejecting settlement with proposed *cy pres* distribution to a San Diego veterans' organization with "no geographic nexus" to the nationwide class or connection between the organization's work and the underlying claims involving "unfair debt collection practices"); *Baby Products*, 708 F.3d at 180 n.16 ("[c]ourts generally require the parties to identify 'a recipient whose interests reasonably approximate those being pursued by the class'"); *Nachshin*, 663 F.3d at 1036 (*cy pres* remedy "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members"); *Powell*, 119 F.3d at 707 (approving *cy pres* local scholarship remedy that served class members' objectives and would directly benefit their descendants); *Six Mexican Workers*, 904 F.2d at 1308 (reversing where *cy pres* remedy benefited a group "far too remote from the plaintiff class"); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 184 (2d Cir. 1987) (approving *cy pres* distribution that would "benefit the entire class").

This issue is a red herring for an additional reason. As the court below noted, petitioners actually

"*do not dispute* that the nexus requirement is satisfied here." Pet. App. 12 (emphasis added).

Third, petitioners simply speculate that class counsel will pursue *cy pres* awards in lieu of compensating class members. Pet. 25-26. As discussed above (at 16-17), the circuits uniformly guard against that concern too, by permitting *cy pres* awards only when it is infeasible to distribute the fund directly to individual class members. More broadly, courts, including the Ninth Circuit, uniformly demand a "'higher standard of fairness'" in scrutinizing pre-certification settlements in order to guard against "collusion and other abuses." Pet. App. 7; accord *Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988) (collecting cases). And petitioners have no genuine quarrel with the district court's findings that the *Hanlon* factors were satisfied here. Pet. App. 39-55.

Fourth, petitioners complain that defendants might negotiate for the selection of *cy pres* recipients that petitioners perceive as benefiting the defendants rather than the class members. But the court below specifically considered this concern and found it inapposite here, noting that "some of the recipient organizations have challenged Google's Internet privacy policies in the past"—even pressing a Federal Trade Commission complaint that resulted in a $17 million fine. Pet. App. 16 & n.7 (describing the efforts by the World Privacy Forum and the Stanford Center for Internet and Society).

The Ninth Circuit also considered and rejected petitioners' argument that the *cy pres* distribution reflects merely a change in accounting entries for organizations to whom Google may make other donations, pointing out that "there was transparency in this process," with each proposed recipient "ex-

plain[ing] how the *cy pres* funds were distinct from Google's general donations." Pet. App. 17.

Fifth, petitioners complain that the availability of *cy pres* remedies in class-action settlements makes it easier to satisfy the manageability requirement of Rule 23(b)(3). Pet. 28-29. But that is true of *any* settlement, not just one involving *cy pres* relief. This Court has held that manageability does not matter in a settlement class. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, * * * for the proposal is that there be no trial." *Id.* at 620. Petitioners also offer no alternative means by which defendants can settle putative class actions when individual class members cannot feasibly be identified—short of overturning decisions from the Ninth Circuit and other courts holding that Rule 23 does not require an "'administratively feasible way to determine who is in the class'" (Pet. 29 (quoting *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121, 1125, 1129 (9th Cir. 2017))), which goes well beyond the scope of the question presented in the petition.

Finally, petitioners fret over the possibility that district judges will approve of *cy pres* settlements that direct funds to organizations with a connection to the judge, creating "the appearance or reality of judicial conflicts of interest." Pet. 29-31. Yet petitioners have not alleged that Judge Davila has such a relationship with any of the *cy pres* recipients in this

case—making these concerns entirely hypothetical here.[7]

D. The Decision Below Is Correct.

Finally, review is unwarranted because the Ninth Circuit's decision was correct. Under the circumstances of this case, the district court acted within its discretion in approving the settlement after careful scrutiny, and the Ninth Circuit in turn correctly determined that the district court did not abuse its discretion.

Petitioners have not presented any basis to undermine the findings of both courts below that, in light of the enormous size of the class and the comparatively small value of the settlement fund, that fund is "non-distributable" directly to class members. Pet. App. 8, 47. Specifically, the district court found that, "[s]ince the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would undeniably impose a significant burden to distribute, re-

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[7] Some of petitioners' *amici*—but not petitioners themselves—raise the additional argument that *any* distribution on a *cy pres* basis raises First Amendment concerns. *E.g.*, Cato Br. 20-24; Center for Ind. Rights Br. 3-8; Center for Const. Juris. Br. 5-7. The argument makes no sense. Absent members of a proposed Rule 23(b)(3) settlement class are in no way "compelled" to support *cy pres* recipients with which they disagree because they are free to opt out of the settlement instead. In any event, petitioners' failure to adequately raise the First Amendment argument "at any stage of this litigation" is reason alone for the Court to "not consider it." *Atl. Marine Constr. Co.* v. *Dist. Ct. for the Western Dist. of Texas*, 134 S. Ct. 568, 580 (2013); see Pet. App. 131 (two-sentence objection to AARP as a *cy pres* recipient because of its "political positions," with no mention of the First Amendment).

view, and then verify," such that "the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class." Pet. App. 47.

Petitioners have not contended—let alone pointed to any evidence to show—that the district court's factual finding, and the Ninth Circuit's endorsement of it, were clearly erroneous. The two courts' determination therefore must be accepted here. See *Texas Dep't of Housing*, 135 S. Ct. at 2544. And both the district court's and Ninth Circuit's analyses complied with settled law, discussed above, holding that *cy pres* remedies are proper when individual distributions would be infeasible.

Instead, petitioners asked the Ninth Circuit to hold for the first time that, as a matter of law, a settlement *must* offer a mechanism to provide a windfall to a minuscule portion of class members—chosen either by lottery or by a claims process that petitioners expect to have a claims rate of "well below 1 percent"—rather than providing an indirect benefit to the class as a whole through the *cy pres* mechanism. Pet. 11.

Yet no circuit has endorsed that absolutist approach, and for good reason. Petitioners cannot explain why the interests of the class as a whole are invariably better served by giving a windfall to a very few and nothing to the rest. The court below rightly rejected petitioners' proposal to adopt a rigid requirement favoring small payments to a tiny fraction of class members over payments to fund research, analysis, education, and advocacy on Internet privacy issues that will benefit a much greater proportion (and quite possibly all) of the class.

Petitioners and their *amici* try to extract a mandatory rule from one district court's rejection of a proposed *cy pres*-only settlement in favor of attempting a claims process in which a handful of class members recovered $15 each, with the remainder distributed to *cy pres* recipients. See, *e.g.*, Pet. 11; State AG Br. 6 (citing *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 3d 939 (N.D. Cal. 2013), aff'd *sub nom. Fraley* v. *Batman*, 638 F. App'x 594 (9th Cir. 2016), cert. denied *sub nom. K.D.* v. *Facebook, Inc.*, 137 S. Ct. 68 (2016). But one district court's exercise of discretion does not mean that the law has calcified so that no court could ever order *cy pres*-only relief instead. As the Ninth Circuit noted in rejecting this inflexible position, "the fact that there are other conceivable methods of distribution does not mean that the district court abused its discretion by declining to adopt them." Pet. App. 10 n.2.

Additional practical problems here demonstrated why the court below was right to reject petitioners' proposal. In contrast with an employee or subscriber class, in which putative class members can be readily identified from a defendant's records, here it would not be possible for Google to direct payment to any significant proportion of class members. Instead, members would have to identify themselves in a claims process, with notice and distribution costs that would inevitably swallow up the settlement fund, leaving little to nothing for class members. Cf. *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *7 (N.D. Cal. Mar. 18, 2013) (approving *cy pres*-only settlement for a class of over 62 million Netflix members, because the amount set aside to attempt "a direct class cash payout" would "likely prove to be nullified by distribution costs"). Petitioners' proposal would only shift funds to class-action administrators

and away from the *cy pres* recipients and their educational, technological, and policy initiatives aimed at enhancing privacy protections for Internet users.

Petitioners' objections to the selection of the *cy pres* recipients were equally meritless. Petitioners do not dispute that the actual uses to which the settlement funds will be put are closely aligned with the class allegedly affected by referrer header disclosures. See pages 25-26, *supra*.

Instead, petitioners insisted below on another categorical rule: that any prior connection between a party or its counsel and a *cy pres* recipient, such as previous donations or an *alma mater* relationship, is an "absolute disqualifier." Pet. App. 14. The Ninth Circuit rightly rejected that proposal too. While "[o]f course it makes sense that the district court should examine any claimed relationship between the *cy pres* recipient and the parties or their counsel," petitioners' proposal failed even under the commentary that petitioners urged the court to adopt. Pet. App. 14. That standard, drawn from a Restatement, would require invalidating a *cy pres* remedy only when the "'significant prior affiliation with the intended recipient * * * would raise substantial questions about whether the selection of the recipient was made on the merits.'" *Ibid.* (quoting Principles of the Law of Aggregate Litigation, *supra*, § 3.07 cmt. b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision below perpetuates Ninth Circuit law that, even where it is "possible" to make payments to class members whose injuries have not been compensated, a district court may nonetheless approve a *cy pres* settlement that wipes out their claims and gives them nothing. App. 8–9. Meanwhile, class counsel get paid in full—here, they collected more than double their asserted lodestar fees—based on settlement amounts often propped up with distributions to their own *alma maters* and organizations already being funded by defendants. It is easy to understand why class counsel and the defendant would defend such a settlement—one is handsomely compensated, and the other avoids liability risk at pennies on the dollar. But it is impossible to justify such settlements as "fair, reasonable, and adequate" to class members. Fed. R. Civ. P. 23(e)(2).

Seeking to avoid this Court's review, Respondents mischaracterize that issue as one of fact. But the question presented by this case, on which the courts of appeals are split, addresses when as a matter of law a district court may approve a settlement containing a *cy pres* award. The Ninth Circuit uniquely holds that settlement funds are "non-distributable" to class members, and therefore appropriate for *cy pres* distribution, "where each class member's individual recovery would have been '*de minimis*'"—that is, simply divide the fund amount by the total number of class members and then eyeball the result. App. 8–9. Under

that rule, enterprising class counsel can almost always structure a consumer or privacy class action to result in a fast, lucrative *cy pres* settlement, and almost any class action settlement could divert some amount of funds from class compensation to a *cy pres* award.

By contrast, the Seventh and Eighth Circuits have rejected as a matter of law *cy pres* awards of funds that amounted to, respectively, just pennies and several dollars per class member, holding that *cy pres* is categorically unavailable whenever it is feasible to compensate *at least some* class members. The Fifth Circuit has espoused the very same rule, and the Second and Third Circuits have both vacated settlement approvals when district courts failed to adequately consider whether distributions could be made to class members before authorizing *cy pres* awards. The Ninth Circuit's permissive standard for *cy pres* cannot be squared with these authorities. Respondents dispute it, but that conflict is recognized by practically everyone else to consider the matter.

Respondents fare no better with their attempt to downplay the importance of this issue. The Ninth Circuit's decision pushes the envelope, giving savvy class attorneys an enormous incentive to bring massive class actions with confidence that a *cy pres*-only settlement will be upheld. Even if *cy pres*-only settlements may have slightly waned in recent years—a trend not likely to continue after the decision below—the use of *cy pres* awards in class action settlements

is at an all-time high. Notably, Google itself is defending a *cy pres*-only settlement of a major class action over its use of "cookies" to track web users, relying on the decision below. Given the frequency of *cy pres* awards, this Court's guidance is needed not only to secure a single nationwide standard for what are often nationwide class actions, but to protect absent class members and address the other "fundamental concerns" with *cy pres* identified in the Chief Justice's *Marek v. Lane* opinion. 134 S. Ct. 8, 9 (2013).

This case is the ideal vehicle to do so. Unlike in *Marek*, Petitioners objected at every level to the settlement's *cy pres* award, and Respondents do not contend otherwise. Instead, they simply assert that this settlement, unlike others containing *cy pres* awards, does not commit certain "abuses," but that is both debatable—the *cy pres* recipients include two of class counsel's *alma maters* and four groups already funded by Google—and no defense of the Ninth Circuit's standard that permits class counsel and defendants to divest class members of funds that are rightfully theirs. Respondents identify no defect that would prevent the Court from assessing that standard, and it should do so to provide the guidance and uniformity so urgently needed.

I. The Decision Below Perpetuates a Conflict Among the Lower Courts

The circuits are split on the fundamental question of when it is "fair, reasonable, and adequate" for a class action settlement to award money not to class members but to third parties unconnected to the litigation.

To begin with, and contrary to Respondents' contention, that is a question of law, not fact. *See* Google at 17; Gaos at 18–19. Petitioners do not dispute that it would be infeasible to divide a $5.3 million settlement fund among all 129 million or so class members. At issue, instead, is whether that fact permits approval of a settlement that directs settlement proceeds to *cy pres* recipients instead of class members. The decision below answered that question in the affirmative, holding that settlement funds are "non-distributable," and therefore appropriately devoted to *cy pres*, where a payment to each and every class member would be "*de minimis*." App. 8–9. (discussing and applying *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012)). In that circumstance, it held, a district need not consider "'possible' alternatives," such as a claims process, that actually compensate class members. App. 9; *see also* App. 10 n.2 (restating rule that there is no requirement to adopt "other distribution methods that might benefit the class more directly").

Respondents insist that there is no circuit split on the legal standard for permitting *cy pres* awards, but cannot even agree on how to wave away conflicting precedent. Google (at 18) says that Seventh Circuit's

decision in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), is distinguishable because it was possible to pay each class member a couple bucks apiece, while Gaos (at 12) simply observes that *Pearson* contains some general language that has also appeared in Ninth Circuit decisions. Neither, however, grapples with the fact that *Pearson* involved a $1.13 million fund and 12 million class members, such that even a cost-free distribution would entitle each member to less than a dime, 772 F.3d at 780–82—in the same ballpark as in this case and less than the $2 per class member the Ninth Circuit held "non-distributable" in *Lane*. 696 F.3d at 819–21. Nonetheless, because it was possible to compensate at least some class members, such as through an improved claims process, the Seventh Circuit held that doing so was required. 772 F.3d at 784. Of course, that is the very thing—"other distribution methods that might benefit the class more directly"—the decision below held was *not* required. App. 9, 10 n.2.

As for the Eighth Circuit's decision in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), Google (at 19) wrongly suggests the court there rejected a *cy pres* award because the recipient lacked a sufficient nexus to the claims, while Gaos (at 13–14) again finds solace in 10,000-foot statements of law. Neither, however, addresses the Eighth Circuit's holding that a *cy pres* award was not "permissible" because it was possible to compensate at least some class members—those who had previously received and cashed distribution checks. *Id.* at

1064. Again, that is in direct conflict with the decision below.

Both Google (at 19–20) and Gaos (at 14) refuse to take the decision of the Fifth Circuit in *Klier v. Elf Atochem North America, Inc.*, at its word that, because "settlement funds are the property of the class," a *cy pres* award is permissible only "where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution." 658 F.3d 468, 475 (5th Cir. 2011). Nor do they address the court's recognition that, under longstanding Fifth Circuit precedent, "a *cy pres* distribution of unclaimed settlement funds is appropriate only when it is not feasible to distribute those funds to any party to the class action who has a persuasive equitable claim to those funds," including failure to be fully compensated. 658 F.3d 468, 475 n.17 (5th Cir. 2011) (citing *Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 811–13 (5th Cir. 1989)). Instead, they focus on the fact that *Klier* involved a court-ordered *cy pres* distribution, but its reasoning is broader than that, with the express exception of its ultimate conclusion regarding a district court's discretion to order *sua sponte* a *cy pres* distribution. *Id.* at 478 n.29 and surrounding text; *see also BankAmerica*, 775 F.3d at 1066 (rejecting such a narrow reading of *Klier*).

Likewise, Respondents refuse to acknowledge the tension between the decision below and *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013), and *Masters v. Wilhelmina Model Agency, Inc.*,

473 F.3d 423 (2d Cir. 2007). Both vacate settlements containing *cy pres* components and remand with instructions to place greater emphasis on direct compensation for class members—a consideration that the decision below regards as secondary at best. *See* App. 10 n.2 (district court need not insist upon "other distribution methods that might benefit the class more directly"). Google (at 20) and Gaos (at 15) focus on the Third Circuit's language in *Baby Products* approving *cy pres* generally, while giving short shrift to the decision's extended discussion emphasizing the primacy of direct benefit to class members, not to mention its ultimate judgment. *E.g.*, 708 F.3d at 173, 178 (stating that "direct distributions to the class are preferred over *cy pres* distributions" and that class counsel's "responsibility [is] to seek an award that adequately prioritizes direct benefit to the class").

Masters likewise emphasized that *cy pres* remains the "*next best*," not first best, use of settlement funds, 473 F.3d at 436 (emphasis in original and quotation marks omitted), and on that basis encouraged the district court to provide class members with up to *treble damages*, as permitted by statute but not provided by the parties' settlement, before directing any funds to *cy pres* recipients, *id.* Neither Google (at 21) nor Gaos (at 15–16) saw fit to address these points.

Finally, if Respondents seriously believe that the lower courts' disparate positions on this issue can somehow be reconciled, then they are in a minority of two. Judges, academics, legal reporters, and practitioners have all reached the opposite conclusion. *See*,

e.g., *Keepseagle v. Perdue*, 856 F.3d 1039, 1069 (D.C. Cir. 2017) (Brown, J., dissenting) (contrasting different circuits' scrutiny of *cy pres* awards); *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 483–86 (E.D.N.Y. 2016) (discussing different circuits' approaches before declining to approve *cy pres*-only settlement); Robert G. Bone, Justifying Class Action Limits: Parsing the Debates Over Ascertainability and Cy Pres, 65 U. Kan. L. Rev. 913, 942 & n.141 (2017) (recognizing that, "for the past five years, lower courts have sharply disagreed about when and how the remedy should be used," and contrasting *Lane* with *BankAmerica*, among others)); Andrew Rodheim, Class Action Settlements, Cy Pres Awards, and the Erie Doctrine, 111 Nw. U. L. Rev. 1097, 1118–19 (2017) (contrasting Ninth Circuit's approach with other circuits'); Christine P. Bartholomew, Saving Charitable Settlements, 83 Fordham L. Rev. 3241, 3252 (2015) (explaining how, in evaluating proposed *cy pres* awards under Rule 23(e), "judicial interpretation differs, resulting in confusion and inconsistent outcomes"); Jeffrey S. Jacobson, State AGs Still Really Don't Like Cy Pres Class Action Settlements, Ad Law Access Blog (Feb. 12, 2018)[1] (reluctantly acknowledging that the "[c]ircuits are slightly split on what it means to be "feasible"); Gregory A. Markel,

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[1] Available at https://www.adlawaccess.com/2018/02/articles/state-ags-still-really-dont-like-cy-pres-class-action-settlements/

Settling Class Actions: Process and Procedure, Practical Law Practice Note 3-541-8765 (contrasting circuits' different "Approaches to Cy Pres Distributions"); Anthony Anscombe, Cy Pres: 'As Close As Possible' Is Not Good Enough, Law360 Expert Analysis (Oct. 7, 2013)[2] ("Not all circuits permit the use of cy pres in a class action context, and those that do have imposed different restrictions on its use."); James M. Beck, Cy Pres Abuse Poster Child, Drug & Device Law Blog (Sept. 11, 2017)[3] (explaining that the decision below "created a circuit split (unacknowledged), and if the Court takes a look at [this case], it will see the full spectrum of abuse that cy pres awards allow to occur."); Examination of Litigation Abuses: Hearing Before the H. Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. 11 (Mar. 13, 2013) (written testimony of John H. Beisner on behalf of the U.S. Chamber Institute for Legal Reform) (contrasting Ninth Circuit and Third Circuit approaches); U.S. Chamber Institute for Legal Reform, The New Lawsuit Ecosystem 15 (2013)[4] (noting that the Ninth Circuit has "been more accepting of *cy pres* settlements" than others).

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[2] Available at https://www.law360.com/articles/478314/cy-pres-as-close-as-possible-is-not-good-enough.

[3] Available at https://www.druganddevicelawblog.com/2017/09/cy-pres-abuse-poster-child.html.

[4] Available at http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf.

The Court's review is necessary to resolve this well-documented conflict in authority.

II. This Case Is an Ideal Vehicle To Address an Important and Recurring Issue that Raises "Fundamental Concerns"

This case presents an ideal vehicle for the Court to resolve a widely acknowledged circuit split on an issue of overriding importance. Respondents do not dispute that this case properly raises the issue of the appropriate standard for district courts to approve class action settlements containing *cy pres* awards. As such, it would permit the Court, in the course of answering that fundamental question, to address any of the subsidiary concerns with *cy pres* identified by the Chief Justice in *Marek* as "fairly included within the question presented." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006) (quotation marks omitted). Respondents' extended argumentation (Google at 24–28; Gaos at 19–24) that each and every conceivable "abuse" that could occur in a *cy pres* settlement may not be present in this settlement is beside the point, because that would not prevent the Court from speaking on all relevant issues in the course of enunciating the proper legal standard. Under Respondents' logic, no case would ever be a proper vehicle to address the use of *cy pres*.

Google (at 21–22) seeks to downplay the importance of the issue presented, but refuses to acknowledge that, as its own authority reports, *cy pres* awards in class action settlements are at an all-time high. *See*

Natalie Rodriguez, Era of Mammoth Cases Test Remedy of Last Resort, Law360 (May 2, 2017).[5] Even if *cy pres*-only settlements have declined—and keep in mind that Gaos (at 4) insists that even this one doesn't fit the bill—settlements involving any *cy pres* component equally implicate the fundamental question of when *cy pres* is permissible at all.

And Google doth protest too much, given the many important *cy pres* cases in the pipeline. Google itself is currently defending on appeal a *cy pres*-only settlement over its conduct circumventing users' browser privacy settings so it could better target ads, and it relies in part on the decision below. *In re: Google Inc. Cookie Placement Consumer Privacy Litigation*, No. 17-1480 (3d Cir. filed Mar. 7, 2017). This court recently considered a petition involving a class action settlement over fuel-mismeasurement claims that directed all $22 million of the settlement fund to third parties, including for lobbying. *Speedway LLC v. Wilson*, No. 17-1030 (cert. denied Mar. 19, 2018).[6] *Cy pres* awards are typical in the current wave of data-breach class action settlements, *e.g.*, *In Re Anthem, Inc. Data Breach Litigation*, No. 15-md-02617 (N.D. Cal. filed June 12, 2015), and remain a common feature of false-advertising class action settlements, *e.g.*, Class Action Settlement, *Rikos v. Proctor & Gamble Co.*, No. 11-cv-226, ECF Nos. 166, 167, 169–70 (S.D. Ohio filed Sept.

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[5] Available at https://www.law360.com/in-depth/articles/918296.

[6] Unlike in this case, *Speedway* did not properly present the *cy pres* issue because it had not been raised in the lower courts.

21, 2010) (proposed settlement over probiotic advertising provides for reductions in class compensation to fund *cy pres* awards). The "need to clarify the limits on the use of such remedies," *Marek*, 134 S. Ct. at 9 (Roberts, C.J.), has not at all waned.

Indeed, the Ninth Circuit standard imposes few if any practical limits on *cy pres*. Consider, for example, the $135 million settlement to resolve claims that De Beers injured a class of between 67 and 117 million consumers by abusing its monopoly position in the diamond market. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 290–91 (3d Cir. 2011) (en banc). Deducting fees and expenses leaves just a dollar or two per class member—amounts that the decision below and *Lane* regard as "*de minimis*" and "non-distributable." Under the Ninth Circuit standard, then, the entire fund could go to *cy pres*. The same would be true for almost any large class action. The result is to transform the class action from a device to aggregate class members' claims into a fundraising opportunity for class counsel's favorite charities.

Finally, Google's suggestion (at 24–28) that this case is unsuitable for review because (in its opinion) class members were not really injured by its practices only reinforces the importance of the question presented. If (as Gaos maintains) class members suffered serious injury to their privacy rights under state and federal law, then they should have been compensated, and a settlement that gives them nothing and directs all funds to third parties is not "fair, reasonable, and adequate." But if Google is right, then this case is a

prime example of how the Ninth Circuit's lax approach toward *cy pres* encourages and facilitates strike suits that should never have been brought. After all, without a *cy pres* award to inflate the settlement fund, it would have been impossible to justify paying class counsel over $2 million in fees, and so the case may never have been filed. Either way, the standing of the Petitioners, as class members denied any share of the settlement fund, is unquestionable, and review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, COLORADO, GEORGIA, IDAHO, INDIANA, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, NORTH DAKOTA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are their respective States' chief law enforcement or chief legal officers and hold authority to file briefs on behalf of their offices.

Amici's interest arises from two responsibilities. *First*, as chief law enforcement or chief legal officers, amici have an overarching responsibility to protect their States' consumers. *Second*, amici have a responsibility to protect consumer class members under CAFA, which provides a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials," exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

Consistent with these responsibilities, state Attorneys General actively monitor proposed class action settlements in federal court in an ongoing effort to protect consumers from abuse in the class action settlement process. State Attorneys General also speak against unfair settlements by filing briefs

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[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief and only amici or their offices made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice of amici's intent to file at least ten days prior to this brief's due date and have given written consent.

under CAFA, often with bipartisan support. *See e.g., In re Google Inc. Cookie Placement*, No. 17-1480, Dkt. 29 (3d Cir.) (brief of thirteen-state, bipartisan coalition urging reversal of *cy pres*-only settlement); *In re EasySaver Rewards Litigation*, No. 16-56307, Dkt. 21 (9th Cir.) (brief of thirteen-state, bipartisan coalition urging reversal of imbalanced coupon settlement); *Cannon, et al. v. Ashburn Corp.*, No. 16-1452, Dkt. 68-3 (D.N.J.) (brief of nineteen-state, bipartisan coalition urging rejection of imbalanced coupon settlement). And these efforts have helped generate meaningful outcomes for consumers. *See, e.g., Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261, 268 (S.D. Cal.) (after Arizona-led coalition filed *amicus* brief and District Court rejected initial deal, revised settlement was reached that increased the cash recovery to the class from $0 to ~$700,000).

The Attorneys General, acting in a bipartisan coalition, submit this brief to further these interests and continue the ongoing CAFA efforts of state Attorneys General. Amici are able to offer a unique perspective on class action matters that should aid the Court in its analysis. Based on that experience, amici urge the Court to prohibit *cy pres*-only class action settlement arrangements and confirm strict limits on the use of *cy pres* to ensure that consumers are not relegated to an afterthought in the class action settlement process.

SUMMARY OF ARGUMENT

A settlement cannot be in the class's best interest or fair, adequate, and reasonable under Rule 23 where it releases millions of consumer claims, generates millions of settlement dollars, and yet the class languishes without direct compensation—the touchstone of a class settlement under Rule 23(b)(3) must be a direct class benefit.

Cy pres diverts settlement compensation from the class while heightening the risks consumers already face in the class action settlement process. And *cy pres*-only deals, which release class claims yet block consumers from receiving any direct benefit, represent the worst possible outcome for consumers. This type of arrangement is precisely why courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003).

Cy pres-only settlement arrangements are a judicial creation that this Court has never blessed; the Court should not do so now. The Court should confirm that: (1) *cy pres*-only deals are *per se* invalid because class action settlements under Rule 23(b)(3) must include a direct class benefit, and (2) given *cy pres*'s lack of direct class benefit, Rule 23 prevents using *cy pres* amounts to reach a fair, adequate, and reasonable determination or award attorneys' fees as part of a court's settlement analysis. Confirming these points would constrain *cy pres* (to the extent allowed at all under Rule 23) to its only potentially proper role: addressing relatively immaterial remainder amounts in class actions that otherwise provide a direct benefit to consumers.

ARGUMENT

I. *CY PRES* HARMS CONSUMER CLASS MEMBERS, ESPECIALLY AS BLESSED BY THE NINTH CIRCUIT

A. IMPORTATION OF *CY PRES* TO CLASS ACTIONS DIVERTS COMPENSATION FROM CLASS MEMBERS AND MAGNIFIES PROBLEMS CONSUMERS ALREADY FACE IN THE CLASS ACTION SETTLEMENT PROCESS

The use of *cy pres* in the class action settlement context is a judicial creation (imported from the trust arena), which has had the effect of diverting compensation away from the class members whose interests are supposed to be served by class actions. Yet sending settlement funds directly to class members is a critical component of resolving class actions. Class members extinguish their present (and sometimes future) claims in class action settlements. And since class members extinguish these claims in exchange for settlement funds, those "settlement funds are the property of the class[.]" *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010) ("funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members"). [2]

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[2] This key aspect of Rule 23 settlements—the release of claims in exchange for settlement funds—is in marked contrast

Cy pres's diversion of settlement funds away from consumers is particularly concerning because consumers already face disadvantages in the class action settlement process. Most notably, in dividing settlement funds that are obtained via the release of class members' claims, the interests of class members and others often diverge.[3] There is an ever-present risk of conflict between class counsel and the class because counsel has an incentive to obtain a large fee, which invariably comes from class members' pockets. *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("interests of class members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D. N.Y. 1989) (noting need to protect the "[c]lass from whose pockets the attorney's fees will come[.]").

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to statutorily based actions by state Attorneys General for the benefit of consumers, which are almost always brought and resolved without directly representing consumers or releasing consumer claims.

[3] Consumers also face procedural hurdles, including being only indirectly represented, having to make interest-based determinations with limited notice documentation, and facing burdens in raising concerns with the court. *See, e.g.*, *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157, 1163–64 (9th Cir. 2013) (incentive awards undermine adequacy of class representatives); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (discussing class representatives' failure to protect absent class members' interests); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir. 2010) (notice failed to provide "interested parties with knowledge critical to an informed decision as to whether to object[.]").

And defendants have no incentive to help correct for this risk of conflict between the class and class counsel. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003). "[A]llocation ... is of little or no interest to the defense." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995). The fee and class award "represent a package deal," *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015).

Indeed, there is an "inherent risk" in class action settlements of "class counsel ... collud[ing] with the defendants, 'tacitly reducing the overall settlement in return for a higher attorney's fee.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Both Congress and the courts have noted that coupon settlements are an example of this problem. *See, e.g., In re HP Inkjet*, 716 F.3d at 1178 ("[B]y decoupling the interests of the class and its counsel, coupon settlements may incentivize lawyers to 'negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.'" (quoting S. Rep. No. 109–14, at 29–30)).

Cy pres arrangements are a particularly salient example of this inherent risk playing out—as with coupons, *cy pres* presents a "conflict of interest

between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods.*, 708 F.3d at 173; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir. 2012) (noting "incentive for collusion" in *cy pres* class settlements; "the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award.").

It is easy to find examples where *cy pres* is relied upon to increase an attorneys' fee award without a concomitant benefit to the class. *See, e.g., In re Baby Prods.*, 708 F.3d at 169-70 (attorneys requested ~$14 million as a percentage of the $35.5 million settlement, where ~$18.5 million was designated for *cy pres* and only ~$3 million to consumers); *Dennis v. Kellogg Co.*, 697 F.3d 858, 862 (9th Cir. 2012) (counsel requested ~$2 million in fees from a $10.64 million settlement where ~$7.4 million went to *cy pres* and only $800,000 to consumers).

And defendants may prefer *cy pres* over other class action resolution options. *See, e.g., Lane*, 696 F.3d at 834 (defendant "may prefer a *cy pres* award ... for the public relations benefit"); *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp .2d 402, 415 (S.D. N.Y. 2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs," as "defendants reap goodwill from the donation of monies to a good cause"); *see also Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting existing corporate donations to many proposed *cy pres* recipients and support on cases and issues those recipients often give to donating corporations). This may help explain why *cy pres* recipients often drift far from the subject of the action, *see infra* at Section II.A,

and why "groups have now started lobbying for cy pres distributions[.]" *Lane v. Page*, 862 F. Supp. 2d 1182, 1234 (D.N.M. 2012); *see also* Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1035–1036 (2009) (noting examples of groups requesting or welcoming *cy pres*).

B. *Cy Pres*-Only Deals Threaten Consumers The Most, Even As Their Supporting Rationale Is Inconsistent With Congressional And Judicial Class Action Standards

Cy pres-only settlement arrangements embody the worst flaws of the class action settlement system and are notable in their disservice to consumers. In *cy pres*-only deals, defendants and class counsel secure their own goals from the litigation while bypassing the class—the class receives no payment, indeed no direct benefit, even as millions change hands in the settlement and class members' claims are extinguished in sweeping numbers. Worse than merely imbalanced *cy pres* settlements, which inherently threaten class members' interests by diverting to third parties (at times substantial) compensation that belongs to the class, *cy pres*-only arrangements circumvent the class completely.

The foundational assumption underpinning a pre-certification, *cy pres*-only deal is that, *ab initio*, there is no way to direct a single dollar of direct value to the absent members of the class that is being offered for certification. Yet acceptance of this foundational assumption calls into question how such a deal, and certification of such a class, could meet the standards that Congress and the courts have placed on the class action procedural tool; indeed, on several

grounds, it appears that such a deal would fail to comport with what the Court and Congress require.

First, inasmuch as *cy pres*-only settlements stem from unascertainability of the class (either because the class cannot be adequately identified to ensure a proper distribution or reached with sufficient confidence to support a distribution), the settlement cannot meet the foundational Rule 23(b)(3) requirement that a class action serve a particular, known, ascertainable class. *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013) (determining whether class is ascertainable is "'an essential prerequisite of a class action ... under Rule 23(b)(3).'"); *see also Marcus v. BMW of North America, LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012) (gathering sources). Ascertainability requires (at minimum) that the class is defined clearly using objective criteria, *see Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015), or that there is an "administratively feasible" method for determining whether someone is in the class, *Carrera*, 727 F.3d at 306. But blessing *cy pres*-only settlements obviates any need for ascertainability because the class contours no longer matter; whether class members can be identified using objective criteria or in an administratively feasible manner is of no consequence to a court that is blessing a deal where no compensation will be distributed to class members directly and the only class effect is a release of the now-aggregated claims.

Second, a class action that cannot provide a direct benefit to the purported class cannot be a superior method of adjudication. Before a court may certify a class under Rule 23(b)(3), the court must find "'that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'"

Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011). But *cy pres*-only deals (in particular pre-certification *cy pres*-only deals) effectively aggregate consumer claims solely for purposes of accomplishing a single, aggregate release—in such a deal, there is no direct class benefit, just a mass release of now-aggregated claims. This cannot be a superior adjudication method from the perspective of class members. Aggregation of consumer claims through a private class action solely for purposes of releasing the claims without direct class benefit cannot be superior to leaving consumers with their claims, whatever the value of those claims might be. The Rule 23(b)(3) class action procedural mechanism is surely meant to provide a superior means of delivering something directly to the class, not a superior means for defendants to obtain an aggregate release at a bulk-discount price.

Third, certifying a class for which the only feasible relief is a *cy pres* distribution to a third party requires interpreting Rule 23 in violation of the Rules Enabling Act. In certifying a class under Rule 23 (even as part of a settlement), a court must bless both the class's cohesion as well as its desired relief, recognizing that the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Where (as here) class actions are brought under substantive laws that only permit recovery of compensatory damages for the class, it would enlarge the substantive rights of the plaintiffs to certify a class in which all compensation is instead directed towards third parties. This error would essentially "transform substantive law 'from a compensatory remedial structure to the

equivalent of a civil fine.'" *See Klier*, 658 F.3d at 481 (quoting Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 641 (2010)); *cf. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (procedural rules allowing multiple claims do not violate Rules Enabling Act because they "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights.").

C. Given Its Risks, Courts Have Rightly Criticized *Cy Pres* And Focused On The Need For Direct Class Benefit, But The Ninth Circuit Has Blessed Free Use Of *Cy Pres*

It should be no surprise that judges from across the country have been plainspoken in their appraisal of *cy pres*'s failings. *See, e.g.*, *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1111 (D.N.M. 2012) ("*cy pres* awards are a bad idea and inappropriate, because they inject a third party into the litigation, do not adequately reflect the best interests of absent class members, create an appearance of impropriety, and are not the best use of the Court's time and resources."). Judges are placed in the role of fiduciary for the absent class members. *E.g.*, *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987) ("In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion.'"). And this duty is especially important when settlements are offered prior to formal class certification. *E.g.*, *In re Bluetooth*, 654 F.3d at 946 ("Courts have long recognized that

'settlement class actions present unique due process concerns for absent class members.'"); *id.* ("Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement.").

Reflecting this duty toward the class, and the dangers of *cy pres*, even where courts have stopped short of *per se* rejecting *cy pres*, they have rightly focused on ensuring a direct class benefit in connection with any class settlement with a proposed *cy pres* component. Most notably, the Third Circuit has introduced as a specific *cy pres* consideration "the degree of direct benefit provided to the class," while emphasizing that "*cy pres* awards should generally represent a small percentage of total settlement funds." *In re Baby Prods.*, 708 F.3d at 174.

Notwithstanding these criticisms, and the necessary focus on the direct class benefit, the Ninth Circuit has blessed free use of *cy pres*-only distributions whenever there is a large class, which relegates the class to an afterthought and is exactly the type of approach to *cy pres* that is inconsistent with congressional and judicial class action requirements. *See* Section I.B. In weighing *cy pres*, the Ninth Circuit asks only whether the *pro rata* distribution of the proposed settlement fund over the full class would result in a *de minimis* amount, and is clear that *cy pres* is to be blessed in such a circumstance even if there are alternative options that would provide a direct class benefit; put simply, the Ninth Circuit requires only that a court turning to *cy pres* reach a determination that "'the proof of individual claims would be burdensome or distribution of damages costly.'" Pet. App. 8 (quoting *Lane v. Facebook, Inc.*, 696 F.3d at 819). But in almost every large

class action, the proof of individual claims will be burdensome in some respect (hence the need to aggregate the claims in the first place), and the distribution of damages costly (because distributions across large numbers of claimants or class members are, by their nature, costly).

II. IF THE COURT DOES NOT BAR ALL *CY PRES*, IT SHOULD CONFIRM THAT *CY PRES*-ONLY DEALS ARE *PER SE* INVALID AND *CY PRES* AMOUNTS CANNOT SUPPORT A RULE 23 FAIRNESS DETERMINATION OR FEES

Given the numerous risks that *cy pres* as a whole presents, the Court may well determine that all uses of *cy pres* in the class action settlement context are impermissible under Rule 23(e)'s "fair, reasonable, and adequate" inquiry. But, to the extent the Court does not foreclose all uses of *cy pres*, it should certainly provide clarification that (1) *cy pres*-only deals under Rule 23(b)(3) are *per se* invalid because *cy pres* provides no direct class benefit, and (2) given the lack of direct class benefit from *cy pres*, Rule 23 prevents using any *cy pres* sums to reach a fair, adequate, and reasonable determination or award attorneys' fees for cases settled under Rule 23(b)(3).

A. THE COURT SHOULD BAR *CY PRES*-ONLY DEALS, CONFIRMING THAT A RULE 23(B)(3) CLASS ACTION MUST DELIVER A DIRECT CLASS BENEFIT

The Court should reject Rule 23(b)(3) *cy pres*-only settlements as *per se* invalid because they lack a direct benefit to the class. "Rule 23 of the Federal Rules of Civil Procedure is meant to provide a vehicle

to compensate class members and to resolve disputes." *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d at 1105. And Rule 23 is to be "applied with the interests of absent class members in close view." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). It is therefore critical that any class action settlement under Rule 23(b)(3) include a direct benefit to the class—otherwise, the class action being certified and judicially approved serves only to allow defendants to aggregate claims solely for purposes of extinguishing them.[4]

Yet *cy pres* distributions themselves do not directly benefit the class; in the place of the traditional direct benefit to the class in exchange for the extinguishment of their claims, *cy pres* deals substitute an indirect benefit. *See, e.g., Lane v. Facebook, Inc.*, 696 F.3d at 819 ("A cy pres remedy ... is a settlement structure wherein class members receive an indirect benefit ... rather than a direct monetary payment").

And courts have readily noted that the "indirect benefit" received by the class from *cy pres* in place of direct compensation "is at best attenuated and at worse illusory." *In re Baby Prods.*, 708 F.3d at 173. Even setting aside the foundational concern that "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else," *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004), the *cy pres* distribution is often so tenuously connected to the class's claims that it can

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[4] Rule 23(b)(3) class actions present different considerations than those under (b)(1) and (b)(2). Rule 23(b)(3) actions are focused specifically on "individualized monetary claims," whereas under (b)(1) or (b)(2), "individual adjudications [are] impossible or unworkable" or "the relief sought must perforce affect the entire class at once." *Dukes*, 564 U.S. at 361-62.

hardly be said to provide any benefit to class members. For example, a *cy pres* distribution to "a scholarship program" named after the defendant, "two museums," and "a local history and genealogy library" have been offered to resolve a suit relating to an agrochemicals plant, exposure to arsenic, and contracting cancer. *Klier*, 658 F.3d at 473. In another example, a *cy pres* distribution to Family House Toledo—a charitable organization that offers emergency family housing in Toledo—was used in resolving a multidistrict class action alleging antitrust violations relating to foam in consumer products, even though the district court acknowledged that "few class members likely reside in Northwest Ohio." *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621, 625 (N.D. Ohio 2016). And the list goes on. *See e.g. Schwartz v. Dallas Cowboys Football Club Ltd.*, 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (awarding a *cy pres* remainder in an antitrust case, even after noting that such distribution "would not further the goals of the antitrust laws"); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395–99 (N.D. Ga. 2001) (approving *cy pres* distribution to Georgia-based charities, including The Make-a-Wish Foundation of Greater Atlanta and North Georgia as well as the American Red Cross's Atlanta chapter, in a multidistrict, price-fixing class action over NASCAR race souvenirs).

In the absence of a direct benefit to the class, a proposed *cy pres* settlement cannot pass muster under basic conceptions of fairness, much less Rule 23's specific requirements. A tenuous, illusory benefit from a third-party distribution does not match the purposes of Rule 23, and should not be blessed as serving the interests of the class or being fair, adequate, and reasonable. The solution is

simple: require a direct benefit to the class for actions under Rule 23(b)(3) and reject the use of *cy pres*-only arrangements that by their nature cannot satisfy this basic consumer protection requirement.

B. The Court Should Further Confirm That Because *Cy Pres* Does Not Provide A Direct Class Benefit, It Cannot Support A Rule 23(e) Fairness Determination Or The Award Of Fees

Because *cy pres* amounts do not provide a direct class benefit, they cannot be treated as providing an adequate basis for approving a settlement or awarding fees in a class action—it is critical that any settlement purporting to use *cy pres* is able to stand on its own, without considering the *cy pres* sums. This will ensure consumers are protected from imbalanced settlements where *cy pres* dwarfs the direct class benefit, and that the interests of class counsel and defendants are aligned toward the key goal of class action settlements: ensuring that class members receive the benefits bargained for in exchange for the release of their claims.

Even where a settlement contains class member awards beyond *cy pres*, the class (or even just a subset of the class) can often receive at most a nominal direct benefit and effectively suffer all the harms of a *cy pres*-only deal. For example, when claims-made structures are paired with a *cy pres* provision for unclaimed funds, the resulting settlements can direct almost all funds to *cy pres*. The Ninth Circuit recently heard oral argument in such a case, where, after the close of the claims process, the proposed distribution would send over 90% of the claims-made settlement fund to *cy pres*. *In re Easysaver Rewards*

Litigation, No. 16-56307, Dkts. 21, 76, 77 (9th Cir.) (detailing distribution plan featuring ~$4 million to *cy pres*, ~$8.5 million in fees, and only ~$250,000 to consumers). And this case is not unique. *See, e.g.*, *Zeisel v. Diamond Foods, Inc.*, No. 10-01192, Dkt. 243 at 2 (N.D. Cal.) (distributing ~$2.2 million worth of donations to *cy pres* recipient where the class only recovered ~$370,000); *Hartless v. Clorox Co.*, No. 06-cv-02705, Dkts. 137 at 1, 138 (S.D. Cal.) (approving distribution of ~$3.9 million to *cy pres* recipients after only ~$2.3 million was received by the class).

These types of settlements no more comport with Rule 23 than *cy pres*-only deals; if a settlement cannot stand absent consideration of *cy pres* amounts (whether because it is *cy pres*-only or an imbalanced *cy pres*-focused deal), then it cannot be deemed fair, adequate, and reasonable by a federal court. These imbalanced arrangements are judicially blessed only when a court commits the error of treating the *cy pres* award as adequate compensation for the release of class members' claims (in lieu of a direct benefit). But, as noted above, the direct class benefit is central to the fairness of a settlement. And the question is not just whether there is *any* direct class benefit, but whether there is *adequate* direct class benefit to warrant the release of the class members' claims and approval of the proposed settlement.

The Court should confirm the need for an *adequate* direct benefit by clarifying that, given the lack of direct class benefit from *cy pres*, Rule 23 prevents using any *cy pres* sums to reach a fair, adequate, and reasonable determination or award attorneys' fees in cases settled pursuant to Rule 23(b)(3). This analytical framework would properly acknowledge the

failure of *cy pres* to directly benefit the class, ensure that settlements are only approved with adequate direct class benefit, and do so without preventing courts from relying on *cy pres* to address the complex question of what is to be done with relatively immaterial remainder amounts in claims-made settlements, where the costs of distribution would exhaust the available funds: *e.g.*, where $25,000 remains available but additional direct notice or distribution costs would total $45,000.[5]

Put simply, this guidance would confirm that *cy pres* cannot be used to circumvent the class and create the illusion of fairness; it can only be used (if at all) if it is wholly ancillary to an otherwise fair, adequate, and reasonable settlement arrangement. This guidance would also serve the overarching goal of aligning the often-divergent interests in the class action settlement process by giving class counsel in particular an incentive to resort to *cy pres* only for amounts that are immaterial to the settlement as a whole. *Cf. Pearson v. NBTY*, 772 F.3d 778, 781 (7th Cir. 2014) ("Basing the award of attorneys' fees on [the ratio of fees to the fees plus what class members actually receive] ... gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class"); *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 406 (D. Mass. 2008) ("tying the award of attorneys' fees to claims made by class members ... will not only encourage more

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[5] Practically, this may require a two-step (or more) fee award in some cases, with the final fee analysis and award only coming after the claims process has ended and *cy pres* amounts (to the extent proposed) are fully known and calculable.

realistic settlement negotiations and agreements, but also will drive class counsel to devise ways to improve how class action suits and settlements operate"). And we know that when parties are properly incentivized to direct would-be *cy pres* distributions to class members, consumer-positive outcomes follow. For example, in *Fraley v. Facebook Inc.*, the court rejected a *cy pres*-only deal, leading counsel to turn to a claims-made process that distributed ~$20 million amongst class members. 966 F. Supp. 2d 939, 943 (N.D. Cal. 2013).

As a district court explained in connection with an analogous set of class action settlement concerns:

> At bottom, class action litigation should benefit the individuals who have been harmed. To be sure, class action lawsuits have a valuable deterrent role to play, and there is therapeutic and punitive value in requiring defendants to pay for wrongful conduct, regardless of to whom those monies are transferred. But these considerations ought not cause courts complacently to abide an institution that fails efficiently and effectively to deliver relief into the hands of those in whose name it was established—the class.

TJX Cos., 584 F. Supp. 2d at 406.

* * *

"Whatever the superficial appeal of *cy pres* in the class action context may have been, the reality of the practice has undermined it." *Klier* at 481. To the extent *cy pres* serves any place in the class action settlement process, it is in handling relatively immaterial, remainder amounts in claims-made settlements, where the costs of additional notice and

distribution would literally exhaust the available funds. State Attorneys General are repeatedly engaged in the class action settlement process, looking out for the interests of their consumers and speaking against imbalanced settlements. Based on that experience, amici believe it is important for the Court to confirm that Rule 23(b)(3) *cy pres*-only deals are *per se* invalid in light of *cy pres*'s lack of direct class benefit, and a proposed Rule 23(b)(3) settlement must stand or fall on its direct class benefit, without consideration of *cy pres* amounts.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(e)(2) requires that a settlement that binds class members be "fair, reasonable, and adequate." In this case, the Ninth Circuit upheld approval of a settlement that disposed of absentee class members' claims while providing those class members no relief at all. Breaking with the Second, Third, Fifth, Seventh, and Eighth Circuits, the Ninth Circuit held that the settlement's award of $5.3 million to six organizations that had prior relationships with class counsel and/or defendants was a fair and adequate remedy under the trust-law doctrine of *cy pres*. The question presented is:

Whether the Due Process Clause of the Fifth Amendment, the Free Speech Clause of the First Amendment, and Federal Rule of Civil Procedure 23(e)(2) require courts to reject proposed *cy pres* class action settlements that deprive class members of their legal remedies and compel speech approved of by class counsel, defendants, and the court without meaningful consent by class members.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, releases the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The present case concerns Cato because it involves a threat to the integrity of the adversarial legal system and thus to constitutional due process.

SUMMARY OF ARGUMENT

The use of *cy pres* awards in class-action settlements violates the constitutional rights of absent class members. Specifically, the Fifth Amendment's Due Process Clause protects class members' right both to adequate representation and to pursue their legal claims against the defendant, while the First Amendment's Free Speech Clause protects the right of class members to be free from compelled speech—including being forced to fund charitable organizations to which class members might be opposed.

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no party's counsel authored this brief in whole or in part and that no person or entity other than *amicus* funded its preparation or submission.

Our opt-out class-action system significantly reduces participation by class members—often eliminating it entirely. Class counsel, without meaningful supervision by their clients, engage in self-dealing and collusion with defendants, selling class claims at a steep discount while maintaining high attorney fees. *Cy pres* awards facilitate that collusion and enable even greater self-dealing—allowing class counsel and defendants to appear publicly charitable while expending money that rightfully belongs to the class.

The Constitution guarantees class members due process through adequate representation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Those due-process rights are violated when class counsel enrich themselves by selling off class members' legitimate claims without compensation or meaningful opportunity to consent. Only a "rigorous analysis" under Rule 23 can avoid judicial complicity in this wholesale deprivation of class members' due process rights. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552 (2011).

The judiciary is also complicit in the deprivation of class members' First Amendment rights when a court approves a *cy pres* award as part of a class-action settlement, because it forces class members to "endorse[] . . . ideas that [the court] approves." *Knox v. Service Employees Intern. Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). The opt-out system used in the class-action context is problematic because it presumes "acquiescence in the loss of fundamental

rights" to be free from compelled speech and places the burden on absent class members. *Id.* at 2290.

More importantly in the context of a cert. petition, the deprivation of all of these rights is not limited to this case—or even to the Ninth Circuit—but will be suffered by class members nationwide, as class counsel file claims in the jurisdiction that exercises the least scrutiny over potential self-dealing.

ARGUMENT

I. WITHOUT MEANINGFUL JUDICIAL OVERSIGHT OF PROPOSED *CY PRES* CLASS-ACTION SETTLEMENTS, CLASS MEMBERS ARE DEPRIVED OF THEIR LEGAL CLAIMS WITHOUT DUE PROCESS

The Fifth Amendment's Due Process clause protects the right of individuals to their liberty and property. Few forms of property are as crucial to a free society as the right to pursue legitimate legal claims, seeking to obtain a redress of wrongs. Similarly, while there is no right to counsel in civil litigation, the Court has said that due process includes the right of litigants to have their claims adequately represented by whatever counsel is bringing claims on their behalf. U.S. Const., amend. V; *Shutts*, 472 U.S. at 812.

The current opt-out regime governing class actions in federal court raises serious due-process concerns by allowing named plaintiffs, class counsel, and defendants to dispose of the legal claims of absent class members without meaningful consent. The only bulwark against this deprivation of

property in federal court is the requirement that district courts approve "proposals [that] would bind class members" only after determining that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Approval of a *cy pres* class action settlement that provides no benefit to class members removes this bulwark, deprives class members of due process, and leaves class members protected only by the goodwill of class counsel and defendants.

A. Present Opt-Out Mechanisms for Class-Action Participation Result in Effectively Zero Participation by Class Members

The evolution of class actions in U.S. courts has yielded a system where litigation is controlled by class counsel and defendants, bargaining over class certification and settlement. Named plaintiffs are likely allowed to offer token input, as required by class counsel's professional obligation, but the vast majority of class members have no way of making their voices heard. This result is not surprising, given the incentives faced by class counsel and the absent class members, but the lack of meaningful participation by absent class members borders on a violation of due process even in the absence of concerns regarding *cy pres* awards.

The Court has stated that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 812. If due process protections are to be meaningful in the class-action context, the absent plaintiff's

"opportunity" must be meaningful. The Court in *Shutts* said as much when it described a Kansas opt-out statute and concluded that the opportunities afforded plaintiffs were "by no means *pro forma*" and that the Constitution required no more protection for plaintiffs who could be "presumed to consent to being a member of the class by his failure to [affirmatively opt out]." *Id.* at 813. See also *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 799 (1996) ("the right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

Rule 23 provides that class members be notified of the lawsuit, ostensibly providing class members with an opportunity to become informed about their legal claims and participate meaningfully in legal proceedings. Fed. R. Civ. P. 23(c)(2). This is the theoretical foundation for concluding that class members can be presumed to have consented to being part of the class. That foundation falls apart, however, when subjected to a critical review under a practical lens. *See generally* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71 (2007). *See also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071-72 (2013) (Alito, J., concurring) (inaction in response to a class arbitration opt-out form is not consent).

Having suffered relatively small injuries, class members have little incentive to learn of the existence of class actions in which they may have

legal interests. Class counsel, meanwhile, having already assembled their named plaintiffs, have no incentive to provide meaningful notice to the rest of the class. As a result, when notices arrive at class members' homes, they are likely to resemble little more than the piles of junk mail that most people receive on a daily basis. Most class members, not being on the lookout for class-action "opportunities," will dispose of such notices without any comprehension of the fact that they have forfeited their right to opt out. Class counsel are then able to proceed with the case unencumbered by an informed and participating class that could object to the uncompensated extinguishing of its legal claims.

B. Without Meaningful Class Participation, Class Actions Are Rife with Principal-Agent Problems and Conflicts of Interest

The attorney-client relationship is a classic principal-agent arrangement. As with all principal-agent relationships, the most difficult task is to constrain the self-interest of the agent, especially where the agent has a significant informational advantage over the principal. Standards of professional ethics, enforced by state bar associations, provide some constraint on lawyers' tendencies to enrich themselves at the expense of their clients but, as shown by the number of disciplinary actions commenced each month, professional standards are often not enough. As unfortunate as this truth is, the situation becomes even more problematic when the agent (class counsel) is aware that the vast majority of the

principals (class members) are not monitoring the agent's actions. In fact, most of these "principals" are unaware of the existence of the "agent" or the fact that he is acting in their names and binding them.

Because class counsel need not worry about class members involving themselves in the litigation, they are largely free to pursue their own interests, even when doing so prejudices the interests of absent class members. The Court has previously stated that due process is violated when the named plaintiffs' interests are in line with those of the defendant, rather than the absent class members. *Hansberry v. Lee*, 311 U.S. 32, 45-46 (1940). Self-dealing by class counsel, especially in collusion with defendants, violates the due-process rights of absent class members in precisely the same way.

Self-dealing on the part of class counsel could take a number of forms—including advancement of a particular political agenda—but it typically takes the form of pursuing larger attorney fees. One way that class counsel can inflate fee awards is to be over-inclusive when identifying the class. A larger class means more aggregated damages and, consequently, a larger fee award.

The emergence of *cy pres* awards in the class action context provides circumstantial evidence of this phenomenon. *Cy pres* was initially proposed as a way of disposing of the unclaimed portion of the damages fund. *See generally* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010).

Most scholars account for the disparity between awarded and claimed damages by arguing that the damages to be claimed did not justify each class member's cost of obtaining his share. *See id.* It is at least plausible, however, that many of those whose alleged injuries went into the damages calculation were not actually harmed, making their failure to claim damages not only reasonable but ethical.

This raises a related conflict of interest, that class counsel and defendants have a strong incentive to collude in reaching a settlement. Class counsel want to inflate the size of the class in order to maximize damages awards. Defendants want to inflate the size of the class so that a settlement will eliminate more potential legal claims at a discounted rate. Class counsel can agree to the discount and still increase their payoff due to the increased class size. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?"). This collusion works well for defendants and for class counsel, but legitimate class members suffer because their injuries are compensated at a discounted rate, to say nothing of those outside of the legitimate class, who suffer because their separate claims have been improperly categorized and disposed of through settlement.

Of course, the existence of incentives to engage in self-dealing does not mean that class counsel will do

so, but there is plentiful evidence that class counsel engage in self-dealing, thereby failing to provide adequate representation to absent class members as required by due process. *Shutts*, 472 U.S. at 812. The Court has previously dealt with two such examples of self-dealing by class counsel. In *Dukes*, the Court rejected an attempt to limit damages to back-pay claims in order to make the class action mandatory. *Dukes*, 131 S.Ct. at 2559. The Court rejected this self-interested attempt by class counsel because it would have precluded class members' compensatory damages claim. In *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1348-49 (2013), class counsel attempted to stipulate to less than $5 million in damages, in order to avoid federal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). While the Court decided that case on other grounds, it acknowledged that the attempted stipulation would have reduced the value of class members' claims. *Knowles*, 133 S.Ct. at 1349.

Lower courts have also rejected selective pleading, waiver, or abandonment of claims in order to achieve certification of the class, even though doing so would impair class members' ability to raise abandoned claims at a later date. *See, e.g., Arch v. Am. Tobacco Corp., Inc.*, 175 F.R.D. 469, 479-80 (E.D. Pa. 1997); *Pearl v. Allied Corporation*, 102 F.R.D. 921, 922-23 (E.D. Pa. 1984); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982); *Kreuger v. Wyeth, Inc.*, No. 03-cv-2496, 2008 WL 481956, at *2-4 (S.D. Cal. Feb. 19, 2008).

Not every principal-agent problem or conflict of

interest that arises in the class-action context is the result of class counsel's nefarious motives. For example, it is impossible to effectively communicate with the entire class, which will inevitably lead to some class members being disadvantaged. Courts should be aware of the strong potential for self-dealing by class counsel, however, and should refuse to condone it by certifying classes and approving settlements that appear self-serving. By reviewing class-action certifications and settlements with a skeptical eye, courts will be better able to protect the rights of class members to adequate representation.

C. Fed. R. Civ. P. 23(e)(2)'s "Rigorous Analysis" Provides a Bare Minimum Check on Abuses by Class Counsel

Our current class action regime raises significant due process concerns, but it also contains a safeguard against actual due process violations, by requiring the trial court to engage in a "rigorous analysis" of the plaintiffs' claims. *Dukes*, 131 S.Ct. at 2552 ("Rule 23 does not set forth a mere pleading standard . . . certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied") (internal quotation marks omitted). While the Court in *Dukes* only needed to address the due process requirements of the certification process, due process violations are possible at all points in class action litigation, and especially in the settlement context. The Court should therefore apply its "rigorous analysis" standard to the entirety of Rule 23.

This application of Rule 23 would preclude the

cursory review that many courts give to proposed settlements and the increasingly brazen self-dealing by class counsel, often in collusion with defendants. Broad application of the "rigorous analysis" standard would empower trial courts to protect the interests of those most vulnerable in this context—those absent class members whose liberty and property interests are in the hands of class counsel whose interests are misaligned from those of the class.

D. Due Process Concerns Are Heightened When the Proposed Settlement Includes a *Cy Pres* Component

1. Class counsel maximize fee awards by using *cy pres* to inflate settlements.

Class counsel seeking higher fees after a settlement must normally increase the total amount of damages agreed to by the defendant. In a more traditional class-action context, that means that he must increase either the number of class members covered by the settlement or the estimated damages suffered by each class members. Trial courts have experience in scrutinizing both class composition and damages, and have the capacity—if not always the willingness—to reject any attempts by class counsel to engage in self-dealing in these two areas. Introduction of the *cy pres* mechanism into a settlement changes the dynamic in ways that pose increased risks to the due-process rights of absent class members.

Cy pres awards provide class counsel an additional method for inflating the total settlement

amount without having to justify expansion of claimed damages or inclusion of additional class members. Instead, the settlement amount gets larger in a far more public-relations-friendly manner, with large sums being directed towards charitable causes. Class counsel also need not be bothered with determining how to process damages payments to the actual injured parties. To make the point particularly clear, *cy pres* awards are desirable to class counsel because it relieves them of what should be their primary responsibility—delivering actual benefits to the class they promised to represent.

Defendants will not object to the use of a *cy pres* awards—far from it—because they gain significant public-relations benefit, often at minimal to no cost. The benefit to defendants is derived by appearing to accept responsibility and agreeing to settle, and the benefit will be higher with a *cy pres* award because defendants will be seen as engaging in charitable giving. *See S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("In general, defendants reap goodwill from the donation of monies to a good cause.") In extreme cases, such as the present one, the defendant may not object because it directly benefits from the *cy pres* award—as it has a pre-existing relationship with four of the recipient organizations. *Id.* ("[D]efendants may also channel money into causes and organizations in which they already have an interest.") Contributions to those four *cy pres* recipients could easily serve as substitutes for future contributions by defendant, meaning that portion of the settlement will cost the defendant nothing.

It is theoretically possible that the various methods for augmenting the settlement amount are perfect substitutes, so that an increase in *cy pres* awards will be exactly offset by a reduction if attempts by class counsel to improperly increase the class size or damages calculation. But class counsel have strong incentives to increase their monetary payoff from each case in whatever way possible. The far more likely result is thus that class counsel will use *cy pres* awards at the margin, increasing total settlement awards as a means of increasing the total fee award. Only enhanced scrutiny of settlement agreements by the courts can properly counter this trend and minimize self-dealing by class counsel.

2. Class counsel can double-dip by choosing *cy pres* award recipients controlled by or benefitting class counsel.

The use of *cy pres* awards raises a related concern over self-dealing by class counsel, that the choice of charity designated in the settlement agreement might allow class counsel to reap significant monetary and other benefits. In one case, class counsel steered $5.1 million to the alma mater of the lead plaintiffs' lawyer. *See* Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet, Dec. 3, 2007. Here, three of the *cy pres* recipients are the alma maters of class counsel. Cy *pres* awards can also be made to charities that have direct financial ties to class counsel or their family members—but even if there is no such direct link, counsel can benefit from "causing" the contribution,

generating goodwill and alleviating the annual charitable-giving goals of the lawyers involved.

3. Class counsel can improperly lobby presiding judges by selecting *cy pres* awards that benefit them.

Even more troubling than self-dealing by class counsel is the fact that class counsel have a strong incentive to corrupt the judicial process by engaging in a form of what public-choice economists would call "rent-seeking." In essence, class counsel can choose as the *cy pres* award a charity or charities with ties to the trial judge in an attempt to improperly encourage the court to approve the settlement. In *Fairchild v. AOL*, LLC, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009) (class action settlement agreement), for example, the *cy pres* award included payment to the Legal Aid Foundation of Los Angeles, a charity on whose board the trial judge's husband sat. Such an award might normally be a great benefit to society, but "the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety." *Bear Stearns*, 626 F. Supp. 2d at 415.

4. Judges have an incentive to approve *cy pres* awards that benefit themselves.

Class counsel have strong incentives to engage in inappropriate rent-seeking. Worse still, judges have an incentive to succumb to rent-seeking pressures and distort their judgment and approve otherwise questionable settlements that benefit charities in which they have an interest. In other contexts, this

could be cause for mandatory recusal. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("[T]he Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case. This rule reflects the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'") (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1948); The Federalist No. 10). This due-process concern typically arises in the context of settlement approval, however, so the defendant has already approved and will not challenge the settlement. If the trial court fails to engage in a rigorous analysis, as was the case here, absent class members' rights will go unprotected in yet another way.

5. Class members often get little or no benefit from *cy pres* settlements.

All of these concerns might be overblown if class members are receiving something of reasonable value in return for the settlement of their legal claims. Hence the requirement that trial courts engage in rigorous analysis to determine whether the settlement is fair, reasonable, and adequate. In the case of *cy pres* awards, however, the award of damages to charitable organizations represents money that defendant is paying, ostensibly in restitution for injuries inflicted, but which will never be received by those who were injured. Not only are the absent class members deprived of any direct compensation for their injuries, but "[t]here is no

indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi*, 356 F.3d at 784. Here, the "someone else" that received the money has a prior relationship with the defendant, potentially reducing or even eliminating the net cost to defendant.

The substitution of *cy pres* awards for actual compensation to class members also begins to call into question the entire notion of class action lawsuits. "A consumer class action is superior to individual suits because it allows people with claims worth too little to justify individual suits-so called negative-value claims-to obtain the redress the law provides. But if the consumer class action is likely to provide those with individual claims no redress . . . the consumer class action is likely not superior to individual suits." *Hoffer v. Landmark Chevolet Ltd.*, 245 F.R.D. 588, 603 (S.D. Tex. 2007).

E. The Court Should Require the Ninth Circuit to Honor Its Rule 23 Obligations and Avoid Deprivations of Due Process

The lower court, in its decision to uphold approval of the settlement agreement, acknowledged its basic responsibilities under Rule 23. Pet. App. 7-8 ("we scrutinize the proceedings to discern whether the [lower] court sufficiently 'account[ed] for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit"), 10 ("we benchmark whether the district court discharged its obligation to assure that the settlement is 'fair, adequate, and free from collusion.'") It did so, however, without once

mentioning the requirement of a "rigorous analysis." Having previously expressed its unwillingness to inquire too rigorously into the nature of a *cy pres* award because to do so would be "an intrusion into the private parties' negotiations [that] would be improper and disruptive to the settlement process," *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), the Ninth Circuit maintained its perverse standard here by "quickly dispos[ing]" of claims that a *cy pres*-only settlement appropriated the class members' legal claims for the personal benefit of class counsel and defendant. Pet. App. 8. The analysis therefore fell short of that required by Rule 23, exhibiting a fundamental misunderstanding about the impact of a *cy pres* award on the incentives faced by class counsel and defendant.

The Ninth Circuit's errors appear to derive from its refusal to acknowledge the due process risks of class actions generally, and the particular dangers of collusion present when *cy pres* awards are used. The Ninth Circuit did acknowledge that "*cy pres*-only settlements are considered the exception, not the rule," Pet. App. 8, but still approved the settlement in cursory fashion merely because the district court had found the settlement fund to be non-distributable. *Id.* By so doing, the Ninth Circuit effectively abdicated its review responsibilities because class counsel and defendants decide what the settlement fund should be. Class counsel and defendants, preferring *cy pres*-only awards for the reasons described *supra*, face a straightforward calculus problem—maximize the settlement and resulting fee award, subject to the constraint of the

settlement fund being non-distributable. Having done so, class counsel and defendants will be assured that the Ninth Circuit will "quickly" approve whatever collusive *cy pres* award is put before it.

Oddly, the court justified its decision by noting the district court's finding that plaintiffs' claims were "shak[y]." Pet. App. 9. It is not entirely clear why the Ninth Circuit believed that the potentially frivolous nature of class counsel's claims was sufficient to justify approval of a settlement of those claims, complete with exorbitant fees to class counsel, without the rigorous analysis required by law.

When addressing the objections raised with regard to the choice of *cy pres* recipients, the Ninth Circuit correctly articulated the risk of using *cy pres* awards—the process of selecting award recipients might "answer to the whims and self-interests of the parties, their counsel, or the court." Pet. App. 12 (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-39 (9th Cir. 2011)). Once again, however, the lower court failed to engage in a rigorous analysis—or even mention the requirement—a decision which fell short of the required "higher level of scrutiny for evidence of collusion or other conflicts of interest." Pet. App. 25 (Wallace, J., dissenting) (citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).) That the lower court failed to engage in any form of rigorous analysis is made worse by its acknowledgement that "the district court cannot as effectively monitor for collusion and other abuses." Pet. App. 7. To summarize, even though the Ninth Circuit knew that collusion was more likely in this

case, that the district court was ill-equipped to prevent collusion, and that prevention of collusion was one of the lower court's primary tasks, it refused to actively look for collusion.

Had the Ninth Circuit chosen to take its responsibility seriously, evidence of collusion was easily identifiable. The district court had approved the selection by class counsel of three of their alma maters and four groups that had previously received funds from defendant, a practice previously described by the lower court as "unseemly," *Nachshin*, 663 F.3d at 1039, but accepted in this case without a moment's hesitation. Instead of engaging in any substantive analysis, the lower court justified the district court's conclusion merely by comparing it to its previous approval of a *cy pres* award to an entity controlled by defendant. *Lane*, 696 F.3d at 817. Compared to that appalling approval of naked self-dealing by—and collusion between—class counsel and a defendant, almost anything would appear mild, but such a cursory reference hardly satisfies the due process to which absent class members are entitled.

If allowed to remain as Ninth Circuit precedent, this decision will lead to greater levels of self-dealing by class counsel, greater levels of collusion between class counsel and defendants, and greater rent-seeking pressures on judges to corrupt their rulings for personal gain. These deprivations of due process will not be limited to those living in the Ninth Circuit, however, because class counsel nationwide will choose to file claims in whichever forum has exhibited the least desire to police self-dealing.

II. USE OF *CY PRES* AWARDS IN CLASS-ACTION SETTLEMENTS COMPELS CLASS MEMBERS TO SUPPORT SPEECH WITH WHICH THEY MAY DISAGREE, IN VIOLATION OF THE FIRST AMENDMENT

When a class action is settled, the damages funds belong solely to the class members. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). When a trial court approves a *cy pres* award, therefore, it ratifies a mandatory transfer of value from class members to a charitable organization. That organization will use the funds provided by the settlement agreement to pursue its own goals, including (understandably) by engaging in various forms of speech. In effect, the court forces class members to support groups whose views may be disagreeable to them. *See Knox*, 132 S. Ct. at 2289 ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups.").

This type of *cy pres* imprimatur is problematic because the Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

The Court has approved a narrow class of compelled speech which might not violate the First Amendment: When the government implements a comprehensive regulatory scheme that mandates

association among a defined group—such as a trade or professional association—compelled contributions for the benefit of that group may be allowed. *Id.* And even then, the contribution can only be sustained "insofar as [it is] a necessary incident of the larger regulatory purpose which justified the required association." *Id.* (internal quotation marks omitted).

To state the obvious, the forced subsidization of charitable organization that arises from *cy pres* awards does not meet the initial criteria for that narrow class of permissible compelled speech. Class actions are governed by Rule 23 and the diverse laws that give rise to legal claims, not a comprehensive regulatory scheme. Likewise, association among class members is voluntary, even if not based on full and meaningful consent. *See supra* at I.A.

The Court has also expressed doubts about the use of opt-out systems given compulsory subsidies. *See Knox*, 132 S. Ct. at 2290-96. While there are significant differences between the context here and that of *Knox*, certain principles are the same, such as that courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 2290. "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Id.* Similarly, class members should not be forced to subsidize class counsel's, defendants', or the judges' charitable goals.

Whether or not an opt-out mechanism is proper for a traditional class action, once a *cy pres* award is

introduced, an opt-in mechanism is needed because courts can no longer presume acquiescence by class members in the loss of their First Amendment rights.

A. Class Members Are Likely to Be Diverse in Their Political and Social Views, while *Cy Pres* Award Recipients Are Likely to Share the Views of Class Counsel, Defendants, and the District Court

In order for a class action to be certified, the class has to be "so numerous that the joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The only required commonality between members of the class pertains to their legal claims, not their personal preferences, or political persuasion. It would therefore be truly extraordinary if members of the class were uniform in their preferences for charitable giving. Some class members could be misanthropes, preferring to avoid all philanthropy. Most class members might agree with the notion of charitable giving generally, but would disagree as to the type of organizations that were worthy of financial support. In light of this diversity of views among class members, it is inappropriate for class counsel and defendants to presume to select a "worthy" charities to be the recipients of funds that represent damages owed to class members.

That a trial or appellate court sanctions the choice is immaterial to the question of class members' First Amendment rights to be free from compelled speech. Such a government imprimatur simply adds one additional external entity that has

"approved" the compelled speech, but it does not render the nature of the speech voluntary.

B. If *Cy Pres* Funds Are at All Controlled by Defendants, Class Members Will Be Forced to Support the Views of the Those Who Caused Their Injury, and May Even Be Compelled to Support a Repetition of the Actions That Resulted in That Injury

One thing that class members must have in common is an injury caused by the defendant. Fed. R. Civ. P. 23(a)(3); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The result of a fair and just trial should be a transfer of wealth from perpetrator to victim, not the other way around. As a result of the settlement, the defendant admits—impliedly or explicitly—that the victims have a legal right to restitution. To compel the class members to return their rightful compensation to the one who injured them is repugnant to basic principles of justice and fairness and is a particularly pernicious example of Thomas Jefferson's adage that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Irving Brant, James Madison: The Nationalist 354 (1948) (quoted by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977)).

To add insult to injury—quite literally—the money that should have made the class members whole is, instead, used to burnish the public-relations image of the one who inflicted the damages that gave rise to the lawsuit.

From a more practical perspective, if the defendant is thus rewarded for its role in damaging class members, it will feel less reluctance to engage in future activities in the same vein, creating the perverse possibility that the class members will be forced to fund their future, repetitive victimization. This peculiar form of unconstitutional compelled speech can be avoided if courts fulfill their responsibilities under Rule 23, for it cannot be argued that forcing victims to fund their victimizers is fair, reasonable, or adequate.

The use of *cy pres* awards in class-action settlements, particularly those that enable the defendant to control the funds, are an emerging trend, one to which courts must attend in order to preserve the due-process and free-speech rights of class members. If not prevented by proper application of Rule 23's rigorous analysis requirements, class counsel, defendants, and judges great cost to absent class members.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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No. 17-961

In the

Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The petition for writ of certiorari asks whether the requirement of Federal Rule of Civil Procedure 23(e)(2) that a binding class action settlement be "fair, reasonable, and adequate" can be interpreted in such a way as to permit a settlement that provides no relief to unnamed class members but only provides *cy pres* awards to third parties not involved in the litigation or in any way harmed by the conduct of the defendant as alleged in the complaint. Amicus believes that the answer to that question of statutory interpretation should be informed by this Court's constitutional avoidance doctrines, because such an interpretation would raise significant constitutional issues, including:

1. Whether a binding class action settlement that redirects remedial compensation away from class members to unharmed third parties because of the causes they represent amounts to compelled speech in violation of the First Amendment?

2. Whether allowing class counsel and the judge presiding over the class action case to determine which third party organizations will receive *cy pres* awards redirected from class members creates an irreconcilable conflict between class counsel and class members, and deprives class members of an unbiased judge, in violation of core Due Process concerns?

3. Whether a class action settlement that provides compensation only to uninjured third parties, and none to the class members injured by the conduct alleged in the case, exceeds the case or controversy limits on the Article III jurisdiction of the federal courts?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing compelled speech issues similar to those at issue here, including *Friedrichs v. California Teachers Association*, 136 S. Ct. 1038 (2016); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Knox v. Service Employees International Union Local 1000*, 567, U.S. 298 (2012).

INTRODUCTION

The *cy pres* doctrine originated in estate law and trusts, but in 1974, the U.S. District Court for the Southern District of New York applied the *cy pres* doctrine in a class action settlement setting. Wilber H. Boies and Latonia Haney Keither, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 Va. J. Soc. Pol'y & L. 267, 270 (2014). In *Miller v. Steinbach*, the district court noted that, in implementing a settlement agreement between the parties, it "appli[ed] a variant of the *cy pres* doctrine at common law." *Miller v. Steinbach*, 268 F.Supp. 255 at 3-4 (S.D.N.Y 1974). Since then, *cy*

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[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

pres awards have been used as a form of remedy in class actions. *See Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012); *In re Lupron Marketing and Sales Practices Litig.*, 295 F.Supp.2d 148 (D. Mass. 2003).

There are three categories of class action settlements in which *cy pres* awards might be applied. First is the situation, at issue in *Miller*, in which all of the plaintiffs who have submitted claims have been fully compensated for their injuries, but excess funds remain because the size of the settlement fund (or, more precisely, the number of people who would file claims against the fund) was overestimated. The Third Circuit has held that a federal district court "does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of *excess* settlement funds to a third party to be used for a purpose related to the class injury." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3rd Cir. 2013) (emphasis added); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61 (D. Mass. 2005); *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (recognizing that the court has broad discretion in identifying appropriate uses of *cy pres* distribution of *residual* settlement funds); *but see Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 482 (5th Cir. 2011) (Jones, J., concurring). Faced with *excess* funds, the courts in this situation have utilized the *cy pres* award as an alternative to providing a windfall to the already-compensated class plaintiffs or a refund to the tortfeasor defendant that could undermine the deterrent effect of the settlement.

The second situation arises when the settlement did not fully compensate class plaintiffs for their injuries, and because of a lower-than-expected rate of claims against the fund, there is an excess. As in category one, refunding the excess to the tortfeasing defendant could undermine the deterrent effect of the settlement. But the question remains: Should the excess funds at least first be distributed to the class plaintiffs who had filed claims up to the point where they are fully compensated, with any remaining excess distributed via a *cy pres* award, or should all of the excess funds be distributed via a *cy pres* award? Problems of proof (i.e., is "full compensation" what is alleged in the complaint, or something else?) and benefit of the bargain concerns (i.e., the claim-submitting class plaintiffs already got what they agreed to by way of the settlement) regarding what constitutes full compensation might tilt the balance toward the latter, but either way, the *cy pres* award is only made once class plaintiffs have received some measure of compensation for their injuries. *See Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re BankAmerica Corp. Securities Litig.*, 775 F.3d 1060 (8th Cir. 2015).

The third situation, at issue here, is where the *cy pres* award is made *in lieu of* compensation to the class plaintiffs. This third category fails to provide plaintiffs with any relief, much less adequate relief, and instead rewards nonparties who admittedly suffered no harm from defendant's conduct, raising serious constitutional concerns. The settlement here was $8.5 million, but of that, only a few thousand dollars was provided to the named plaintiffs as "incentive awards." $2.125 million was awarded to class counsel (more than double its lodestar), and the bulk of the settlement, $5.3 million—was provided to nonparties via a

cy pres award. No compensation whatsoever—not damages, or nominal damages, or even coupons, and not even a change in practices by the defendant—was provided to any of the estimated 129 million unnamed members of the class.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling raises serious constitutional issues that should inform this Court's determination of whether Rule 23(e)(2) can be interpreted to permit such a settlement. First, by directing the settlement funds away from unnamed members of the injured plaintiff class to advocacy groups such as AARP, Inc. and the World Privacy Forum, the ruling effectively forces those plaintiffs to provide financial support to organizations with which they may not agree, in violation of the First Amendment's prohibition on compelled speech. Second, by allowing class counsel and, worse, the judge, to determine which causes will be supported by the *cy pres* award, the Ninth Circuit's ruling exacerbates the potential conflict of interest between class counsel and unnamed members of the class, and undermines the judge's role as an unbiased adjudicator, all in violation of core Due Process principles. And finally, by redirecting compensatory relief away from those who were injured to those who admittedly suffered no injury by defendant's actions, the Ninth Circuit's ruling raises serious questions about whether there remained a viable case or controversy necessary for Article III jurisdiction. Quite simply, the *cy pres* award recipients have no standing because they have not suffered any injury, and those who do have standing—the unnamed members of the class who suffered injury—not only receive no remedy but are forever foreclosed from obtaining relief.

ARGUMENT

I. Interpreting Rule 23(e)(2) to Permit a Binding Settlement that Redirects Class Action Settlement Funds From Class Members to Third Parties (Often Advocacy Groups) Would Raise Serious First Amendment Concerns.

The *cy pres* settlement at issue in this case redirects class action settlement funds from unnamed class members to outside organizations, including advocacy organizations, that admittedly were not injured by the defendant's conduct. The lower courts approved the settlement by utilizing a nexus requirement developed in the context of *cy pres* awards of *excess* funds, namely, that there by "some connection ... between the interests of the class members and the proposed charitable recipient of the funds." Cecily C. Shiel, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 Wash. L. Rev. 943, 951 (2015). *See* Am. L. Inst., Principles of the Law of Aggregate Litigation §3.07(c) (2010) (suggesting that settlement funds should be awarded to those "whose interests reasonably approximate those being pursued by the class"). However, before any *cy pres* awards are distributed, the recipients must be approved by the court.

But in the context of a case such as this, the redirecting of compensatory funds (rather than just excess funds) from class members to nonparty entities effectively appropriates damages rightly due to the class members for injuries they suffered, to advocacy organizations that had no such harms and that are committed to advocating for causes that particular class members might not approve. In effect, class members

are forced by the terms of the settlement to support speech and advocacy activity chosen by class counsel and approved by the judge, with remedial funds that by rights should have been paid to them.

In other words, the settlement at issue here compels unnamed class members to support causes advocated by AARP and the World Privacy Forum—compelled speech not unlike that at issue in *Janus v. Am. Fed'n*, 138 S. Ct. 54 (cert. granted Sept. 28, 2017), currently pending before this Court. Interpreting Rule 23(e)(2) to allow for such a settlement therefore raises the same kind of First Amendment concerns that are at issue there.

Quite simply, such compelled speech is contrary to the original understanding of the First Amendment. The founding generation voiced its concerns through debates over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. And this Court has often quoted Jefferson's argument that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), in 5 The Founders Constitution, University of Chicago Press (1987) at 77 (quoted in, *e.g.*, *Keller v. State Bar*, 496 U.S. 1, 10 (1990); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305, n.15 (1986); *Abood v Detroit Board of Education*, 431 U.S.209, 234-35 n.31 (1977); *Everson v. Board of Education*, 330 U.S. 1, 13 (1947)). Jefferson went on to note "[t]hat even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he

would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

Although these statements were made in the context of compelled religious assessments, these same principles can be applied to compelled financial support of court-endorsed *cy pres* recipients. The petitioners in this case objected to the recipients of the *cy pres* award because the awards were given to organizations already being supported by Google. Pet. App 13. Additionally, Petitioner argued that "[t]he AARP takes political positions opposed by many class members, including" Petitioner. Pet. App. 131. Requiring the petitioner to give their settlement funds to AARP to engage in advocacy with which Petitioners disagreewould violate their First Amendment rights. Accomplishing the same thing by way of a *cy-pres*-only settlement does not obviate the First Amendment problem.

II. Allowing Class Counsel and the District Court to Redirect Class Members' Remedial Settlement Funds to Non-Parties Favored by Them Raises Serious Due Process Concerns.

The Ninth Circuit's interpretation of Rule 23(e)(2) to permit the type of *cy-pres*-only settlements at issue here raises two significant Due Process concerns. First, it creates (or exacerbates) an inherent conflict of interest between class counsel and the members of the class they supposedly represent. *See, e.g., Radcliffe v. Hernandez*, 818 F.3d 537, 545 (9th Cir. 2016); *cf. Wood v. Georgia*, 450 U.S. 261, 271 (1981). Second, to the extent the court itself participates in the designation of the of the *cy pres* award recipients, class members are deprived of a neutral adjudicator—a

core requirement of due process. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955); *see also* Henry J. Friendly, *"Some Kind of Hearing,"* 123 Univ. Penn L. Rev. 1267, 1279 (1975).

Regarding the conflict of interest between class counsel and class members, it is commonplace that the interest of the class counsel and the members of the class do not always coincide. Ted Frank, *Cy Pres Settlements*, Center for Class Action Fairness LLC.[2] In a Sears class action case, for example, the "plaintiffs' attorneys received about $1 million, while the 1.5 million member class redeemed claims at under a 0.1% rate for a total of $2,402." *Id.* A similar situation arises in this case. The few named class plaintiffs received "incentive awards" totaling $15,000 and the rest of the 129 million members of the class received nothing, while the attorneys were awarded $2.125 million. Pet. App. 54-55. Furthermore, the class counsel assisted in selecting the organizations that would be the recipients of the the recipients of the *cy pres* awards and chose the following: World Privacy Forum; Carnegie Mellon University; the Center for Information, Society and Policy at Chicago-Kent College of Law; the Berkman Center for Internet and Society at Harvard University; the Stanford Center for Internet and Society; and AARP. Pet. App. 5. The three schools selected (Chicago-Kent College of Law, Harvard University, and Stanford) were all *alma maters* of the class counsel, Pet. App. 25-26, raising a significant appearance that class counsel had negotiated a settlement that benefit their own charitable purposes

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[2] Available at https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2016_sac/written_materials/6_cy-pres_settlement.authcheckdam.pdf.

to the detriment of remedial compensation claims by the class members they represented.

As for the concern about a non-neutral adjudicator, "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). For there to be a fair tribunal, the judge must be neutral, for "'no man can be a judge in his own case,' and 'no man is permitted to try cases where he has an interest in the outcome." *Caperton*, 556 U.S. at 876 (quoting *Murchison*, 349 U.S. at 136).

A news account from the New York Times about a decade ago highlights the problem. "Judges all over the country have gotten into the business of doling out leftover class-action settlement money," the Times reported, "sometimes to an organization only tangentially related to the subject of the lawsuit." Adam Liptak, *Doling Out Other People's Money*, N.Y. TIMES, A14 (Nov. 26, 2007).[3] For example, there was $6 million of unclaimed settlement funds left from an antitrust class action lawsuit brought by a group of models against their modeling agencies. *Id.* The federal judge overseeing the case interviewed applicants for the excess funds and gave such funds to organizations only "tangentially related to the subject of the lawsuit." *Id.* There has also been a case of "a newly created charity where the judges who approved the settlement and three of the plaintiff's attorney sat as board members, each receiving tens of thousands of dollars for their services." Ted Frank, *Cy Pres Settlements*, Center for

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[3] Available at http://www.nytimes.com/2007/11/26/washington/26bar.html.

Class Action Fairness LLC, (D-15), *supra* n. 2. Indeed, in what the Times described as an "unseemly" development, various charities organizations now lobby judges in order to get funds from class settlements. Litpak, supra, n. 3. And as a result, there is now a significant risk that the supposedly neutral adjudicator will be tempted to approve *cy-pres*-only settlements that benefit his or her preferred charities, to the detriment of the interests of class members who receive nothing from the settlement the judge approves.

These are not isolated incidents; they are becoming more prevalent with class action settlements. Whether Rule 23(e)(2) can be interpreted to permit such settlements, despite the significant Due Process concerns raised by them, is an issue that should be addressed by this Court.

III. The Ninth Circuit's Interpretation of Rule 23(e)(2) Also Raises Significant Article III Case or Controversy Concerns.

Article III "confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1982)). To determine whether there is actual case or controversy, courts look to standing doctrine to determine "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' "as to warrant his invocation of federal-court jurisdiction to justify exercise of the court's remedial power *on his behalf.*" *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (*Baker v. Carr*, 369 U.S. 186, 204 (1962). Furthermore, standing will only be found if "[plaintiff] can

show that he himself has suffered or will suffer injury whether economic or otherwise." *Sierra Club v. Morton*, 405 U.S. 727, 728 (1972).

The class action settlement approved by the Ninth Circuit below does not involve the exercise of the court's remedial power on "behalf" of unnamed class members, because it provided no relief to them. Nor did the *cy pres* recipients of the settlement funds have a "personal stake in the outcome" of the litigation, because they were not even parties to it and had alleged no injury. The Ninth Circuit's interpretation of Rule 23(e)(2) to allow such a settlement therefore raises serious questions about whether that court has exceeded its Article III authority.

The Ninth Circuit is not alone here. For example, in a class action suit brought on behalf of purchasers of various chemicals against a chemical company, the District Court for the District of Columbia approved a motion to distribute a *cy pres* award to the George Washington University Law School. *Diamond Chemical Co. v. Akzo Nobel Chemical. B.V.*, 517 F.Supp.2d 212 (D.D.C 2007). Similarly, the "Illinois Institute of Technology got $5 million from a settlement in a case involving a diabetes drug in Illinois." Liptak, *Doling Out Other People's Money*, N.Y. TIMES at A14, *supra* n. 3. None of the entities that received the *cy pres* settlements had any injury caused by the defendant that would justify relief. None of them were parties in the litigation, nor were their rights being adjudicated in the litigation. They were awarded *cy pres* funds merely because they had a loose connection with the issues involved in the litigation, with the courts applying a nexus test developed in the entirely different context of *cy pres* distribution of *excess* settlement

funds. Because the low threshold for that test falls well beneath the legal requirements for standing, use of it by those courts, as by the Ninth Circuit in this case, to affirm settlement agreements under Rule 23(e)(2) raises serious enough Article III concerns as to warrant this Court's review.

In addition, as Judge Edith Jones has noted, because *cy pres* award distributions "likely violate Article III's standing requirements," the courts "should be troubled that *cy pres* distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent proceedings should distribution somehow go awry." *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring). In other words, these *cy pres* award settlements violate the adversarial model of adjudication and the requirements of Article III by granting relief to nonparties who have suffered no injury. As Northwestern University Law Professor Martin Redish has correctly observed, the distribution of *cy pres* awards to nonparties transforms the "judicial process from a bilateral private rights adjudicatory model into a trilateral process." Martin H. Redish, *et al., Cy Pres & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L.Rev., 617, 641 (2010).

This trend toward *cy-pres*-only awards, based on the dubious authority of a federal rule of civil procedure, thus raises serious questions about the federal court's constitutional authority to approve, much less participate in, such settlements. The issue warrants this Court's attention now, before the trend gets even further out of control.

CONCLUSION

The petition for writ of certiorari should be granted, and the decision of the Ninth Circuit below should be reversed.

February 2018

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No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

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Neil Walters, *The Importance of the Internet to Older Americans*, AARP Public Policy Institute (Oct. 2, 2017) 4

INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Individual Rights ("CIR") is a public interest law firm. It has represented parties in numerous cases concerning issues related to the First Amendment, including *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002). It has also submitted *amicus* briefs in cases involving important First Amendment issues.

CIR believes that the Ninth Circuit's practice of approving *cy pres* settlement agreements in class action litigation in which the proceeds are awarded to third parties implicates the First Amendment rights of class members because such settlements compel class members to subsidize speech. CIR submits this *amicus* brief to point out the dangers of adopting such settlements and urge the Court to grant the petition and limit the use of *cy pres* settlements where such First Amendment concerns are present.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. All parties have consented to this filing.

SUMMARY OF ARGUMENT

Damages awarded pursuant to a class action settlement belong to the class members. Thus, when a court permits a *cy pres* award to third parties, it is endorsing a transfer of value from the class members to the third parties; in this case, charities chosen by class counsel and the defendants. The *cy pres* funds may then be used to engage in speech or political activity with which class members may very well disagree, in violation of their First Amendment rights.

An affirmative opt-out requirement for class members is not carefully tailored to minimize the infringement of free speech rights and does not satisfy the requirements of the First Amendment. To the contrary, class members are required to bear the entire burden of complying with the opt-out procedure or risk subsidizing speech with which they disagree. The desires of class counsel and defendants to settle cases expediently and cheaply do not qualify as compelling interests sufficient to justify this infringement.

ARGUMENT

I. USE OF *CY PRES* AWARDS IN CLASS ACTION SETTLEMENTS COMPELS CLASS MEMBERS TO SUPPORT SPEECH WITH WHICH THEY MAY DISAGREE

Damages awarded pursuant to settlement of a class action belong to the class members. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). When the court permits a *cy pres* award, therefore, it is ratifying a mandatory transfer of value from class members to a third party. That organization can then use the funds provided by the settlement agreement to pursue its own goals, including (understandably) by engaging in various forms of speech. In effect, the court forces class members to support groups whose views may be disagreeable to them. *See Knox v. SEIU*, 132 S. Ct. 2277, 2289 (2012) ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups.").

Here, the court awarded *cy pres* funds to Harvard Law School, Stanford Law School, the MacArthur Foundation, and AARP, Inc. The only conditions attached were that the recipients agree to "devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." *App.* at 84. The settlement agreement does not otherwise limit the use of the *cy pres* funds, or even define "initiatives." Nor is there any sort of continuing supervision on the use of funds after they are distributed to the recipients. Under the settlement agreement approved here, an "initiative" could be virtually

anything and it could take place many years from now.

Thus, the AARP (or any other recipient) might support an initiative relating to internet privacy which makes internet use marginally more difficult or costly. Under the settlement agreement, AARP could use *cy pres* funds to lobby Congress or state legislatures for that initiative.[2] Should AARP use *cy pres* funds to support a similar initiative in the future, a class member is left completely without recourse.

This type of *cy pres* award violates the First Amendment because the Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001).

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[2] This concern is not imaginary. For several years, AARP has lobbied Congress and the F.C.C. in favor of net neutrality, a fairly controversial set of rules regulating internet service providers, with which many disagree. *See* Neil Walters, *The Importance of the Internet to Older Americans*, AARP Public Policy Institute (Oct. 2, 2017), https://www.aarp.org/ppi/info-2017/importance-of-an-open-internet-to-older-americans.html, Anne Broache, *Push for Net Neutrality Mandate Grows*, CNet (March 30, 2006), https://www.cnet.com/uk/news/push-for-net-neutrality-mandate-grows/. While "net neutrality" may not itself be an issue involving internet privacy, the AARP's activities on that topic demonstrate that it does not shy away from controversial political issues. And given that money is fungible, the funding of any privacy "initiatives" will leave more available for overtly political efforts even if the privacy initiatives would not be so characterized.

The Court has approved a narrow class of compelled speech which might not violate the First Amendment—compelled contributions to a trade or professional association pursuant to a comprehensive regulatory scheme. *Id.* But even then, mandatory contributions are only permitted "insofar as [it is] a necessary incident of the larger regulatory purpose which justified the required association." *Knox*, 132 S. Ct. at 2289. (internal quotation marks omitted).

Forced subsidies to charities resulting from *cy pres* awards in class action settlements are not incident to a comprehensive regulatory scheme. Class actions are governed by Rule 23 along with numerous state and federal laws governing the underlying claims in the litigation, not a single comprehensive regulatory scheme covering a discrete subject matter.

II. REQUIRING CLASS MEMBERS TO AFFIRMATIVELY OPT OUT VIOLATES THE FIRST AMENDMENT

This Court has also expressed doubts about the use of opt-out systems in the context of compulsory union subsidies. In *Knox*, the Court noted that "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment priciples." 132 S. Ct. at 2290. While there are subtle differences between the context of a *cy pres* award and mandatory union fees, the First Amendment rights at stake are identical, and courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 2290. "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's

political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Id.* Similarly, class members should not be forced to subsidize preferred charities or the initiatives these charities engage in. Whether or not an opt-out mechanism is sufficient in a traditional class action, once a *cy pres* award is contemplated, an opt-in mechanism is constitutionally required because the court cannot presume acquiescence by class members in the loss of their First Amendment rights.

An opt-out requirement cannot be reconciled with *Knox* and other First Amendment precedents. Put simply, the requirement that class member affirmatively object to subsidizing a charity's political or ideological activities is in no way "'carefully tailored to minimize the infringement' of free speech rights," as the First Amendment requires. *Knox*, 132 S. Ct. at 2291 (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986)). This Court's review is necessary to carry *Knox*'s reasoning—which reflects First Amendment imperatives—to its logical conclusion.

In *Knox*, the Court reviewed the First Amendment claims of dissenting public-sector workers who were charged an "Emergency Temporary Assessment to Build a Political Fight–Back Fund." *Id.* at 2285, 2287. Because "a special assessment billed for use in electoral campaigns" went beyond anything the Court had previously considered, it declined to simply rely on its prior cases' implicit approval of opt-out schemes for dissenting employees. *Knox*, 132 S. Ct. at 2291. Instead, it considered the question *ab initio*.

The reasoning in *Knox* shows that opt-out schemes like the one here are constitutionally untenable because they violate dissenting class members'

free speech rights. The First Amendment requires that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." *Id.* at 2291(quoting *Hudson*, 475 U.S. at 303). Accordingly, "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id.* In the context of compulsory union dues, the government's interest in permitting a union to collect fees from nonmembers is solely to prevent them "'from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred.'" *Id.* at 2289 (quoting *Davenport v. Washington Education Ass'n*, 551 U.S. 177, 181 (2007)). That interest, of course, does not extend to collecting expenses for political or ideological activities from dissenting employees. *Id.* at 2290. Rather, collection of fees for such activities is the "infringement of free speech rights" which must be "minimized."

Applying these principles, the Court held that a public-sector union imposing a special assessment or dues increase "may not exact any funds from nonmembers without their affirmative consent." *Id.* at 2296. An opt-out scheme, the Court recognized, "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* at 2290. Against this risk, there is simply no "justification for putting the burden on the nonmember to opt out of making such a payment." *Id.* Instead, any such risk must be borne by "the side whose constitutional rights are not at stake"—in *Knox*, the labor union. *Id.* at 2295. Thus, rather than presume non-members' willingness to fund a union's political or ideological activities, the

law requires their affirmative consent. After all, the courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 2290 (quoting *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999)).

A fortiori, requiring class members in a *cy pres* settlement to opt out of the class or risk subsidizing some unknown "initiative" in the future cannot withstand First Amendment scrutiny. Such "initiatives" could very well include political or ideological activities with which they may disagree. Worse, class members have no way of knowing what they will be subsidizing—unlike unions, the third parties may have no track record on which the class members could make such a judgment. The desires of class counsel and defendants to settle the case expediently and cheaply do not qualify as a compelling interest.

Further, the defendants in the class action, meanwhile, have no freedom of speech rights at risk (on the contrary, they along with class counsel chose the benefiting charities) but nonetheless enjoy the presumption of financial support in the Ninth Circuit.

CONCLUSION

For the reasons given above, this Court should grant the petition.

Respectfully submitted,

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No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK, ET AL.,
Petitioners,

v.

PALOMA GAOS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
SAN JOSE DIVISION

No. 5:10-CV-04809-EJD

IN RE GOOGLE REFERRER HEADER
PRIVACY LITIGATION

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/25/2010	1	Complaint (summons issued) jury demand against Google Inc. *** Filed by Paloma Gaos. ***
02/10/2011	19	Motion to Dismiss Plaintiff's Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) filed by Google Inc. ***
02/10/2011	20	Declaration of Jean B. Niehaus in Support of 19 Motion to Dismiss Plaintiff's Complaint *** filed by Google Inc. ***
03/21/2011	22	Response (re 19 Motion to Dismiss Plaintiff's Complaint ***) filed by Paloma Gaos.
03/28/2011	23	Reply (re 19 Motion to Dismiss Plaintiff's Complaint ***) filed by Google Inc. ***

DATE	NO.	PROCEEDINGS
04/07/2011	24	Order Granting 19 Motion to Dismiss. The Court GRANTS Defendant's Motion to Dismiss Plaintiff's Complaint without prejudice. ***
04/25/2011	25	Order Reassigning Case. Case reassigned to Judge Edward J. Davila for all further proceedings. Judge James Ware no longer assigned to the case. ***
05/02/2011	26	First Amended Complaint against Google Inc. Filed by Paloma Gaos. ***
05/06/2011	27	Joint Case Management Statement filed by Paloma Gaos. ***
05/06/2011	28	Joint Case Management Statement (attorney name spelling corrected) by Paloma Gaos. ***
05/16/2011	29	Motion to Dismiss First Amended Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) filed by Google Inc. ***
05/16/2011	30	Declaration of Jean B. Niehaus in Support of 29 Motion to Dismiss First Amended Complaint *** filed by Google Inc. ***
10/07/2011	32	Response (re 29 Motion to Dismiss First Amended Complaint ***) filed by Paloma Gaos. ***
10/07/2011	33	Declaration of Kassra P. Nassiri in Support of 32 Opposition/Response to Motion, filed by Paloma Gaos. ***

DATE	NO.	PROCEEDINGS
10/14/2011	34	Reply (re 29 Motion to Dismiss First Amended Complaint ***) filed by Google Inc. ***
10/28/2011	35	Minute Entry: Motion Hearing held on 10/28/2011 before Judge Edward J. Davila re 29 Motion to Dismiss First Amended Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) *** The Court took the motion under submission after oral argument. The Court to issue further Order following hearing. ***
11/16/2011	36	Statement of Recent Decision pursuant to Civil Local Rule 7–3.d filed by Google Inc. ***
12/06/2011	37	Transcript of Proceedings held on 10/28/2011, before Judge Edward J. Davila. ***
03/29/2012	38	Order by Hon. Edward J. Davila Granting in Part and Denying in Part 29 Motion to Dismiss. with leave to amend as to all other claims. ***
05/01/2012	39	Amended Complaint (Second) against All Defendants. Filed by Paloma Gaos. ***
06/15/2012	44	Motion to Dismiss / Plaintiffs' Second Amended Complaint Pursuant to Rules 12(b)(1) and 12(b)(6) filed by Google Inc. *** (Attachments: # 1 Declaration of Randall W. Edwards in Support of Motion to Dismiss ***) ***

DATE	NO.	PROCEEDINGS
07/19/2012	45	Response (re 44 Motion to Dismiss / Plaintiffs' Second Amended Complaint ***) filed by Paloma Gaos. ***
08/02/2012	46	Reply Reply in Support of Google Inc.'s 44 Motion to Dismiss Plaintiffs' Second Amended Complaint*** filed by Google Inc. ***
09/19/2012	47	Clerks Notice Taking Motion Under Submission Without Oral Argument. The Motion to Dismiss (Docket Item No. 44) before Judge Edward J. Davila previously noticed for 9/21/2012 at 9:00 AM has been taken under submission without oral argument pursuant to Civ. L.R. 7–1(b). ***
03/20/2013	48	Motion to Relate Case (Administrative) filed by Paloma Gaos. ***
03/27/2013	49	Clerks Notice. The court has reviewed the motion and determined that no cases are related and no reassignments shall occur. ***
04/26/2013	50	Stipulation With Proposed Order for Consolidation of Class Actions filed by Paloma Gaos. ***
04/30/2013	51	Order as Modified by the Court Granting 50 Stipulation of Class Actions. Before consolidation, the clerk shall relate case numbers 5:10–cv–04809 EJD and 5:13–cv–00093 LHK and reassign the latter to the undersigned. The clerk shall

DATE	NO.	PROCEEDINGS
		then administratively close case number 5:13–cv–00093 once reassigned. The pending motion to dismiss filed in case number 5:10–cv–04809 EJD (Docket Item No. 44) is Terminated as Moot in light of the forthcoming consolidated complaint. ***
07/19/2013	52	Motion for Settlement (Preliminary Approval) filed by Paloma Gaos. *** (Attachments: # 1 Exhibit Declaration – Aschenbrener, # 2 Exhibit Declaration – Chorowsky, # 3 Exhibit Settlement Agreement, # 4 Exhibit Declaration – Simmons, # 5 Exhibit Declaration – Nassiri, # 6 Exhibit Proposed Order) ***
08/21/2013	53	Declaration of Michael Aschenbrener in Support of 52 Motion for Settlement (Preliminary Approval) filed by Paloma Gaos. ***
08/23/2013	55	Minute Entry: Motion Hearing held on 8/23/2013 before Edward J. Davila (Date Filed: 8/23/2013) re 52 Motion for Settlement (Preliminary Approval) filed by Paloma Gaos. The Court requested revised proposed order and forms submitted by September 6, 2013. Matter submitted on September 6, 2013. ***
08/27/2013	57	Transcript of Proceedings held on 08/23/2013, before Judge Davila. ***

DATE	NO.	PROCEEDINGS
09/03/2013	58	Received Document Letter by Electronic Privacy Information Center dated 8/28/13. ***
09/06/2013	59	Stipulation With Proposed Order / Stipulated Request for Extension of Deadline to File Supplemental Materials filed by Google Inc.. ***
09/10/2013	60	Order Granting 59 Stipulation for Extension to File Supplemental Materials. The deadline to file the supplemental information requested at the August 23, 2013 Preliminary Approval Hearing is extended until September 13, 2013. ***
09/13/2013	61	Declaration of Kassra P. Nassiri in Support of 52 Motion for Settlement (Preliminary Approval), *** filed by Paloma Gaos. ***
09/16/2013	62	Received Letter from Marc Rotenberg Executive Director Electronic Privacy Information Center. ***
03/26/2014	63	Order granting 52 Motion for Preliminary Approval of Class Action Settlement. A hearing on the final approval of class action settlement shall be held on August 29, 2014 at 9:00 a.m. ***
05/05/2014	64	Status Report by Paloma Gaos. (Attachments: # 1 Declaration of Kassra P. Nassiri, # 2 Declaration of Randall W. Edwards) ***

DATE	NO.	PROCEEDINGS
07/25/2014	65	Motion for Settlement (Final Approval) filed by Paloma Gaos. *** (Attachments: # 1 Declaration Aschenbrener Declaration, # 2 Declaration Nassiri Declaration, # 3 Declaration Chorowsky Declaration, # 4 Declaration Class Admin Declaration, # 5 Proposed Order Proposed Order Granting Final Approval and Fees, # 6 Proposed Order Proposed Final Judgment Order) ***
07/25/2014	66	Motion for Attorney Fees Expenses and Costs filed by Paloma Gaos. *** (Attachments: # 1 Declaration Aschenbrener, # 2 Declaration Nassiri, # 3 Declaration Chorowsky, # 4 Declaration Class Admin, # 5 Declaration Dore, # 6 Declaration Gaos, # 7 Declaration Italiano, # 8 Declaration Priyev, # 9 Proposed Order for Final Approval and Fees, # 10 Proposed Order Final Judgment) ***
08/05/2014	67	Objections to 65 Notice of Motion for Preliminary Approval of Class Action Settlement by Kim Morrison. ***
08/05/2014	68	Objections to 65 Proposed Class Action Settlement by David Weiner. ***

DATE	NO.	PROCEEDINGS
08/08/2014	69	Notice of Appearance by Theodore Harold Frank on behalf of Objectors Melissa Holyoak and Theodore H. Frank ***
08/08/2014	70	Objection (re 65 Motion for Settlement (Final Approval), 66 Motion for Attorney Fees Expenses and Costs filed by Theodore H Frank, Melissa Holyoak. (Attachments: # 1 Declaration of Melissa Holyoak, # 2 Declaration of Theodore H. Frank) ***
08/15/2014	71	Objections to re 65 Motion for Settlement (Final Approval) by Cameron Jan. ***
08/22/2014	75	Reply (re 65 Motion for Settlement (Final Approval), 66 Motion for Attorney Fees Expenses and Costs) filed by Paloma Gaos. (Attachments: # 1 Declaration Aschenbrener, # 2 Declaration Nassiri, # 3 Declaration Class Admin, # 4 Proposed Order Final Approval & Fees, # 5 Proposed Order Final Judgment) ***
08/29/2014	80	Minute Entry: Motion Hearing held on 8/29/2014 before Judge Edward J. Davila *** re 65 Motion for Settlement (Final Approval) filed by Paloma Gaos, 66 Motion for Attorney Fees Expenses and Costs filed by Paloma Gaos. Matter submitted. The Court to issue written order. ***

DATE	NO.	PROCEEDINGS
09/08/2014	82	Transcript of Proceedings held on 08/29/2014, before Judge Davila. ***
03/31/2015	85	Order granting 65 Motion for Final Approval of Class Action Settlement; granting 66 Motion for Attorney Fees, Costs and Incentive Awards. The Clerk shall close this file upon entry of Judgment. ***
04/02/2015	86	Final Judgment and order of Dismissal with Prejudice. ***
04/27/2015	87	Notice of Appeal to the 9th Circuit Court of Appeals filed by Theodore H Frank, Melissa Holyoak. ***
04/29/2015	88	USCA Case Number 15–15858 9th Circuit Court of Appeals for 87 Notice of Appeal, filed by Theodore H Frank, Melissa Holyoak. ***
10/08/2015	90	Certificate of Interested Entities by Google Inc. identifying Corporate Parent Alphabet Inc. for Google Inc. ***
08/22/2017	91	Opinion of USCA - Affirmed ***
10/05/2017	92	Order of USCA The petition for panel rehearing and the petition for rehearing en banc are DENIED. ***
10/13/2017	93	Mandate of USCA as to 87 Notice of Appeal ***
10/13/2017	94	Clerk's Letter Spreading Mandate to Counsel ***

DATE	NO.	PROCEEDINGS
01/11/2018	95	Supreme Court Case Info Case number: 17-961 Filed on: 01/03/2018 Cert Petition Action 1: Pending ***
05/03/2018	96	The petition for a writ of certiorari is granted. re 87 Notice of Appeal ***

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15858

IN RE GOOGLE REFERRER HEADER
PRIVACY LITIGATION

PALOMA GAOS, ET AL.,

Plaintiffs-Appellees,

v.

MELISSA ANN HOLYOAK; THEODORE H. FRANK

Objectors-Appellants,

v.

GOOGLE, INC.,

Defendants-Appellee.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/28/2015	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. ***
09/04/2015	10	Submitted (ECF) excerpts of record. Submitted by Appellants Theodore H. Frank and Melissa Ann Holyoak. ***

DATE	NO.	PROCEEDINGS
09/04/2015	11	Submitted (ECF) Opening Brief for review. Submitted by Appellants Theodore H. Frank and Melissa Ann Holyoak. ***
12/04/2015	25	Submitted (ECF) Answering Brief for review. Submitted by Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev. ***
12/04/2015	26	Submitted (ECF) Answering Brief for review. Submitted by Appellee Google, Inc. ***
12/04/2015	27	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev. ***
12/04/2015	28	Filed (ECF) Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev Motion to take judicial notice of settlement website, page thereon titled "Proposed Cy Pres Recipients and Allocations," the citation to that page to the District Court, the 6 specific cy pres proposals linked from that page, and the District Court's review of the cy pres proposals. ***
01/11/2016	37	Filed (ECF) Appellee Google, Inc. citation of supplemental authorities. ***
01/15/2016	38	Submitted (ECF) Reply Brief for review. Submitted by Appellants

DATE	NO.	PROCEEDINGS
		Theodore H. Frank and Melissa Ann Holyoak. ***
05/25/2016	41	Filed (ECF) Appellee Google, Inc. citation of supplemental authorities. ***
03/01/2017	47	Filed (ECF) Appellee Google, Inc. citation of supplemental authorities. ***
03/06/2017	48	Filed (ECF) Appellants Theodore H. Frank and Melissa Ann Holyoak citation of supplemental authorities. ***
03/06/2017	49	Filed (ECF) Appellants Theodore H. Frank and Melissa Ann Holyoak citation of supplemental authorities. ***
03/06/2017	50	Filed (ECF) Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev citation of supplemental authorities. ***
03/13/2017	51	ARGUED AND SUBMITTED TO J. CLIFFORD WALLACE, M. MARGARET MCKEOWN and JAY S. BYBEE. ***
03/13/2017	52	Filed (ECF) Appellants Theodore H. Frank and Melissa Ann Holyoak citation of supplemental authorities. ***
03/13/2017	53	Filed Audio recording of oral argument. ***

DATE	NO.	PROCEEDINGS
03/14/2017	54	Filed (ECF) Appellees Paloma Gaos, Anthony Italiano and Gabriel Priyev citation of supplemental authorities. ***
03/17/2017	55	Filed (ECF) Appellee Google, Inc. citation of supplemental authorities. Date of service: 03/17/2017. ***
08/22/2017	56	Filed order (J. CLIFFORD WALLACE, M. MARGARET MCKEOWN and JAY S. BYBEE) Appellees' motion to take judicial notice, [28], is denied as unnecessary. ***
08/22/2017	57	FILED OPINION (J. CLIFFORD WALLACE, M. MARGARET MCKEOWN and JAY S. BYBEE) AFFIRMED. Judge: JCW Concurring & dissenting, Judge: MMM Authoring. FILED AND ENTERED JUDGMENT. ***
09/05/2017	58	Filed (ECF) Appellants Theodore H. Frank and Melissa Ann Holyoak petition for panel rehearing and petition for rehearing en banc ***
10/05/2017	60	Filed order (J. CLIFFORD WALLACE, M. MARGARET MCKEOWN and JAY S. BYBEE): The panel has voted to deny the petition for panel rehearing. Judge McKeown and Judge Bybee vote to deny the petition for rehearing en banc. Judge Wallace

DATE	NO.	PROCEEDINGS
		recommends granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED. ***
10/13/2017	61	MANDATE ISSUED. ***
01/11/2018	62	Supreme Court Case Info Case number: 17-961 Cert Petition Action 1: Pending ***
05/03/2018	63	Supreme Court Case Info Case number: 17-961 Cert Petition Action 1: Granted, 04/30/2018 ***

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

No. C 10-04809 JW

PALOMA GAOS,

Plaintiff,

v.

GOOGLE, INC.,

Defendant

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH LEAVE TO AMEND

Presently before the Court is Defendant's Motion to Dismiss Plaintiff's Complaint. (hereafter, "Motion," Docket Item No. 19.) The Court finds it appropriate to take the Motion under submission without oral argument. *See* Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS Defendants' Motion to Dismiss.

A. Background

In a Complaint[1] filed on October 25, 2010, Plaintiff alleges as follows:

Plaintiff is a resident of San Francisco County, California. (Complaint ¶ 6.) Defendant is a Delaware corporation that maintains its headquarters in Mountain View, California. *(Id.)* Defendant conducts business throughout California and the nation. *(Id.)*

---

[1] (Class Action Complaint, herafter, "Complaint," Docket Item No. 1.)

Defendant's primary business enterprise centers on its proprietary search engine. (Complaint ¶ 13.) Defendant runs millions of servers around the world and processes over one billion user-generated search requests every day. *(Id.)* Defendant generates substantial profits from selling advertising. (*Id.*) Defendant is able to operate its search engine more efficiently by analyzing user search data and Defendant benefits from Search Engine Optimization ("SEO") companies who also use this data to better target their websites to particular user search terms. (*Id.* ¶ 16.)

Since the launch of Defendant's search service, and continuing until the present, Defendant's search engine has intentionally included the search terms in the URL of the search results page. (Complaint ¶¶ 37, 41.) Neither Defendant's search technology nor the technological architecture of the Internet requires Defendant divulge these search terms. (*Id.*) As a result of the search terms being included in the URL, when a user of Defendant's search service clicks on a link from Defendant's search results page, the owner of the website that the user clicks on will receive the user's search terms in the Referrer Header from Defendant. *(Id.)* Several web analytics services parse the search query information from web server logs, or otherwise collect the search query from the Referrer Header transmitted by each visitor's web browser. (*Id.* ¶ 39.) Defendant's own analytics products provide webmasters with this information in the aggregate. (*Id.*)

Search terms could be linked together with the identity of the user through the process of "reidentification," either by linking the terms with the user's IP address, which is also sometimes released

with the clicked link; with any cookies stored on the user's computer; or with "vanity searches," where the user searches for their own name. (Complaint ¶¶ 31, 70-73.)

On the basis of the allegations outlined above, Plaintiff alleges seven causes of action: (1) Violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2510; (2) Violation of the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*; (3) Violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (4) Violation of Cal. Bus. & Prof. Code §§ 17500, *et seq.*; (5) Public Disclosure of Private Facts; (6) Violation of Cal. Civ. Code §§ 1572, 1573; and (7) Unjust Enrichment. *(See* Complaint.)

B. Standards

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for a motion to dismiss for lack of subject-matter jurisdiction. A Rule 12(b)(1) motion may be either facial, where the inquiry is confined to the allegations in the complaint, or factual, where the court is permitted to look beyond the complaint to extrinsic evidence. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). On a facial challenge, all material allegations in the complaint are assumed true, and the question for the court is whether the lack of federal jurisdiction appears from the face of the pleading itself. *See Wolfe*, 392 F.3d at 362; *Thornhill Publishing Co. v. General Telephone Electronics*, 594 F.2d 730, 733 (9th Cir. 1979). When a defendant makes a factual challenge "by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject-matter jurisdiction." *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The court need

not presume the truthfulness of the plaintiff's allegations under a factual attack. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). However, in the absence of a full-fledged evidentiary hearing, disputes in the facts pertinent to subject-matter are viewed in the light most favorable to the opposing party. *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996). The disputed facts related to subject-matter jurisdiction should be treated in the same way as one would adjudicate a motion for summary judgment. *Id.*

C. Discussion

Defendant moves to dismiss Plaintiff's Complaint on the grounds that: (1) Plaintiff fails to allege injury-in-fact sufficient to establish Article III standing; (2) Plaintiff's state law claims are preempted by the Stored Communications Act ("SCA"); (3) Plaintiff's Consumer Legal Remedies Claim ("CLRC") is inapplicable as the alleged transaction does not involve the "sale or lease of goods to any consumer," as required by Cal. Civ. Code § 1770(a); (4) Plaintiff fails to allege facts sufficient to meet the stringent standing requirements of her Unfair Competition Laws ("UCL") and False Advertising Laws ("FAL"), further Plaintiff fails to state a claim under these statutes; (5) Plaintiff fails to plead public disclosure of private facts sufficient to state a claim for common law violation of privacy; (6) Plaintiff's cause of action for Unjust Enrichment fails as there is no such cause of action under California law. (Motion at 5-22.) Plaintiff responds that dismissal is improper as: (1) alleging violation of Plaintiff's statutory rights under the SCA is sufficient to establish Article III standing; (2) Plaintiff has alleged actual harm through the

disclosure of her private information sufficient to convey standing for her state law claims; (3) Defendant's citation to a provision of the SCA as an express preemption clause misinterprets the provision, which is solely intended to address the exclusionary rule; (4) Plaintiff pleads her fraud claims with sufficient particularity to satisfy Rule 9(b); (5) Plaintiff alleges that Defendant disclosed her private search queries, which is sufficient to state a claim for common law privacy violation; (6) California law does, in fact, recognize a cause of action for unjust enrichment. (Opp'n at 6-20.)

Because the issue of whether Plaintiff's allegations are sufficient to convey Article III standing may be dispositive, the Court addresses it first.

To satisfy the standing requirements of Article III, a plaintiff must show that she has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (citing *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). The injury required by Article III can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing." *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). In such cases, the "standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* (quoting *Warth*, 422 U.S. at 500)). However, the requirements of Article III remain: "the plaintiff must still allege a distinct and palpable injury to himself, even if it is

an injury shared by a large class of other possible litigants." *Warth*, 422 U.S. at 500.

Here, Plaintiff alleges in pertinent part:

> Plaintiff has at all material times been a user of Google's search engine services and has conducted "vanity searches," including searches for her actual name and the names of her family members and has clicked on links contained in Google's search results.
>
> (Complaint ¶ 6.) As alleged herein, Google has knowingly divulged the contents of communications of Plaintiff and members of the Class while those communications were in electronic storage on its service, in violation of 18 U.S.C. § 2702(a)(1). (*Id.* ¶ 93.) Plaintiff and members of the Class have suffered harm as a result of Google's violations of 18 U.S.C. § 2702. (*Id.* ¶ 95.)

Based on the allegations above, the Court finds that Plaintiff has failed to plead facts sufficient to establish Article III standing. While a plaintiff may establish standing through allegations of violation of a statutory right, Plaintiff has failed to plead facts sufficient to support a claim for violation of her statutory rights. In particular, Plaintiff failed to plead that she clicked on a link from the Google search page during the same time period that Defendant allegedly released search terms via referrer headers. Rather, Plaintiff's Complaint alleges that, at numerous times during the putative class period, Defendant ceased the practice of allowing search terms to pass through referrer headers either because of the implementation of a new technology or mere error. (Complaint ¶¶ 43-57.) Further, Plaintiff's conclusory allegations of disclo-

sures of communications resulting in unspecified harm in violation of the ECPA, not supported by any facts, are insufficient to allege violation of Plaintiff's statutory rights. Thus, the Court finds that Plaintiff lacks Article III standing to assert her claims.

Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiff's Complaint without prejudice to Plaintiff to amend to add facts sufficient to establish Article III standing.

C. Conclusion

The Court GRANTS Defendant's Motion to Dismiss Plaintiff's Complaint without prejudice. On or before **May 2, 2011,** Plaintiff shall file an Amended Complaint consistent with the terms of this Order.

Dated: April 7, 2011

/s/ James Ware
JAMES WARE
United States District Chief Judge

* * *

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

Case No.: 5:10-CV-4809 EJD

PALOMA GAOS,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

ORDER GRANTING-IN-PART AND DENYING-IN-PART MOTION TO DISMISS (Re: Docket No. 29)

Pending before the court is Defendant Google Inc.'s ("Google") motion to dismiss the First Amended Complaint ("FAC"). On May 16, 2011, Google filed this motion to dismiss. The court heard oral argument on October 28, 2011. For the reasons discussed below, Google's motion is GRANTED IN PART as to claims 2-7 and DENIED IN PART as to claim 1.

I. BACKGROUND

On October 25, 2010, Plaintiff Paloma Gaos ("Gaos") filed the Complaint initiating this action. On April 7, 2011, Chief Judge Ware granted Google's motion to dismiss the Complaint with leave to amend because Gaos had failed to allege an "injury in fact" sufficient to establish Article III standing. *See* ECF No. 24. On May 2, 2011, Gaos filed the FAC. In the FAC, Gaos makes the following allegations:

Gaos is a resident of San Francisco County, California. FAC ¶ 6. Google is a Delaware corporation

that maintains its headquarters in Mountain View, California. *Id.* ¶ 7. Defendant conducts business throughout California and the nation. *Id.*

Defendant's primary business enterprise centers on its proprietary search engine. *Id.* ¶ 13. Defendant runs millions of servers around the world and processes over one billion user-generated search requests every day. *Id.* Defendant generates substantial profits from selling advertising. *Id.* ¶ 14. Defendant is able to operate its search engine more efficiently by analyzing user search data and Defendant benefits from Search Engine Optimization ("SEO") companies who also use this data to better target their websites to particular user search terms. *Id.* ¶ 17.

Since the launch of Defendant's search service, and continuing until the present, Defendant's search engine has intentionally included the search terms in the URL of the search results page. *Id.* ¶ 39. Neither Defendant's search technology nor the technological architecture of the Internet requires Defendant divulge these search terms. *Id.* ¶ 43. As a result of the search terms being included in the URL, when a user of Defendant's search service clicks on a link from Defendant's search results page, the owner of the website that the user clicks on will receive the user's search terms in the Referrer Header from Defendant. *Id.* ¶ 40. Several web analytics services parse the search query information from web server logs, or otherwise collect the search query from the Referrer Header transmitted by each visitor's web browser. *Id.* ¶ 41. Defendant's own analytics products provide webmasters with this information in the aggregate. *Id.*

Search terms could be linked together with the identity of the user through the process of "reidentification," either by linking the terms with the user's IP address, which is also sometimes released with the clicked link; with any cookies stored on the user's computer; or with "vanity searches," where the user searches for their own name. *Id.* ¶¶ 32, 60-63.

On the basis of the allegations outlined above, Plaintiff brings seven causes of action: (1) Violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2510, specifically of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701; (2) Fraudulent Misrepresentation; (3) Negligent Misrepresentation; (4) Public Disclosure of Private Facts; (5) Actual and Constructive Fraud; (6) Breach of Contract; and (7) Unjust Enrichment.

On May 16, 2011, Google filed this motion to dismiss arguing that this court lacks subject matter jurisdiction because Gaos has again failed to establish that she has standing under Article III of the United States Constitution because she has not alleged she suffered an injury in fact. In the alternative, Google argues that the FAC should be dismissed because Gaos has failed to state a claim upon which relief can be granted as to her privacy claim, breach of contract claim, fraud-based claims, and unjust enrichment claim. Additionally, Google argues that all the state-law claims are preempted by the SCA.

II. LEGAL STANDARDS

An Article III federal court must ask whether a plaintiff has suffered sufficient injury to satisfy the "case or controversy" requirement of Article III of the U.S. Constitution. To satisfy Article III standing, plaintiff must allege: (1) an injury in fact that is

concrete and particularized, as well as actual and imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely (not merely speculative) that injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). A suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction over the suit. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998). In that event, the suit should be dismissed under Rule 12(b)(1). *See id.* at 109-110. At least one named plaintiff must have suffered an injury in fact. *See Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

III. DISCUSSION

A. Claims 2-7

Google argues that Gaos has failed to allege that she has suffered an injury in fact that is concrete and particularized as well as actual and imminent. As the sole named plaintiff in this action, Gaos alleged she "has suffered actual harm in the form of Google's unauthorized and unlawful dissemination of Plaintiff's search queries, which contained sensitive personal information, to third parties." FAC ¶ 80. Gaos does not identify what injury resulted from this dissemination. Additionally, the FAC states only that Gaos searched for her name and her family's names.

FAC ¶ 77. Thus, the FAC does not plead facts sufficient to show that the disseminated information is of a nature that places her in imminent danger of harm. *Cf. Doe I v. AOL, LLC*, 719 F. Supp. 2d 1102 (N.D. Cal. 2010) (finding injury in fact where database of search queries was posted online containing AOL members' names, social security numbers, addresses, telephone numbers, user names, passwords, and bank account information which could be matched to specific AOL members); *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1140 (9th Cir. 2010) (finding injury in fact where a laptop containing names, address, and social security numbers of Starbucks employees was stolen putting employees at risk of future identity theft). Thus, Gaos has not alleged injury sufficient for Article III standing with respect to her non-statutory causes of action, claims 2–7.[1]

Accordingly, Google's motion to dismiss is GRANTED with leave to amend as to claims 2–7.

B. Claim 1: Violation of the SCA

The injury required by Article III, however, can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing." *Edwards v. First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). In such cases, the "standing question . . . is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* (quoting *Warth*, 422 U.S. at 500). Although "Congress

[1] Because the court finds that Gaos has failed to establish Article III standing for her state-law claims, it need not address Defendant's alternative arguments that Plaintiff's claims fail under Fed. R. Civ. P. 12(b)(6) or are preempted.

cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing," *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997), a plaintiff may be able to establish constitutional injury in fact by pleading a violation of a right conferred by statute so long as she can allege that the injury she suffered was specific to her, *see Warth*, 422 U.S. at 501.

Gaos argues she has alleged an injury in fact based on a violation of her rights under the SCA, which prohibits an electronic communication service from divulging the contents of a communication in electronic storage, 18 U.S.C. § 2702(a)(1), and prohibits a remote computing service from divulging the contents of communications carried or maintained on that service, 18 U.S.C. § 2702(a)(2).[2] Google offers two arguments that Gaos lacks standing to bring this SCA claim.

First, Google argues that Gaos has failed to allege any injury resulting from the SCA violation. Google, however, has not cited any authority supporting its argument that injury beyond a violation of the SCA itself is required to allege a concrete injury. The court finds that the SCA creates a right to be free from the unlawful disclosure of communications as prohibited by the statute. The SCA explicitly creates a private

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[2] On November 16, 2011, Google submitted a Statement of Recent Decision regarding the Order Granting Defendant's Motion To Dismiss in *Low v. LinkedIn Corp.*, 2011 WL 5509848, Case No. 11-CV-1467-LHK (N.D. Cal. Nov. 11, 2011). This order, however, specifically states that it does not address whether the creation of a statutory right by the SCA is sufficient to confer standing on Plaintiff. *See Low*, 2011 WL 5509848, at *6 n.1. Thus, the decision is not instructive on the issue of injury based on a statutory right.

right of action for persons aggrieved by a disclosure of their communications in violation of the statute. 18 U.S.C. § 2702(a) (providing that "any . . . person aggrieved by any violation of this chapter" may maintain a civil action if the violation was done knowingly or intentionally). Google's argument fails because the SCA provides a right to judicial relief based only on a violation of the statute without additional injury. Thus, a violation of one's statutory rights under the SCA is a concrete injury. *See Jewel v. National Sec. Agency*, 2011 WL 6848406, at *4 (9th Cir. 2011) (finding violation of the SCA to be a concrete injury).

Gaos must also allege that the injury she suffered was particularized to her. "The critical question is whether she 'has alleged such a personal stake in the outcome of the controversy as to warrant . . . invocation of federal court jurisdiction.'" *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). In pertinent part, the FAC states that Gaos conducted numerous searches, including searches for her name and her family members' names, and clicked on links on her Google search results pages. The FAC further alleges that Google sent the URLs containing her search queries to third party websites that appeared in the Google search results page, and that this transmission was unlawful and unauthorized. FAC. ¶¶ 76-80. In sum, Gaos alleges that her search queries were disclosed without her authorization, provides examples of those queries, and explains how and by whom that disclosure was made. Because Gaos's alleged injuries were to *her* rights under the SCA, rather than some generalized right, Gaos's injuries are sufficiently particularized—even if many other people were similarly injured. *See Jewel* at *7 ("[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance.").

Additionally, Google argues that Gaos failed to correct the deficiencies identified by Chief Judge Ware in the order dismissing the original complaint. Specifically, Google argues that the FAC still includes "conclusory allegations of disclosures of communications resulting in unspecified harm in violation of the ECPA, not supported by any facts, [which] are insufficient to allege violation of [Gaos's] statutory rights." Google Inc.'s Mot. to Dismiss at 6, ECF No. 29 (quoting Order Granting Defs.' Mot. To Dismiss at 5, ECF No. 24). Gaos argues the FAC remedied the problems identified by Chief Judge Ware by adding allegations about the disclosure of her own search queries. Google does not identify any element of an SCA claim that it argues has been pleaded in a conclusory or otherwise insufficient manner in the FAC.[3] Rather, Google's argument focuses on Gaos's failure to allege facts sufficient to specify harm resulting from the disclosure. As discussed above, a violation of the SCA itself is injury sufficient to allege an SCA claim. It is unclear whether Google objects to the pleadings on any other basis.[4]

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[3] Google argues for the first time in its reply brief that Gaos failed to allege her own lack of knowledge and consent to the disclosure. The court will not address this argument because it was raised after Gaos's opposition was filed.

[4] The court notes that although Gaos has alleged sufficient injury for standing based on a violation of the SCA, this finding does not mean Gaos has properly stated a claim for relief under the SCA. *See Fraley v. Facebook, Inc.*, Case No. 11-CV-01726-LHK, 2011 WL 6303898, at *12 (N.D. Cal. Dec. 16, 2011) ("That Plaintiffs have satisfied the injury-in-fact requirement for constitutional standing does not necessarily mean they have properly stated a claim for relief."); *In re Facebook Privacy Litigation*, 791 F. Supp. 2d 705, 712-13 (N.D. Cal. 2011) (finding that plaintiffs had alleged the injury required for Article III standing based on a violation of their statutory rights under the Wiretap Act while

The court finds that Gaos has alleged a concrete and particularized injury in fact as a result of the alleged violation of her statutory rights under the SCA. Accordingly, Google's motion to dismiss is DENIED as to Gaos's SCA claim.

IV. CONCLUSION

Google's motion to dismiss is DENIED IN PART as to Gaos's SCA claim and GRANTED IN PART with leave to amend as to all other claims. Gaos may file any amended complaint no later than May 1, 2012.

IT IS SO ORDERED.

/s/ Edward J. Davila
EDWARD J. DAVILA
United States District Judge

Dated: March 29, 2012

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also finding that plaintiffs' allegations did not state a claim under the Wiretap Act). Google's motion does not place this latter issue before the court. Thus, the court does not address whether Gaos's allegations state a claim for relief under the SCA in this order.

[1] UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. CV-10-4809-EJD

IN RE: GOOGLE REFERRER HEADER PRIVACY LITIGATION

SAN JOSE, CALIFORNIA
AUGUST 23, 2013
PAGES 1 – 49

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFFS:

Nassiri & Jung
By: Kassra P. Nassiri
* * *

Aschenbrener Law, P.C.
By: Michael Aschenbrener
* * *

Progressive Law Group
By: Ilan Chorowsky
* * *

(Appearances continued on the next page.)

Official Court Reporter:

Irene L. Rodriguez, Csr, Crr
Certificate Number 8074

Proceedings recorded by mechanical stenography, transcript produced with computer.

[2] APPEARANCES: (CONT'D)

FOR THE DEFENDANTS:
Mayer Brown
By: Edward D. Johnson
* * *

O'Melveny & Myers
By: Randall W. Edwards
* * *

* * *

[4] * * *

THE COURT: So I wanted to go through some of the aspects of this settlement here. And I guess it looks like this is an overview, and I'll invite counsel to tell me about this in a couple of minutes. It sounds like because of the size of the class actual remuneration, if you will, to an individual class member is virtually impossible. It can't happen even if you sent them one cent, a penny. The cost of administration of that would dwarf any possible settlement.

* * *

[5] * * *

MR. NASSIRI: Thank you for the opportunity. This is, as Your Honor noted, an interesting lawsuit and it seems to be kind of subject matter that is of greater and greater interest.

The lawsuit is – technically it's about the disclosure of search queries to third parties.

More broadly speaking it's kind of about some of the privacy concerns in general and the innovations in technology that have been occurring at a tremendous pace that makes things that just five years ago disclosures of information and data that just five years ago seemed pretty innocuous like it is anonymized has turned it into something else completely and it has been reidentified and because of advances in computer science and all of the money and attention that has been given to these efforts privacy is really at issue now in almost everything we do on line.

THE COURT: That's why you filed this lawsuit on behalf of your clients I presume because you felt there was an invasion of their privacy, they felt there was an invasion of their privacy and they seek remedies in the court. That's what it was about, right?

MR. NASSIRI: That's right, Your Honor.

THE COURT: Okay.

MR. NASSIRI: And every time the nature of the [6] science is that any piece of information, whether it seems anonymous or not on its own, when you start aggregating data it gets possible to reidentify information and to create pretty detailed profiles. The information never goes away. The storage is practically free, and you have this giant database in the sky.

And I have to say, Your Honor, when we filed this case and I would talk to people about it, they would look at me like where is your tinfoil hat to prevent the rays, you know, they're hacking into your brain.

But I think now people are starting to realize that this is real stuff. And every little bit of data that is

released about people and is associated with people, whether is seems anonymous or not, whether it's associated with an IP address or associated with an ISP server, if there's any information in the search query at all, it can be connected to something else that will eventually lead you back to the individual person.

So that was kind of the basis and in a very general way for why we filed the lawsuit.

THE COURT: And you felt that, and you tell me if I'm wrong here, but you felt, as your clients felt, that this was wrong, and it needed to be corrected?

MR. NASSIRI: That's right, Your Honor. It needed to be addressed particularly at the time and still today.

THE COURT: There's a difference between addressing [7] it and correcting it.

MR. NASSIRI: And it needed to be corrected. And one of the – and particularly what we focussed on in the lawsuit and in our claims and in particular that 2702 claim under the stored communications act was this idea of consent, that people needed to know – it's not necessarily illegal or wrong for Google or anybody else to do what they do with people's data. And there are certainly a lot of benefits to the work that they're doing.

But what we felt was wrong and needed to be addressed was that people needed to know, and they needed to opt in. They needed to understand, hey, when I use Google and I type my name or anything into a search query box, there's a good chance that somebody is going to know it was me that did that and am I okay with that or not?

And so this issue of consent and informed consent is one that we believe is very important.

This shouldn't be taking place kind of without the knowledge of the people who are using the services.

And part of our efforts in structuring the settlement to create real value and benefit for the class was aimed at that kind of an issue, education, transparency, accountability, and making sure that people have an idea that when they use these kinds of services and they submit their personal information, whether they think it's anonymous or not, that, hey, there's a [8] good chance that this is going to be attached to me down the road.

THE COURT: So the lawsuit was not designed to stop the practice because the settlement doesn't.

MR. NASSIRI: It is not designed to stop the practice, Your Honor.

THE COURT: The settlement says they can keep going and they are going to keep doing what they're doing, but as I stand here as champion of my clients, what we have done for you, as you speak to those stadiums up and down the Bay Area where your clients are situated in loud speakers sufficient so they can all hear you, what we have done for you is we have been able – you now know that this is what Google does and this is what we have done for you in this lawsuit.

Is that in essence what is happening here?

MR. NASSIRI: That's not the extent of it. That's a major piece of it because, as you pointed out, Your Honor, this is not something – only Congress could legislate to stop the practice and say consent or no consent, Google, you cannot do this.

That's not for us. For us we believe that we can and do have the tools and have the desire to make sure that

people consented because that is the law under the stored communications act.

These things cannot be disclosed without consent. Consent [9] was lacking.

THE COURT: So consent is providing information to your clients, to the public?

MR. NASSIRI: Yes.

* * *

[10] * * *

MR. NASSIRI: * * *

And in particular the question that you ask that is directly relevant here is do people know that when they type their search queries into Google, that those search queries may end up being associated with them in the future? I would say anecdotally probably not for most people.

THE COURT: And you think that this lawsuit would cure that lack of knowledge?

MR. NASSIRI: I wish I could be –

THE COURT: Your colleague is nodding his head up and down which is a universal sign for agreement I think.

[11] MR. NASSIRI: Yes. Well, Your Honor, that certainly is the goal and I think we are putting together a really good program to do that, and I think we're going to go a long ways in doing that.

THE COURT: And the piece that accomplishes that, I guess it's specific to Google is the FAQ that they're going to add, I suppose?

MR. NASSIRI: Specific to Google, Your Honor, yes, in terms of the business practice change.

As we already discussed, they're not going to change their practices per se, and we don't believe that that would be appropriate from the scope of the claims that we brought.

But they are going to make their disclosures more robust and more prominent and that in conjunction with the notice program and the cy pres efforts and generally the climate in the media these days I think will go a long way in kind of really qualitatively increasing the public's awareness.

* * *

[14] * * *

THE COURT: And the thought occurs to me, well, okay, but don't we really need to educate the corporate world of Googles and whoever does this that this is wrong? Isn't that what your premise is?

MR. NASSIRI: Well, that's a loaded question.

THE COURT: That's why I asked it.

MR. NASSIRI: We wanted to stay within the confines of the lawsuit. And, I mean, there are a lot of answers to that, and I'm not sure exactly how to structure my response.

But one is that that seems a little bit beyond the scope of what we're doing here. Again, our primary concern is making sure that people are informed and give informed consent.

Also that is – by the way, Your Honor, I think one of the – may I briefly explain what we're doing with cy pres so that –

THE COURT: Sure, sure.

MR. NASSIRI: It's relevant to your question.

THE COURT: Please. Thank you.

MR. NASSIRI: I believe we're doing something new here and some of the critiques are misinformed about what we're doing.

We are raising the bar, and I think raising the bar for [15] all cy pres settlements like this to follow.

We're treating the cy pres allocation more like a grant making organization would treat grant – prospective grant recipients.

THE COURT: Isn't that what they tried to do in Lane?

MR. NASSIRI: It's what they tried to do, but I think we're taking it further.

And so – and I don't want to make – or I don't want to have my mouth write checks that we can't cash ultimately, but I think we'll get there.

The money will to specific projects. This money that goes to cy pres recipients is not going to disappear into their general overhead. And not only will the money go to specific projects, those projects are being vetted by us very carefully before we even present them to the court and the class to make sure that they kind of are within the confines of the lawsuit and meet some of the objectives that we have framed by the lawsuit.

One of them that may or may not end up before you, Your Honor, is an initiative by the Berkman Center at Harvard Law School to bring together –

THE COURT: It's your alma mater.

MR. NASSIRI: It is my alma mater and some people have raised an objection to that, and I'm happy to discuss [16] that.

* * *

[18] * * *

THE COURT: * * *

Do you have a white book of people that you would like to consult or cy pres recipients that you look to for these issues?

MR. NASSIRI: In this case in particular, Your Honor?

THE COURT: Yes.

MR. NASSIRI: Well – so in this case in particular we did – so Chris Soghoian who provided a lot of the information for the complaint, he's a well-known privacy advocate who works with a lot of the institutions that typically receive cy pres funding, he weighed in on this and he talked about kind of some of the people that he thought would [19] be really useful for us to speak with and the universe of kind of known institutions who do this kind of work is not that large.

So we had a kind of universe, a white book, if you will, Your Honor, but also this was – there was a negotiating aspect to this. We had to reach agreement between all parties, between the plaintiffs and Google.

THE COURT: With the recipients or as to the recipients?

MR. NASSIRI: About, about – that's right. Now, I want to be clear, Your Honor, while Google did – we did have to agree on the potential pool of recipients, Google's involvement goes no further than that.

So there's no situation here in which, you know, like in some of the prior class actions, cy pres settlements where people will criticize them because the defendants kind of sat on the boards or were somehow closely affiliated with the receiving institutions.

That's not the case here, Your Honor.

* * *

[20] * * *

THE COURT: I'm sure someone keeps records and someone keep notes about what institution receives what and what they have done with those monies.

MR. NASSIRI: Well, in the class action context certainly, Your Honor, it's all a matter of record because they're class actions.

And to the extent that there is kind of less public funding going on with these institutions, we are requiring them to provide us with that information so we can present to the court and the class so that Your Honor and the class can make their own judgment about whether these are independent institutions that can be relied upon to use the money objectively.

* * *

[21] * * *

MR. NASSIRI: But beyond that, these – the entities that we've selected and more well-known established entities, they can do more not just because of the money but because of their experience, their connections, their track record.

[22] THE COURT: No doubt about it. I understand.

MR. NASSIRI: And even, you know, for example, having Stanford cis on the list, you know, those people

are very well connected and are – I think that they stand a better chance, within the tech world, and – but they still have – their interests are in the right place and their mission.

* * *

[23] * * *

THE COURT: * * *

I'm looking at the settlement agreement. I'm looking at – yes, 3.1 is the relief paragraph, pages 6 and 7. And I'm just looking at my notes. I think you have answered the

Question here and my notes ask myself, does this mean – I'm [24] looking on page 7, the last sentence – this tells us then that this policy, this practice will not change, the current practice will not change; is that right?

MR. NASSIRI: In terms of what Google decides to do with search queries, that's right. Now, to give it some context, Your Honor, I don't remember the exact date now, but right around the time that the second motion to dismiss was filed in this case Google did make some changes, important changes. Whether or not our lawsuit had anything to do with it, I don't know.

But Google changed its policy on disclosing search queries so that for Google accountholders who are signed in and do searches, so long as they don't click on paid advertisements, their search queries are no longer disclosed.

* * *

[25] * * *

THE COURT: Sure. So somebody's 72 young great aunt who lives in Grinnell, Iowa in a lovely ranch

house and she gets internet for the first time and she has this lovely 486 computer that her grandson, perhaps, gave her and said, no, no, let me update you and let me get you something new and all you have to do is push the button and she gets this and clicks on it, she's not going to go to an FAQ.

MR. NASSIRI: She might not, Your Honor. But, again, some of the proposals we're looking at will target people who are less likely to receive the message through other [26] channels. So young people and older people is who I'm referring to.

THE COURT: AARP, that's why AARP is in there.

MR. NASSIRI: I'm not actually not talking to AARP. We've kind of divided. So I'm not sure of all of the proposals that they have put on the table.

But, yeah, even Harvard or the Berkman Center has done some work that is aimed at those demographics.

* * *

[27] THE COURT: Okay. Thank you. And I'm turning to page 4 under paragraph 3, why is there a settlement?

MR. NASSIRI: Uh-huh.

THE COURT: The last sentence there describes costs, I guess. That way they avoid the costs and risks of a trial and the class will receive relief when the settlement is final rather than years from now, if at all.

Is that kind of misleading?

MR. NASSIRI: No.

THE COURT: "The class will receive relief," I read that and at first blush I thought, and I'm trying to put

myself like a great aunt who lives in Grinnell or something like that.

Well, am I going to get relief from this? Is there something in the agreement that says you will not receive anything, but what you will receive is access to an enhanced FAQ? Not in that language I'm certain but –

MR. NASSIRI: Well, Your Honor, so there's nothing in here that says that you will not receive direct remuneration.

THE COURT: Is that something that you think the class should know?

MR. NASSIRI: Yes, it is.

THE COURT: I thought so. It seemed to me that to be a full notice, maybe a class member should know that I'm not going to receive anything as a class member. However, for the [28] greater good, the cy pres is receiving this amount and this is what is hopefully will happen from those recipients.

But as an individual member, as an individual plaintiff I'm not going to receive anything. I won't get remuneration, and unless, and I'll hear from Mr. Johnson about this, unless perhaps one of the measures of settlement is that Google has an epiphany and said you know what, we're going to either stop doing this or we'll stop doing this for six months. And that's the next settlement agreement.

I'm not trying to mess with your deal. I'm just trying to suggest that that is something else that might come up.

But they should know, shouldn't they?

MR. NASSIRI: I can think of a lot of things that I would like them to do.

THE COURT: I'm talking about your clients,

Shouldn't they know that they're not going to receive anything specifically?

MR. NASSIRI: Well, it's here because the – where that is disclosed is in the next section of the settlement benefits.

THE COURT: Right.

MR. NASSIRI: So I believe what you're saying, Your Honor, is that it should be kind of simpler and kind of stated more directly.

THE COURT: I think so, I think so. Just in, you [29] know, kind of language that a layperson might grasp.

* * *

[33] * * *

THE COURT: So let's talk about the notice first and the thought occurred to me that the best form of notice for [34] this, shouldn't that be for Google to put it on their, whatever it is, their home page, click here for information about exciting lawsuit that you may be a party to?

MR. JOHNSON: Well, Your Honor, I think that there are – there would be many competing, you know, interest groups who would love to do that.

I think that the question before the court and that the question that the parties negotiated at least how can we let people know about this?

And it's not just the FAQ section and it's not just the key term, but there's an elaborate advertising campaign with banner ads on the most popular websites

that are designed to let people know, and exactly the way that the people are using the internet and searching the internet, where are they likely to be. And it wouldn't even be just Google, and it's going to be on a variety, if they're taking out advertising on a variety of sites, to let people know about the settlement.

* * *

[35] * * *

THE COURT: So you think that the – what you're telling us, Mr. Johnson, what you have negotiated with counsel is fair notice and it provides fair notice and captures the widest possible universes that you can?

Mr. Johnson: Yeah, it's designed – I mean, the heart of their lawsuit, Your Honor, and since we're here to talk about settlement, I won't go into the merits, but the heart of their lawsuit is that these referrer headers, which are visible, the search queries which are visible and the terms are visible in the little white line, you know, that that wasn't disclosed, that people didn't know that when they were clicking that the page that they clicked to could see it.

This settlement process, not to mention all of the publicity associated with the lawsuit, is designed to accomplish that, to let people know.

THE COURT: So it's a notice lawsuit from your perspective?

Mr. Johnson: Yes, Your Honor.

THE COURT: That is what it is about?

Mr. Johnson: And they say that. You know, aside from, you know, questions of harm, I don't think anyone is alleging economic harm.

* * *

[37] * * *

THE COURT: * * *

Let's see, and the estimate for this notice is up to a million dollars; is that right?

MR. JOHNSON: I believe that's what the administrator provided.

THE COURT: And is that a – do you know anything about that figure? Is that a hard figure or is that kind of a [38] mushy figure? I mean, a million dollars for notice?

MR. JOHNSON: It was prepared by professionals who were in the business of engaging in these kinds of notices.

It's my understanding that it was a well vetted figure and we'll accomplish their 200 million impressions goal.

THE COURT: Okay.

MR. EDWARDS: Your Honor, I apologize for interrupting but I just wanted to comment.

THE COURT: No problem at all.

MR. EDWARDS: In exhibit 4(c) of the submission that the plaintiffs made on the motion for a preliminary approval, there's an itemization of how that figure is derived and

Mr. Aschenbrener has had the most close communications with the notice administrator about that.

I believe the million dollar figure in the settlement agreement itself is sort of an initial funding by Google because it will cover the projected cost of notice and some other administrative issues.

And so we just wanted to clarify that point, there is some backup. And to the extent that there are really detailed questions, I think Mr. Aschenbrener can probably address them.

THE COURT: Great. Okay. All right. Thank you. Thank you for that.

Anything else, Mr. Johnson, you would like me to know in support of this? [39] Mr. Johnson: no, Your Honor. I think other than the fact that we – that it was the product of a heavily negotiated settlement which we had the assistance of randy wolf, who I believe the court is familiar with, who believed under the circumstances this was the fair proposal.

THE COURT: Yes, I think – and I neglected to mention that at the outset how you got here.

And the lawsuit was filed, and I know there was some motion practice, and then as you suggest, you met with a professional mediator.

MR. JOHNSON: Yes, Your Honor. Yes, Your Honor.

THE COURT: And you hashed out the issues and you have come to this resolution and what you're asking the court to find as fair, adequate, and reasonable?

MR. JOHNSON: Absolutely, Your Honor.

THE COURT: And I think you indicated in your pleadings the risk for both sides as to the lawsuit progressing and going forward and members of the community might go one way or the other as they sat as a jury and listened to both sides and both of you felt

that it was and in both of your best interests to resolve the case as you have brought to the court here this morning.

MR. JOHNSON: Yes, Your Honor, given the uncertainties and the issues of first impression that are mentioned in the papers, yes, Your Honor.

* * *

[40] * * *

THE COURT: * * *

And what I'd like you to do is I'd like some more information about the selection process and the identification of the pool of cy pres recipients.

And what is it specifically, as specific as you can, can you tell me what is it that they're going to do?

You've talked about the different conferences, perhaps, or whatever there was going to be, meetings with groups.

If you could be more specific for me to give me guidance as to what the public and I can expect the work product to be.

And, of course, in these cases we can't police them and I don't sit here as a professor to have them come in here and [41] grade their work.

But I think it is appropriate for me to, when I look, or when I look at this settlement, to specifically look at the task that they're going to accomplish, or look at the goals that this settlement sets for them. I think that's appropriate for me to look at. I know you put it in your pleadings.

MR. NASSIRI: Well, I have something to say about that now, Your Honor.

THE COURT: Okay.

MR. NASSIRI: A few things. First, with respect to grading them, I actually think that what we're doing will move you a big step closer, and everybody else, closer to grading them both in making a decision about whether or not to give them the money and then down the road how they did with it.

I don't know if Your Honor is aware that like maybe

Six months ago there was a lot of press about certain charities that were wasting money that was given to them and there

Were – there were these charity watchdog foundations that published statistics saying that charity x for every dollar you give them, only six cents of it actually goes to the target community.

So starting on that trail I kind of took a look at those watchdogs, and they have done some really good work in coming up with criteria for increasing transparency and accountability with respect to charities. It's perfectly applicable here. We [42] have sent, and I'll be happy to share with the court in a supplemental filing, we have sent kind of a template. It's not actually a template.

But we have sent our requirements to all of the proposed recipients and said we want a written proposal from you that addresses these points. And included in what we are expecting to get back and have already started to get back, Your Honor, are detailed descriptions of exactly what they're going to do, who is on staff, and how the budget will be allocated within the project.

We have also asked for these entities to give us a set of metrics that they can use to measure the success of

the program, and we are going to require them to publish to the class and to the court down the road the results.

So this is kind of tracking perfectly what some of the forward thinkers in these charity watchdogs are doing.

So that will bring you a lot closer and everybody else to actually grading them.

And it will, kind of over the bigger picture, not just this lawsuit but for the next lawsuit, you'll have something to look at.

* * *

[44] * * *

MR. NASSIRI: * * *

I have described to you what the process is. I think it goes far beyond what has ever been done before, and we're going to present more information to the court and the class for final approval that has ever been done before.

* * *

[45] * * *

THE COURT: So when we look at a pure cy pres, and if we follow that logic then, there will always be the usual suspects.

MR. NASSIRI: Well, no, Your Honor. People are entering the space more and more. There is more interest in funding for it. And we have a few new players, like I said, Chicago-Kent and the World Privacy Organization, those are new players.

* * *

[47] * * *

THE COURT: * * *

If you could, in an additional pleading just, you know, let me know what you did in that regard and why these folks were identified. I think some of these are perhaps self-identifying, you know, as you say.

MR. NASSIRI: They're somewhat obvious choices. THE COURT: thank you.

MR. NASSIRI: And I don't want to overstate the innovation I think we have got here. The fact that any concern that these are kind of, you know, the usual guys and people just throw money at them and maybe we should be more thoughtful, I really believe that, one, the fact that we're requiring them to spend the money on specific projects and not letting them decide after they get the money how they're going to spend the money is a big difference between what has been done in the past and what is going to be done now.

And that by itself I think would alleviate some concerns about, hey, you're just giving money to the usual suspects.

THE COURT: No. This is a creative look at it and treatment of it and I appreciate it.

* * *

EXHIBIT C

Promoting online privacy via research and education at Carnegie Mellon University

Lujo Bauer, Alessandro Acquisti, Nicolas Christin, Lorrie Cranor, Anupam Datta

This document briefly describes the technical and societal impact of Carnegie Mellon research and educational efforts on online privacy, and proposes additional efforts that will be of benefit to both class members and society.

Carnegie Mellon University Carnegie Mellon hosts one of the largest academic security and privacy research centers in the world (CyLab), with over 50 faculty and 100 graduate students working on all facets of computer and information security and privacy, ranging from public policy to software design, network measurements, and behavioral research. To achieve high-impact research, inter-disciplinary collaborations between very different fields (e.g., psychology, economics, and computer science) are not merely encouraged: they are the norm rather than the exception.

CyLab researchers have a strong track record in privacy research, outreach, and education. Our privacy research regularly appears in top peer-reviewed conferences and journals and has been recognized with prestigious awards. CyLab faculty have testified at privacy-related hearings on Capitol Hill; our research papers are frequently cited in similar settings. CyLab faculty are regularly invited to present their research findings at companies such as Google, Facebook, PARC, and Microsoft. Finally, our privacy research is frequently mentioned in the popular press.

CyLab researchers regularly teach privacy-related courses at the undergraduate and graduate level. In addition, Carnegie Mellon has recently launched the world's first masters degree program in privacy engineering. We expect that graduates of this is program will be uniquely well qualified to work for companies where they can help address privacy issues in products and services.

Proposed research Carnegie Mellon proposes to use a potential donation to conduct new and expand current research to improve user privacy, focusing on three areas: (1) furthering our understanding of users' privacy behaviors and online threats to users' privacy; (2) developing new interfaces and technologies to help users understand and control threats to their privacy; and (3) developing computational mechanisms to help ensure that systems and organizations adhere to privacy regulations or policies. These efforts will advance the field of privacy research and result in tools that will benefit class members and other computer users.

In the first area, we propose a series of behavioral experiments to explore the influence that stimuli from the physical world, often processed unconsciously, can have over security and privacy behavior in cyberspace. This research is predicated around an evolutionary conjecture: Humans have evolved to react to threats in their physical environment. In cyberspace, those stimuli often are subdued or deliberately manipulated by attackers. We aim to investigate this conjecture and its implications, studying the evolutionary roots of privacy and security behavior and using this knowledge to improve privacy and security in cyberspace.

Also in this category, we propose to empirically study how private information leaks can impact users. For instance, we have observed through several studies

that an increasing number of websites is compromised by attackers who take advantage of features meant to help personalize the user experience. Users searching for prescription drugs may unknowingly land on such compromised websites, which take them to unlicensed online pharmacies, rather than vetted outfits. This mode of illicit advertising has become increasingly sophisticated. We propose to systematically evaluate how adversaries can abuse personalization information and to design countermeasures that will benefit members of the class as well as the general public.

In the second area, we will focus on user authentication and smartphone privacy. Authentication is a key aspect of the online experience; online banking, email, and other transactions require users to first authenticate to a computer system. Poor authentication mechanisms can increase the chance of lost or stolen passwords leading to compromised accounts; more sophisticated ones, such as using an online identity provider to sign into a service like USA Today may result in undesired leaks of personal information from the identity provider to the service provider. We propose to study both issues: We will extend our studies of passwords to encompass longer, simpler passwords, which appear promising for both security and usability; we will investigate effects of using different data-entry interfaces, such as on mobile phones and Internet-connected TVs; and we will develop privacy-preserving fail-over mechanisms to help reset lost passwords. We will also develop more user-friendly interfaces to give class members and other users more insight into and control over the privacy they may be giving up when using single sign-on.

Also in this category, we will study smartphones and other mobile devices, as they are an increasingly

popular way to interact with the online environment. Building on our past research on privacy decision making and risk communication, we propose to conduct research to improve communication about privacy between smartphone app developers and users, specifically with regards to data collection, use, and sharing.

In the third category, we will express privacy-related laws and corporate online privacy policies (e.g., as used by Facebook and Google) in a computer-readable form and develop computational mechanisms to enforce them. In prior work, we have formalized privacy policies that prescribe and proscribe flows (disclosures) of personal information as well as those that place restrictions on the purposes for which a governed entity may use personal information (e.g., HIPAA, GLBA). Recognizing that traditional preventive mechanisms are inadequate for enforcing such privacy policies, we have developed principled audit and accountability mechanisms that encourage policy-compliant behavior by detecting policy violations, assigning blame, and punishing violators. Our research along these lines is directly relevant to improving compliance of web search engines with their privacy policies. A central challenge that we will address is to enable this form of checking even when the checker does not have access to a web service's software systems. This setting is particularly important because it will enable class members and other users, privacy advocacy groups, and government organizations to check that a web search engine's practices respect users' privacy even though they will typically not have access to the search engine's internal systems (e.g., to check that certain types of personal information do not influence displayed advertisements or flow to third party data aggregators).

Benefits of proposed research Our research results will include an improved understanding of threats to users' privacy and ways to mitigate these threats. Our proposed effort will also result in the design of specific interfaces and tools that improve privacy for class members and other users; as well as algorithms that could be used by Google, privacy advocacy groups, and regulators to measure the privacy compliance of various web-based systems, including search engines. We will generally make our designs and code open-source and freely available for download.

We will additionally disseminate the results of our research through scientific papers and talks, through our regular interactions with the popular press and companies like Google and Microsoft, and through CyLab's corporate partners program. When appropriate, results will be integrated into our curriculum and passed on to the next generation of privacy engineers.

EXHIBIT D

Executive Summary of Stanford Law School Center for Internet and Society's Proposal For Distribution of *Cy Pres* Funds

To aid the Court in its consideration of the distribution of *cy pres* funds in *In re: Google Referrer Header Privacy Litigation*, Case No. 10-cv-04809 EJD, the Stanford Law School Center for Internet and Society ("CIS") hereby submits the following summary of its Proposal for Distribution.

Our Mission. CIS is a public interest technology law and policy program within the Law, Science and Technology Program at Stanford Law School and an international thought leader in privacy. CIS's goal is to improve technology law and policy through ongoing interdisciplinary study, analysis, research and discussion. CIS strives to inform the design of technology and law in furtherance of important public policy goals such as privacy, free speech, innovation and scientific inquiry. CIS's research in consumer privacy has forged a direct path from scholarship to positive changes for Internet users. To continue and expand our consumer privacy work, CIS requests funds to conduct four projects over the next three years, including required personnel.

Project One: Mobile Privacy Notice Research. Effective notice is a precursor to effective privacy choice. The Class members alleged that they were given neither notice nor choice about how Google would relay their search queries to third parties. As Internet users, including Class members, migrate to mobile devices, providing effective notice will directly improve their ability to control the flow of information about them. CIS has been a leader in finding innovative ways to meaningfully conveying privacy

practices to consumers. We propose expanding this work to the context of mobile devices and other small screens. We would: (1) research how best to present privacy information and publish our results; (2) promote adoption of this research by app developers; (3) help policy makers understand and use our research; and (4) host a training event for up to 100 app developers on how create improved privacy notice.

Success metrics: We anticipate that our work will improve mobile privacy notice. Our metrics are whether (1) our central insights are implemented; (2) app developers improve their notices after training; (3) policy makers encourage adoption of our insights.

Project Two: Privacy Legislation Analysis. When companies are unwilling to voluntarily limit online data collection and use, legislation can be an important recourse to protect privacy interests. In 2012, the California legislature introduced nearly two dozen privacy bills. Many of these are well-intentioned bills that would benefit from better understanding of technology. The legislature risks passing laws that are impossible to implement. California online privacy laws apply to all companies with customers in California, and thus become de facto national laws. If crafted well, pending bills and amendments regarding data transfer to third parties could have the intended effect of protecting Class members' and others' privacy. CIS's interdisciplinary approach puts us in a unique position to help inform the legislature. We propose (1) researching and publishing at least three white papers responsive to privacy issues under active consideration by state lawmakers. In addition to (2) informal meetings with policy makers, we would (3) hold a major event in cooperation with the California Assembly Select Committee on Privacy (or other appropriate

partner) to bring together experts in privacy scholarship and legislative staff, with knowledge transfer in both directions.

> **Success metrics:** (1) Legislative directors and policy makers attending the Stanford event will leave with greater technical understanding. (2) We will create a briefing book containing the biographies of participants, allowing ongoing contact over time. (3) We will successfully work with legislators to introduce privacy protecting bills that are technologically astute.

Project Three: Cookie Clearinghouse. Unwanted disclosure of information to third parties is a privacy problem. We created the Cookie Clearinghouse in response. The Cookie Clearinghouse publishes Accept and Block lists to manage cookies. This makes it easier for Class members to control third party tracking and to learn what is tracked. Enhanced control of data flows to third parties is directly relevant to the issues in this litigation, and is the core of the Cookie Clearinghouse tool. We would: (1) perform ongoing technical analysis of cookies; (2) produce and advertise online materials to help web developers understand the Cookie Clearinghouse; (3) hold a video-recorded developer workshop; (4) educate the public about the Cookie Clearinghouse.

> **Success metrics:** Success requires the Cookie Clearinghouse operate effectively as a n anti-tracking tool for users who wish to opt out: (1) Cookie Clearinghouse Accept and Block lists are available in browsers; (2) reach 100,000 users by 2016.

Project Four: Speaker Series. Education is a key aspect in putting users in control of the data they transmit. CIS has a popular lunchtime and evening

Speaker Series. Our Speaker Series events can address the need for more education about privacy practices, rights and self-help by educating users who are able to attend the speaker series in person, and reaching a geographically remote audience online. CIS would host three additional events specifically about consumer privacy online. Topics relevant to the Class include: (1) how to make effective online choices for privacy (2) how third party tracking and advertising practices work (3) how seemingly anonymous data can re-identify people.

> **Success metrics:** (1) At least 300 people in attendance across all evening events, (2) at least three different top-notch speakers, (3) at least 100 remote attendees and downloads within a year of the event.

Necessary Personnel. To accomplish these Projects, as well as other relevant research that would directly benefit the privacy interest of Class members in controlling the use and dissemination of their personal information, CIS would make the position of Director of Privacy permanent. We also request funds for a portion of the salaries of existing staff members who perform tasks directly relevant to this *cy pres* request.

CIS thanks the Court for the opportunity to submit a Proposal for consideration in the proposed settlement of this litigation.

EXHIBIT E

WORLD PRIVACY FORUM

September 04, 2013

Pam Dixon, Executive Director
World Privacy Forum
3108 Fifth Avenue, Suite B
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Executive Summary of World Privacy Forum Cy Pres Distribution Proposal

The World Privacy Forum[1] is pleased to submit a proposal for this online privacy-focused Cy Pres distribution. The World Privacy Forum has developed two focused, relevant and impactful projects to provide direct relief and support for class members in this cy pres. We are uniquely poised in expertise, experience, and in our core mission and function to assist the class members.

About the World Privacy Forum

The World Privacy Forum is a non-profit, non-partisan 501(c)(3) public interest research and consumer education group focused on conducting in-depth research and consumer education in the area of privacy, with a focus on topics relating to privacy and technology. Our core mission is to provide substantive research and consumer information that documents and analyzes critically important privacy issues and to provide consumer information and educational support in the

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[1] The World Privacy Forum is a non-profit public interest and consumer education research group. Our work focuses on consumer privacy and security issues in the areas of technology, health care, finance, and the Internet. WPF is national in scope and impact. Please see <http://www.worldprivacyforum.org>.

area of privacy. We also provide direct support to consumers.

The World Privacy Forum fills a unique need for unbiased, in-depth public interest research with a focus on consumer privacy and education. Our work is focused on benefitting and educating consumers of all ages. The Forum was founded in 2003, and is incorporated and based in California. The Forum has achieved measurable and consistent success in its work, and receives consistent, high-profile press coverage of its activities, reports, and other work as well as consistently high praise from regulators, legislators, academics, and consumers. The New York Times, Wall Street Journal, Time, Business Week, Los Angeles Times, the Economist, San Francisco Chronicle, CNN, NBC, CBS, ABC, and many others have covered World Privacy Forum's activities and materials.

WPF has long experience in researching, documenting, and educating consumers about new and existing areas of privacy inquiry. WPF has testified before Congress regarding online and offline consumer privacy issues, as well as before many Federal agencies, including the Federal Trade Commission, FDA, HHS, the Department of Commerce, and others.

Proposed Use of Funding

Should we receive funding from this cy pres, we are proposing that all of the funds go towards two substantive consumer online privacy projects directly benefiting the class and relating directly to the underlying litigation.

The projects the World Privacy Forum is proposing focus on direct consumer support, research, education, and materials created specifically for consumers who may have typed a search query into a search box; these

projects will greatly assist this class of consumers by protecting and enhancing their privacy and by arming them with increased privacy knowledge. All projects will be conducted with a national scope to reach a national class of consumers. The projects are three-year projects, which will run concurrently. The projects are based on our extensive expertise and effectiveness in consumer privacy research, education, and support. The projects include substantial online components.

To facilitate measurable results and the transparency of outcomes, we are incorporating consumer interviews, surveys, benchmarking, and pre-and post project testing to measure our success. We will report our findings to the court and/or to class representatives at regular intervals post-funding. Another measure of our success will be the completion and availability of the multiple deliverables such as videos, consumer education materials, workshops, reports, and other materials. In our full project proposal we have outlined substantial, detailed, and measurable deliverables for each project.

Project Description

Key Project 1: Research, consumer education, and direct consumer support around online search boxes and referral headers that lead to privacy mischief (data brokers)

Most consumers begin their web browsing with a search box of some sort, and then continue typing in queries across web site search boxes as they read information, shop, communicate, and explore. Unknown to many if not most of these consumers typing in search queries, a significant number of search boxes lead back to online data brokers and their many unnamed affiliates. This is where a great deal of

privacy mischief and outright consumer harm is occurring. There are an astounding variety of these types of data brokers, and they are nearly undocumented online in any meaningful way.

This proposed project would fund two in-depth research reports about data brokers, online people finders, and consumer list brokers and the specific online and policy issues related to their activities relating to consumers. The reports will tease out the facts and details of these sites, which have not been heretofore documented. The project will also fund a very significant national consumer education campaign around these online consumer privacy issues, with online and offline education that includes education through multiple channels, including video, direct consumer support and education, e-books, workshops, and a variety of online materials.

This project meets the needs of the class members by providing vital and currently non-existent research, consumer education, outreach, and support in this critical area. No materials around search queries, search boxes, and problematic referral headers exist at this time, yet literally tens of thousands of these search boxes populate the Internet, with a percentage of these data broker search query boxes having some prominence. WPF is the leading privacy group in the area of online privacy and data brokers, and is uniquely positioned to conduct this project successfully.

Key Project 2: Consumer privacy education around critical online privacy topics for teens, minority and under-served populations, seniors, and disabled consumers

A substantial gap in online consumer privacy education and outreach for teens, seniors, minority, and

under-served populations such as disabled adults exists right now. This gap specifically includes members of this cy pres class.

The gap is twofold. First, focused, online-privacy-specific materials sensitive to this cy pres class are currently unavailable. General online safety materials exist, but specific materials assistive to the actual problems and challenges experienced by the class do not. Second, the class members this project is focused on are the least likely to be touched by the currently available general Internet safety education that is conducted primarily online, most typically through outreach and education directed toward individuals with pre-existing baseline sets of computer and online privacy knowledge.

This project will fund a multi-faceted national consumer online privacy educational campaign that closes the gaps with appropriate educational materials and effective delivery methods for the content. The first aspect of the project is crafting appropriate and focused educational materials, which will range from video to print to curricula to online tips and other items, and will be specifically crafted for each segment of consumers we are working to reach. The second aspect of the project is to provide direct consumer support and education to class members. The vision is for an inclusive approach, with focused, consumer privacy-specific materials reaching new audiences online and off, and collaboration with teachers and senior and other community center directors to ensure vital, appropriate, specific, and helpful online privacy messaging reaches these class members. Our deep and long privacy expertise and consumer assistance expertise combined with our ability and knowledge of executing national

educational campaigns is an invaluable and significant asset in this work.

We are sensitive to meeting the specific needs of this class. WPF receives many consumer phone calls. Most of them are from people who are online, but who did not realize some of their actions online had the possibility of bringing them harm. This project would provide funding to facilitate reaching more consumers with better targeted privacy information. The deliverables for this project will be measurable, robust, and substantial, and we will be able to sustain an educational effort over time in order to allow for adequate penetration of the privacy messaging.

EXHIBIT F

A National Initiative to Fight Online Fraud A Proposal from AARP Foundation and AARP Executive Summary

AARP Foundation, through its network of staff and volunteers around the country, has a long history of delivering effective fraud prevention to older Americans, their families, caregivers and support networks. This proposal describes how AARP Foundation, with the support of AARP, and state and local partners, could significantly scale its fraud prevention efforts, focusing on reaching a minimum of one million older adults with information and tools to help them prevent being victimized by internet fraud.

The Growing Internet Fraud Problem

Government agencies are reporting that not only is consumer fraud on the rise, but much of it is being committed online. The Federal Trade Commission's Consumer Sentinel program reports that the number of fraud complaints it receives increased 60% between 2009 and 2012.[1] A 2013 FTC study found that over the past five years, the percentage of consumers scammed over the internet doubled and is now 40% of all fraud being reported.[2] At the same time that online fraud is skyrocketing, there is evidence that many of these victims are older persons. A 2011 AARP Foundation study found that the average fraud victim is 69 years

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[1] FTC Consumer Sentinel Data Book, 2012.

[2] Consumer Fraud in the United States, 2013.

old.[3] Other studies have found similar trends of older persons being targeted by scammers.[4]

AARP Foundation and AARP have been fighting fraud in the trenches for many years. And there is evidence that these efforts have had significant impact. An example is AARP Foundation's regional Fraud Prevention Call Center operations that utilize trained volunteers to counsel vulnerable older persons about how to avoid fraud. Numerous studies have found that these peer counseling interventions dramatically increase vulnerable consumers' resistance to fraud.[5] A 2011 study by Stanford University found that AARP Foundation's peer counseling program even works to inoculate the most vulnerable consumers, increasing resistance among chronic lottery fraud victims.[6] While these Call Centers have repeatedly proven effective, they are not currently operating on a scale that is capable of putting a dent in the growing online fraud problem.

The Proposal – A National Initiative to Reach One Million Consumers

This proposal outlines a way to utilize cy pres funding to dramatically expand the scope and scale of AARP Foundation ElderWatch and Fraud Prevention programs so that many more vulnerable adults can avoid being victimized by online fraud. AARP Foundation proposes to develop an integrated national initiative with the support of AARP and other national and local

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[3] AARP Foundation National Victim Profiling Study, 2011.

[4] Finra Foundation, 2006;

[5] US Department of Justice, 2003.

[6] Stanford University, Forewarned is forearmed, 2011.

partners that will reach a minimum of one million consumers over a three-year period.

AARP Foundation will accomplish this goal by providing ready and immediate access to relevant, timely, actionable, and credible information and resources for older adults, their caregivers and support network focused on online fraud and scams.

- **Objective 1: Expand and scale AARP Foundation's existing and multi-tiered consumer fraud call center operations** and ensure that relevant and timely information is provided to older adults and their families about cyber safety and avoiding scams and fraud through highly trained and empathic staff and volunteers
- **Objective 2: Build local fraud prevention capacity.** AARP Foundation will help national, state and local organizations and AARP state offices build capacity to fight fraud by utilizing its expertise in online fraud prevention to develop "train-the-trainer" toolkits and materials for local education activities.
- **Objective 3: Build an unprecedented National Fraud Alert Database.** Adapt AARP's existing database management system to create an "early warning system" that tracks online fraud trends that can help Call Centers and law enforcement warn the public. This database will be one of the largest collections of fraud complaints from older adults in the country and will give the Foundation the ability to know what frauds are trending and how to target education and outreach to prevent them.

- **Objective 4: Build strategic partnerships with local, state and national law enforcement.** As part of this effort to ramp up the national online fraud prevention effort, AARP Foundation and AARP will continue to build strong partnerships with local state attorneys general, police, postal inspectors, the Federal Trade Commission, FBI and State Securities regulators.
- **Objective 5: Develop research-based profiles of online fraud victims.** AARP will conduct a national study of online fraud victims in order to identify psychological, behavioral and demographic factors that may lead to victimization. This will enable the Call Centers to better target outreach and messages to those most vulnerable to online fraud.

AARP Foundation is uniquely qualified to administer this program. As a charitable arm of AARP, AARP Foundation helps Americans 50 years of age and older meet their basic needs, and achieve and maintain independence and dignity. AARP is the leading, national expert on people 50+, with access to data and research regarding each socio-economic segment of the population. With a presence in all 50 states, AARP is well-positioned to assist the Foundation in reaching older adults and their caregivers where they live and are able to impact local issues that are either of concern to older adults.

EXHIBIT G

Chicago-Kent
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ILLINOIS INSTITUTE OF TECHNOLOGY

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September 3, 2013

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Re: Gaos and Italiano v. Google (N.D. Cal.)

Dear Michael and Kassra:

We hope you share our excitement in our proposed PRIVACY PREPAREDNESS project – we welcome the opportunity to educate consumers about the privacy risks attendant upon life in the online world. I have enclosed an executive summary.

Please let me know if you have any questions. Once again, we are thrilled with the opportunity to carry forward plaintiffs' goal of ensuring greater understanding of the privacy pitfalls in using the web, and

we are committed to continuing the project even after the cy pres funding has lapsed.

Sincerely,

/s/ Harold J. Krent
Harold J. Krent
Dean and Professor of Law
IIT Chicago-Kent College of Law

PRIVACY PREPAREDNESS PROJECT

The Center for Information, Society and Policy (CISP) at IIT Chicago-Kent College of Law proposes to devote funds from the cy pres award over the next three years to undertake a PRIVACY PREPAREDNESS initiative – a combination of academic research. public education. and outreach to safeguard consumers' online privacy. The centerpiece of the project is an online interactive Privacy Preparedness Guide to help people, if they so choose, implement privacy protections when they interact with the web.

The guide will alert people to the ways in which their privacy may be compromised on the web and offer them a range of choices about the level of privacy protection they can pursue. Through an interactive website and regular blog, it will offer advice about the privacy protections offered by various operating systems, browsers, add-ons. social networks. encryption tools, and risk assessment tools (to determine the safety of websites). For example, what are the relative merits of Twitter vs. Facebook in terms of the company's commitment to privacy? Android vs. Apple iOS in terms of allowing people to control what happens to their online data? What is NoScript, under what circumstances might I use it, and what are the steps to install it? No constantly-updated, comprehensive source exists that provides comparisons among the tools

along with easy-to-understand instructions about how to use them. There is no guide that puts the issue in the context of the choice of whether to block web tracking with step-by-step, up to date instructions that can be used by anyone. Simply put, no one has broken this complex problem down into understandable parts and then updated it as necessary to adapt to the constantly evolving nature of the Internet.

The class of people represented in the litigation that gave rise to this cy pres award will be benefitted by the following efforts:

- An online, interactive **Privacy Preparedness Guide** with hyperlinks an the CISP Privacy Project website. The project will keep track of the number of times the final guide and the privacy blog entries have been accessed online, downloaded or shared through social media, mentioned in the press or used by policymakers.
- **Videos** on the website that show the risks to privacy online and demonstrate the ways to deal with them and a dedicated **Blog** and dedicated **Twitter account** that contain updated information about online privacy. Visitors and downloads will be tracked.
- **In-person training** and **train the trainers** sessions. The project will provide national outreach, This will include reporters, high school teachers (who can then train their students), judges, lawyers, leaders of nonprofit organizations, community groups, and policymakers. Project representatives will administer two surveys at the events. The first survey will assess the knowledge base of program participants before the trainings commence. The second

survey will assess the program participants' knowledge at the completion of the trainings. The second survey will also ask questions regarding the effectiveness of the training format and whether the program participants found the information helpful and applicable. (We have used this method with respect to outreach trainings in the context of a *cy pres* award in a different field of law.)

- **Annual Conferences** will be held, focusing on strategies to protect privacy, vulnerable populations, medical apps, and emerging technologies to safeguard privacy. The effectiveness of the conferences at reaching people can be assessed based on the number of attendees and on the traditional surveys IIT Chicago-Kent distributes to attendees for evaluation after each of its conferences. These surveys were developed to comply with the requirements of state bars for the evaluation of continuing legal education.

Why *CISP*

CBI' faculty have advised a variety of institutions and groups on issues of internet privacy, including national legal groups, reporters, medical groups, forensic organizations, prosecutors and defense attorneys, the National Organization of Bar Counsel, computer scientists, universities, and government agencies in the United States and abroad. They have given keynote speeches on the topic in the United States, Asia, Central America, and Eastern Europe. They are regularly quoted in the media on issues of Internet privacy. Project Director **Lori Andrews** is a Distinguished Professor of Law at IIT Chicago-Kent College of Law and the author of *I Know Who You Are and I Saw What You Did: Social Networks and the Death of*

Internet Privacy. She developed a Social Network Constitution. accessible at www.socialnetworkconst itution.com. She blogs regularly on the issues of internet privacy and has written articles on internet privacy for *The New York Times* and other publications CISP has received funding from the Greenwall Foundation and is the recipient of prior cy pres awards.

CISP also will continue to tap the expertise of professors at the parent university. Illinois Institute of Technology, who similarly have been engaged in academic study of internet privacy. Previously, for example, CISP faculty instituted a project with IIT faculty and engineering students for which children's apps were downloaded and their code analyzed to see what type of information (including geolocation information) was being collected about the children when they used the apps. This allowed CISP researchers to provide data at the request of members of the U.S. Congress and help devise proposed policy to protect children's online privacy.

C1SP has gained a national reputation for exploring issues relating to internet privacy. On March 23, 2012, CISP hosted a conference on "Internet Privacy, Social Networks and Data Aggregation." Leaders in the fields of computer science, engineering, law, and Internet security discussed how social networks blur the lines between socializing and advertising, how data are collected and used, what legal remedies have been most effective and what the future holds for consumers. Over 150 people attended. On October 5, 2012. CISP hosted a conference "Under Watchful Eyes: Privacy and the Technologies That Track." The conference analyzed the legal. privacy, and ethical issues surrounding the collection and use of geolocation data.

Again, over 150 people attended. On September 10, 2013, CISP will co-host an international conference on the use of surveillance technologies in the investigation and prosecution of financial crimes—and the privacy implications of gathering and storing that data, with over 200 attendees already registered.

EXHIBIT H

BERKMAN

The Berkman Center for Internet & Society at Harvard University

Cy Pres Proposal (Google Referrer Header Privacy Litigation)

Executive Summary

The Berkman Center for Internet & Society at Harvard University proposes a research-based multi-stakeholder law and policy initiative aimed at formulating concrete proposals for how Internet privacy can be safeguarded more effectively, via legal and policy reform, company action, technological innovation, targeted educational efforts, and user engagement. With a focus on the changing landscape of online search, this initiative will build upon the Berkman Center's long interest, scholarship, and advocacy regarding privacy and new technologies with an eye towards practically informing policy debates and decision-making processes. Importantly, it will identify critical areas where users, especially youth, may require more information about how search tools work—that is, how their data is being processed and shared—in order to inform practical alternatives or solutions. This project will seek to lay the groundwork for on ongoing multi-stakeholder effort focused on core issues related to privacy on the Internet, in anticipation of emerging search technologies and business practices.

We will begin with an analysis of recent privacy cases and incidents where user search data has been shared with third parties without their knowledge or consent. Based on these findings, and in partnership with relevant stakeholders, we will map and investigate

existing legal and regulatory frameworks and critically evaluate to what extent they succeed or fail in protecting consumer privacy in the evolving online search ecosystem. As part of this effort, we will create connections with a diverse group of individuals and organizations that are experimenting with mechanisms to enhance and impact user privacy—from creative educational materials to technological interventions. A range of outputs will emerge from these working group meetings, including a blueprint that demonstrates how users who are engaged in online search can be better protected in the future, in addition to a set of specific recommendations targeted at lawmakers and regulators.

Most critically, this initiative will bring together and strengthen a community of practitioners, users, company representatives, advocates, and technologists who are interested in collaboratively examining these issues and thinking about opportunities to influence company behavior, strategically educate policymakers about not only the risks, but also the technologies themselves, and provide users with materials, resources, and tools that can enable them to make informed choices about their data. A priority for outreach will be the inclusion of groups who are innovating at the edges of privacy-focused policy, research, and advocacy, in order to ensure that emerging models and experimental approaches are featured prominently in our analysis and among our collaborators. The cultivation of this strong human network will enable us to identify, analyze, and respond to privacy challenges in ways that are based on an understanding of critical gaps in existing legal and policy frameworks.

The proposed initiative benefits the Class directly and in at least three ways. First, it creates a solid knowledge base about current and future privacy threats related to search online, while offering a critical assessment of gaps and limitations the current legal and regulatory framework, including enforcement regimes. This assessment will include an analysis of user expectations and attitudes, and seek to inform consumers and policy makers about the technologies they use (and regulate), in order to position them to take preventive measures as desirable. Second, the initiative will result in a blueprint that includes practical recommendations for lawmakers and regulators aimed at increasing the future level of privacy protection for the users of online search technologies—including the Class members. As such, it seeks to protect the Class from future wrongful conduct which plaintiffs complain. Finally, based on findings emerging from a collaborative, networked process with key actors in the field, the Class will benefit from creative educational materials designed to respond to gaps in knowledge regarding privacy risks. These outputs will ideally complement ongoing efforts to raise awareness and help users and policymakers understand the more complex elements of search technologies, and therefore make informed choices about the products they use.

The outcomes and effectiveness of the proposed initiative will be reported in one midterm and one final report, available to the Class and the public at large through a project website on the Berkman Center's homepage. The reports will be structured in a manner similar to the narrative portion of a grant report. Moreover, all findings and materials resulting from the initiative— including, for instance, the summaries of the multi-stakeholder working meetings as well as

the typology of search-related privacy threats and challenges, in addition to educational materials— will be shared online and presented in such ways that they are accessible to a broader audience, including the Class, in addition to policymakers and companies. Each draft deliverable will be subject to a peer-review, shared among the members of the multi-stakeholder working group, which includes search engine users, and will be part of an open consultation process, in which the Class can participate and provide feedback.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809 EJD

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Presently before the court in this consolidated internet privacy litigation is the unopposed Motion for Preliminary Approval of Class Action Settlement filed by representative Plaintiffs Paloma Gaos, Anthony Italiano and Gabriel Priyev ("Plaintiffs"). *See* Docket Item No. 52. Federal jurisdiction arises pursuant to 28 U.S.C. § 1331. Having carefully considered Plaintiffs' motion and additional filings as well as the arguments of counsel at the hearing on this matter, the court has determined the motion should be granted for the reasons stated below.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the Consolidated Class Action Complaint ("CCAC"), "searching" is one of the "most basic activities performed in the Internet," and Defendant Google, Inc.'s ("Defendant") website offers the most-used search engine in the world." *See* CCAC, Docket Item No. 50, at ¶¶ 15, 16. This case focuses on that proprietary search engine. Plaintiffs allege Defendant operated the search engine in such a manner that violated their

Internet privacy rights by disclosing personal information to third parties.

Specifically, Plaintiffs allege that Defendant's search engine intentionally and by default included the user's search terms in the resulting URL of the search results page. *Id.* at ¶ 56. Thus, when a user of Defendant's search engine clicked on a link from the search results page, the owner of the website subject to the click received the user's search terms in the "referrer header"[1] from Defendant. *Id.* at ¶ 57. Several web analytics services parse the search query information from web server logs, or otherwise collect the search query from the referrer header transmitted by each user's web browser. *Id.* at ¶ 58. Indeed, Defendant's own analytics product provide webmasters with this information in the aggregate. *Id.*

According to Plaintiffs, the problem with Google's disclosure of search information to these third parties is that the referrer header – which displays the user's search terms – can sometimes contain certain personal information often subject to search queries, including:

> users' real names, street addresses, phone numbers, credit card numbers, social security numbers, financial account numbers and more, all of which increases the risk of identity theft. User search queries can also contain highly-personal and sensitive issues, such as confidential medical information, racial or ethnic origins, political or religious beliefs or

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[1] In the simplest of terms, the "referrer" or referring page is the URL of the previous webpage from which a link was followed. HTTP referer, Wikipedia, http://en.wikipedia.org/wiki/HTTP_referer (last visited Mar. 24, 2013).

> sexuality, which are often tied to the user's personal information.

Id. at ¶ 3.

Based on these allegations, Plaintiffs assert the following causes of action: (1) violation of the Stored Communications Act ("SCA"), 18 U.S.C. § 2701; (2) breach of contract; (3) breach of the covenant of good faith and fair dealing; (4) breach of implied contract; (5) unjust enrichment; and (6) declaratory and injunctive relief. They seek to represent the following proposed class:

> All persons in the United States who submitted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification. Excluded from the Class are Google, its officers and directors, legal representatives, successors or assigns, any entity in which Google has or had a controlling interest, any judge before whom this case is assigned and the judge's immediate family.

As to the relevant procedural history, Gaos initiated the action in this court on October 25, 2010. *See* Docket Item No. 1. Judge James Ware granted Defendant's Motion to Dismiss the original complaint with leave to amend on April 7, 2011. *See* Docket Item No. 24. The case was then reassigned to the undersigned on April 25, 2011, and Defendant's second Motion to Dismiss was granted with leave to amend on March 29, 2012. *See* Docket Item Nos. 25, 38. Gaos filed a Second Amended Complaint on May 1, 2012, adding Italiano as an additional representative plaintiff and which Defendant, once again, moved to dismiss. *See* Docket Item Nos. 39, 44.

Meanwhile, Priyev filed his action on February 29, 2012, in the Northern District of Illinois. *See* Docket Item No. 1 in Case No. 5:13-cv-00093 EJD. That court transferred the action to this district on January 8, 2013. *See* Docket Item No. 48 in Case No. 5:13-cv-00093 EJD. On April 30, 2013, the undersigned granted the parties' stipulation to relate and consolidate the actions for the purpose of settlement proceedings. *See* Docket Item No. 51. This motion followed.

II. LEGAL STANDARD

A class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties to a putative class action reach a settlement agreement prior to class certification, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). At the preliminary stage, the court must first assess whether a class exists. *Id.* (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Second, the court must determine whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). If the court preliminarily certifies the class and finds the proposed settlement fair to its members, the court schedules a fairness hearing where it will make a final determination of the class settlement. *Okudan v. Volkswagen Credit, Inc.*, No. 09-CV-2293-H (JMA), 2011 U.S. Dist. LEXIS 84567, at *6 (S.D. Cal. Aug. 1, 2011).

III. DISCUSSION

A. Class Certification

The court first examines whether this action is appropriate for class treatment keeping in mind the rules that control such an inquiry. The Federal Rules of Civil Procedure describe four preliminary requirements for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a)(1)-(4). If these are satisfied, the court must then examine whether the requirements of Rule 23(b)(1), (b)(2), or (b)(3) are satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548-49 (2011).

The Rule 23 requirements are more than "a mere pleading standard." *Id.* The class representations are subjected to a "rigorous analysis" which compels the moving party to "affirmatively demonstrate . . . compliance with the rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Id.*

1. Rule 23(a)

As to the issue of numerosity, Rule 23(a)(1) provides that a class action may be maintained only if "the class is so numerous that joinder of all parties is impracticable." Fed. R. Civ. P. 23(a)(1). In this context, "impracticability" is not equated with impossibility; it is only an apparent difficulty or inconvenience from joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Moreover, satisfaction of the numerosity requirement is not dependent upon any specific number of proposed class members, but "where the number of class members exceeds forty, and particularly where

class members number in excess of one hundred, the numerosity requirement will generally be found to be met." *Int'l Molders' & Allied Workers' Local 164 v. Nelson*, 102 F.R.D. 457, 461 (N.D. Cal. 1983).

In their motion, Plaintiffs are unable to provide an exact estimate of the size of the purported class. But that does not necessarily defeat a favorable determination of numerosity. "Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982). Indeed, it is often the case that "[t]he sheer number of potential class members justifies [a] Court's finding" of numerosity. *Tchoboian v. Parking Concepts, Inc.*, No. SACV 09-422 JVS (ANX), 2009 U.S. Dist. LEXIS 62122, at *13, 2009 WL 2169883 (C.D. Cal. July 16, 2009). Here, that "sheer number" supports satisfaction of the numerosity requirement since Plaintiffs represent that notice of this settlement will be potentially communicated to over 129 million visitors of Defendant's website.[2] Based on that representation, the court finds that Plaintiffs have made an adequate showing of numerosity.

Turning to Rule 23(a)(2), this section requires there be "questions of law or fact common to the class." Fed.

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[2] This estimation is based on information obtained from comScore, which Plaintiffs describe as a "global Internet information provider" that "maintains a proprietary database capturing more than 1 trillion transactions monthly, equal to almost 40% of the monthly page views of the entire internet." *See* Decl. of Richard W. Simmons, Docket Item No. 52, at ¶ 22 n. 6. Information from comScore revealed that 129,979,000 individuals visited Defendant's search website in the six months preceding the filing of this motion. *Id.* at ¶ 24.

R. Civ. P. 23(a)(2). In the wake of *Wal-Mart*, commonality now requires "the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982)). The claims of all class members "must depend on a common contention . . . of such a nature that it is capable of classwide resolution – which means the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

Here, Plaintiffs contend the commonality requirement is met because the claims of all class members arise from one critical allegation: that Defendant's system-wide practice and policy of storage and disclosure of their search query information was unlawful. The court agrees, since confirmation of this allegation would resolve an issue essential to the validity of all causes of action for all members of the class. Thus, having considered the issue in light of *Wal-Mart*, the court finds this case meets the commonality requirement of Rule 23(a)(2).

Rule 23(a)(3) requires that the representative party's claim be "typical of the claim . . . of the class." Fed. R. Civ. P. 23(a)(3). "Under this rule's permissive standards, representative claims are typical if they are reasonably co-extensive with those absent class members; they need not be substantially identical." *Hanlon,* 150 F.3d at 1020. Here, Plaintiffs' personal claims are similar, if not identical, to those of any and all absent class members since Plaintiffs were subjected to Defendant's storage and disclosure policies as users of Defendant's search engine. These policies applied to anyone who conducted a search on Defendant's website, and the ensuing damage to all

class members flows from this uniform application. For this reason, Plaintiffs have satisfied the typicality requirement.

Finally, Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Proc. 23(a)(4). Constitutional due process is central to this determination. "[A]bsent class members must be afforded adequate representation before entry of judgment which binds them." *Hanlon*, 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). Two questions must therefore be resolved by the court: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* Based on the information presented, the court answers the first question in the negative, since Plaintiffs share the desire of all class members to be compensated for the violations alleged in the CCAC. As to the second question, the court is satisfied that Plaintiffs' counsel has and will continue to pursue this action vigorously on behalf of the class considering counsel's reputation and qualifications in the area of complex internet privacy litigation.

2. Rule 23(b)

Under subsection (b)(3) of Rule 23, the court must find "that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "The predominance inquiry focuses on the relationship between the common and individual issues and tests whether the proposed class [is]

sufficiently cohesive to warrant adjudication by representation." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (internal citations omitted).

As already discussed with regard to the Rule 23(a)(2) commonality requirement, the fact that the claims of all proposed class members arise from an allegation based on a uniform policy applied to all users of Defendant's search engine weighs in favor of a finding that common issues will predominate over individual issues. *See Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2008 U.S. Dist. LEXIS 70124, at *48, 2008 WL 4279550 (N.D. Cal. Sept. 11, 2008) (finding predominance when "[t]he challenged practice is a standardized one applied on a routine basis to all customers."). Accordingly, the court finds the predominance requirement satisfied.

For superiority, the court must consider "whether maintenance of this litigation as a class action is efficient and whether it is fair," such that litigating this case as a class action is superior to other methods of adjudicating the controversy. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010). As Plaintiffs note, the alternatives to class certification are either millions of separate, individual proceedings, which would certainly be time-consuming and inefficient, or an abandonment of claims by most class members since the amount of individual recovery could be relatively small – an outcome which is certainly not desirable. Moreover, it is fair to allow this case to proceed as a class action because Defendant's policy was directed at all of its users as whole, rather than at particular users of its search engine. For these reasons, the court finds that a class action is the

superior method of resolving the claims of all class members. This requirement is therefore satisfied.

Since a sufficient showing has been made as to all of the requirements contained in Federal Rule of Civil Procedure 23, the class will be conditionally certified for the purposes of settlement.

B. Preliminary Fairness Determination

The court now examines the fairness of the proposed settlement, beginning with the major terms of the parties' agreement. Here, the parties propose a settlement consisting purely of payments to cy pres recipients without direct payments to the class members. It contains the following components:

- Defendant will pay the total amount of $8.5 million, which will constitute the entirety of the settlement fund. All payments will be made from this fund, including: (1) distributions to cy pres recipients, (2) attorney fees and costs awards, (3) incentive awards to named plaintiffs, and (4) administration costs, including the costs due to the claims administrator.
- Cy pres recipients will receive proportional payments of the amount of the fund that remains after all other payments have been made. As a condition of receiving payment, all cy pres recipients must agree to devote the funds to protecting privacy on the internet.
- The parties have proposed the following entities as potential cy pres recipients: World Privacy Forum; Carnegie-Mellon; Chicago-Kent College of Law Center for Information, Society and Policy; Berkman Center for Internet and

Society at Harvard University; Stanford Center for Internet and Society; and AARP, Inc.[3]

- As to particular payments, incentive awards the representative plaintiffs have been capped at $5,000 each, subject to court approval. The parties have allotted up to $1 million as costs to the Claims Administrator for the notice plan.
- In addition, Defendant will maintain information on its website under the "FAQs" to advise search users of its conduct and policies so that users can make an informed choice about whether and how to use Defendant's search engine.

As previously noted, the details of this settlement are scrutinized to ensure they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(C). The burden to demonstrate fairness falls upon the proponents of the settlement. *Staton*, 327 F.3d at 959; *see also Officers for Justice v. Civil Svc. Comm'n. of the City and Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). The relevant factors for consideration include: the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed; the stage of the proceedings; and the experience and views of counsel. *Staton*, 327 F.3d at 959.

When, as here, settlement occurs before formal class certification, settlement approval requires a higher

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[3] This takes into account the decision of the MacArthur Foundation to withdraw from cy pres consideration after this motion was filed. *See* Supplemental Decl., Docket Item No. 53, at ¶ 2.

standard of fairness in order to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the class. *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

The court has carefully reviewed the settlement agreement and the circumstances leading up to it and finds several characteristics support a finding of fairness. First, the settlement was reached after an extensive amount of motion practice and document exchange; thus, this case was not at an early stage when a compromise was reached. Second, the parties engaged the services of an experienced private mediator to assist them in their efforts to resolve this action at arms-length, a fact which undermines any possible collusion between Plaintiffs' counsel and Defendant. Third, Plaintiffs' counsel – as experienced class action litigators – support the settlement. Fourth, it is apparent the parties thoughtfully considered the risk, expense and complexity of further litigation in reaching a compromise. Indeed, as Plaintiffs point out, Defendant's arguments and affirmative defenses in opposition to liability were viable and presented issues of first impression for the Ninth Circuit. Thus, it was entirely possible that Defendant could ultimately prevail at some point, if not on the next motion to dismiss which was pending at the time this motion was filed, which would have resulted in further time and expense to obtain final resolution for the class. Moreover, full compensation for the class would be unlikely even if Plaintiffs received a favorable verdict at trial.[4] Settlement at this point avoids an adverse

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[4] On that note, Plaintiffs point out that the full amount of statutory damages available through the CCAC is likely in the trillions of dollars considering the size of the class. This is an

result and saves both parties the burden of funding what could very well have been protracted litigation for many years.

At the same time, there are certain aspects of the settlement which could weigh against a finding of fairness. Most importantly, the court observes that Defendant's challenged practices will not change as a result of this settlement. Instead, Defendant will be obligated to make certain "agreed-upon disclosures," or changes to certain portions of its website, which better informs users how their search terms could be disclosed to third parties through a referrer header. This disclosure, as Plaintiffs indicate, will allow potential users of Defendant's search engine to know in advance how their search terms might be provided to third parties. This is not the best result when compared to the injunctive relief sought in the CCAC since such an order would have required Defendant to stop disclosing users' search terms for profit.[6] But class action settlements do not need to embody the best result for preliminary approval. At this point, the court's role is to determine whether the settlement terms fall within a reasonable range of possible settlements, with "proper deference to the private consensual decision of the parties" to reach an agreement rather than to continue litigating. *Hanlon*, 150 F.3d at 1027; *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

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amount in excess of what Defendant could ever pay considering it is much more than it's value as a company.

[6] "As a result of [Defendant's] above-described conduct in violation of applicable law, Plaintiffs and the Class are also entitled to an order requiring [Defendant] not to use or store preexisting Web History for purposes of profiting by transmitting their information to third parties." *See* CCAC, at ¶ 171.

Considering all of the circumstances which led to a compromise here, the relief obtained for the class does fall within a reasonable range of possible settlements since it was entirely possible that nothing would be obtained if the case were dismissed or if Defendant received a favorable verdict at trial – two entirely possible scenarios that would have allowed Defendant to continue its practice without any further comment. Under this settlement, that results is avoided by providing a means for future users of Defendant's website to know the disclosure practices before conducting a search.

The court must also be mindful of the Ninth Circuit's recent direction concerning pure cy pres settlements like this one. In *Lane v. Facebook, Inc.*, the Court clarified that the cy pres distribution must be the "next best" remedy to direct payments to the class either because proof of individual claims would be burdensome or distribution of damages too costly. 696 F.3d at 819 (citing *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)). The Court further advised that the district court "should not find the settlement fair, adequate, and reasonable unless the cy pres remedy 'accounts for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members.'" *Id.* at 821 (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)).

In this case, a settlement providing for cy pres payments rather than direct payments to class members is the "next best" remedy for both reasons identified in *Lane*. Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would impose a significant burden to distribute, review and then

verify. Similarly, the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class.

Furthermore, Plaintiffs have demonstrated how distributing settlement funds to the proposed cy pres recipients accounts for the nature of this suit, meets the objectives of the SCA claim,[6] and furthers the interests of class members. All of the cy pres recipients were chosen only after they met certain qualifying criteria[7] tailored to the claims in this case and submitted detailed proposals aimed at resolving issues in the area of Internet privacy. The executive summaries

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[6] "The SCA was enacted because the advent of the Internet presented a host of potential privacy breaches that the Fourth Amendment does not address." *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 900 (9th Cir. 2008), rev'd on other grounds by *City of Ontario v. Quon*, 560 U.S. 746 (2010). "Generally, the SCA prevents 'providers' of communication services from divulging private communications to certain entities and/or individuals." *Id.*

[7] According to Plaintiffs' counsel, cy pres recipients had to (1) be independent and free from conflict; (2) be qualified organizations with exemplary service records, and they must promote public awareness and education, and/or support research, development and initiatives related to protecting privacy on the Internet, with an emphasis on consumer-facing efforts; (3) reach and target internet users of all demographics across the country; (4) be willing to provide detailed proposals to the court and the class; and (5) be capable of using the funds to educate the class about risks attendant with disclosing personal information to internet service providers; or inform policy makers about the challenges associated with internet privacy and possible solutions; or develop tools allowing consumers to understand and control the flow of their personal information to third parties; or develop tools to prevent third parties from exploiting consumer data. *See* Supplemental Decl., Docket Item No. 61, at ¶ 21.

submitted after the hearing on this motion confirm that the proposed cy pres recipients certainly have the capabilities to carry out Plaintiffs' goals. The court therefore finds, for the purposes of preliminary approval,[8] that the proposed cy pres distribution "bears a substantial nexus to the interests of the class members," as required by *Lane*. *Id.*

On balance, the factors favoring approval of the settlement outweigh those that could support a finding to the contrary. Accordingly, for the reasons described, the court will approve the settlement terms as fair, reasonable and adequate.

C. Class Notices and Settlement Administration

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." However, individual notice is not always practical. When that is the case, publication or something similar is sufficient to provide notice to the individuals that will be bound by the judgment. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

As to the content of the notice, it must explain in easily understood language the nature of the action, definition of the class, class claims, issues and defenses, ability to appear through individual counsel, procedure to request exclusion, and the binding nature of a class judgment. Fed. R. Civ. P. 23(c)(2)(B).

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[8] It is important to emphasize that the court may reach another conclusion when determining whether to finally approve this settlement since, by that time, the detailed proposals of the cy pres recipients will have been released for comment.

This case is somewhat unique in that the size and nature of the class renders it nearly impossible to determine exactly who may qualify as a class member. In fact, due to popularity of Defendant's search engine and its rather ubiquitous position in American culture, this class potentially covers all internet users in the United States. That being the case, direct notice to class members by mail, e-mail or other electronic individualized means is impractical.

Faced with similar circumstances, other courts have approved indirect notice to potential class members in a manner similar to notice by publication. *See In re MetLife Demutualization Litig.*, 262 F.R.D. 205, 208 (E.D.N.Y. 2009) ("The best practicable notice under the circumstances is notice by publication in newspapers. In view of the millions of members of the class, notice to class members by individual postal mail, email, or radio or television advertisements, is neither necessary nor appropriate."). That is what the parties propose here. The plan includes four media channels: (1) internet-based notice using paid banner ads targeted at potential class members (in English and in Spanish on Spanish-language websites); (2) notice via "earned media" or, in other words, through articles in the press; (3) a website decided solely to the settlement (in English and Spanish versions); and (4) a toll-free telephone number where class members can obtain additional information and request a class notice. There will also be a dedicated post office box for class members to correspond with the settlement administrator. Plaintiffs approximate this advertising campaign will reach approximately 73.1% of likely class members. In light of the size of the class, the court finds that this plan meets the goals Rule 23(c)(2)(B).

Plaintiffs have also included copies of the class notice, request for exclusion and objection form, each of which have been amended to account for the concerns identified by the court at the hearing. The court has reviewed these documents and approves them as amended.[9]

IV. ORDER

In light of the preceding discussion, the Motion for Preliminary Approval of Class Settlement (Docket Item No. 52) is GRANTED as follows:

1. This action is certified as a class action for settlement purposes only pursuant to subsections (a) and (b)(3) of Federal Rule of Civil Procedure 23 and 29 U.S.C. § 216(b).

2. The settlement agreement and release is preliminarily approved as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e).

3. Named plaintiffs Paloma Gaos, Anthony Italiano and Gabriel Priyev are appointed as adequate class representatives for settlement purposes only.

4. Kassra Nassiri of Nassiri & Jung, LLP, Michael Aschenbrenner of Aschenbrenner Law, P.C. and Ilan Chorowsky of Progressive Law Group LLC are appointed as co-lead counsel for the settlement class pursuant to Federal Rule of Civil Procedure 23(g).

5. The Notice Plan and the content and form of Notice to the Settlement Class as set forth in Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and the Supplemental Declaration filed September 13, 2013, are approved.

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[9] Although it raised the issue at the hearing, the court declines to impose a page limit on written objections.

6. A hearing on the final approval of class action settlement shall be held before this court on **August 29, 2014 at 9:00 a.m.**, at the United States District Court, Northern District of California, San Jose Division, 280 South 1st Street, Courtroom 4, 5th Floor, San Jose, California 95113. Class Counsel may file brief(s) requesting final approval of the Settlement Agreement, Fee Award, and Incentive Award, no later than 35 calendar days before the final approval hearing. Objections must be filed no later than **August 8, 2014.** All other applicable dates shall be established by the Settlement Agreement and Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

IT IS SO ORDERED.

Dated: March 26, 2014

/s/ Edward J. Davila
EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809-EJD

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION

This Document Relates To: All Actions

CLASS ACTION

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* * *

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARDS

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* * *

II. ARGUMENT

A. The Proposed *Cy Pres* Distributions Meet Ninth Circuit Criteria For Final Approval.

* * *

3. There Is No Improper Relationship Amongst The Cy Pres Recipients, Class Counsel, And Defendant Google.

Objector Frank argues that because Class Counsel attended school at Harvard, Stanford, and Chicago-Kent, distributing *cy pres* money to any of these organizations is de facto improper. (Dkt. 70 at 9-10.) Objector Jan joins in this objection, and also claims the relationship is improper based upon Defendant's counsel Eric Evans having obtained his J.D. from Harvard.[4] (Dkt. 71 at 10.) However, neither Frank nor Jan claim that Class Counsel (or Mr. Evans) have any relationships with the *cy pres* organizations beyond having attended these respected institutions. (*Id.*)

Being an *alma mater* of a *cy pres* recipient, without more, does not create an appearance of impropriety. In *In re EasySaver Rewards Litigation*, objectors to a class action settlement alleged that there was an appearance of impropriety where class counsel proposed giving *cy pres* money to USD Law School, a school three of the attorneys involved in the settlement had attended. *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040, 1050-51 (S.D. Cal. 2013). The court held that where the law school was not entitled to any greater award than the others, where there were "no suggestions that counsel [had] any further relationship with the school than simply graduating from there, and where there was a "rational connection between the chosen recipients and the nature of the settlement," it was not improper to grant *cy pres* money to an *alma mater* school. *Id.* In fact, the court noted that "simply by virtue of it being a law school, USD Law School may be in the best position to develop

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[4] In addition to being irrelevant, this statement is incorrect. Mr. Evans obtained his A.B. (1993) and A.M. (1997) from Harvard, but received his J.D. at the University of Michigan in 2004. http://www.mayerbrown.com/people/eric-b-evans/ (last accessed August 22, 2014).

and research the legal issues associated with internet privacy and security underlying Plaintiffs' claims." *Id.* at 1051.

Here, the proposed proportional amounts to be distributed are: Carnegie Mellon (21%), World Privacy Forum (17%), Stanford Center for Internet and Society (16%), Chicago-Kent College of Law Center for Information, Society, and Policy (16%), AARP, Inc (15%), and Berkman Center for Internet and Society at Harvard University (15%).[5] As shown, two of the three non-*alma mater* proposed recipients would receive the largest proportions under the Settlement. Additionally, Class Counsel Kassra Nassiri and Michael Aschenbrener have no affiliation with Harvard's Berkman Center ("Berkman Center"), Stanford's Center for Internet and Society ("CIS"), or Chicago-Kent's Center for Information, Society and Policy ("CISP") other than obtaining degrees from the institutions housing these centers. (Declaration of Michael Aschenbrener ("Asch. Decl."), attached hereto as Exhibit A, at ¶ 5); (Declaration of Kassra Nassiri ("Nassiri Decl.), attached hereto as Exhibit B, at ¶ 4.)

Furthermore, as the court noted in *In re EasySaver Rewards*, law schools by their very natures are often best situated to research legal issues related to the matters here, including the legality and adequacy of online privacy disclosures. The Berkman Center, as part of its mission, researches, teaches, and encourages engagement revolving around risks to privacy and

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[5] http://www.googlesearchsettlement.com/hc/en-us/articles/202372170-Proposed-Cy-Pres-Recipients-and-Allocations (last accessed August 21, 2014).

reputation online.[6] CIS similarly "works in the public interest to empower and support user choice online."[7] Finally, CISP "promotes interdisciplinary research about privacy and information security issues raised by developing information technologies."[8] The aims of each of these proposed *cy pres* recipients fit squarely within Plaintiffs' underlying claims and meet the criteria for receiving funds from this Settlement.

Frank cites the Ninth Circuit's decision in *Naschin v. AOL* to support his criticism of *cy pres* donations to the *alma maters* of Class Counsel. *Nachsin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2012). However, the problems with the *cy pres* awards in *Naschin* are not present in the instant case. In *Naschin*, the Ninth Circuit held that the proposed donations did not satisfy any of the guiding standards outlined in *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d. 103 (9th Cir. 1990). 663 F.3d at 1040. Because the proposed donations in *Naschin* were focused primarily on Los Angeles recipients in a national class action and because the donations were made to local charities (e.g. the Boys and Girls Club of Los Angeles) that had no relationship to the underlying claims of breach of electronic communications privacy, unjust enrichment and breach of contract, the Ninth Circuit refused to uphold the rewards. *Id.*

In contrast here, the proposed *cy pres* recipients are geographically diverse, serving the interests of a

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[6] http://p2.zdassets.com/hc/theme_assets/512007/200043500/Berkman_Center_at_Harvard.pdf (last visited Aug. 14, 2014).

[7] http://p2.zdassets.com/hc/theme_assets/512007/200043500/Stanford_CIS.pdf, (last visited Aug. 14, 2014).

[8] http://p2.zdassets.com/hc/theme_assets/512007/200043500/Chicago-Kent.pdf (last visited Aug. 14, 2014).

nationwide class.[9] This geographical diversity favors, rather than detracts, from the attractiveness of these recipients. *Compare Naschin*, 663 F.3d at 1036 (*cy pres* distributions not appropriate where recipients geographically isolated and substantively unrelated to underlying claims). And, as detailed above, the mission statements of the *cy pres* recipients align squarely with Plaintiffs' claims in conformity with the guiding principles in *Six Mexican Workers*, 904 F.2d at 1037 ("The district court's choice among distribution options should be guided by the objectives of the underlying statute and the interests of the silent class members.").

Objector Frank also takes issue with the proposed *cy pres* donations to the Berkman Center, CIS, CISP, and AARP because Frank claims Google "is already a regular contributor." (Dkt. 70 at 11.) While Google has apparently donated to these institutions previously, Google has never provided funding for the specific proposals submitted by the *cy pres* recipients. Thus, Frank's conjecture that "Google is agreeing to do something that it was in all likelihood going to do anyway" is incorrect and misplaced.[10] (Dkt. 70 at 11.)

Objector Jan also offers a variety of other organizations that he believes are "better aligned with the interests of the Class members." (Dkt. 71 at 12.) Jan offers no specifics about the use of the funds by his preferred recipients, however, or any criticism of the

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[9] The proposed *cy pres* recipients in this case are located in California, Illinois, Pennsylvania, Massachusetts, and Washington, D.C.

[10] In fact, this district has approved proposed *cy pres* donations to the Berkman Center in previous class action litigation against Google. *In re Google Buzz Privacy Litig.*, 2011 WL 7460099 at *3 (N.D. Cal. June 2, 2011) (order approving $500,000 *cy pres* donation to Berkman Center).

proposed use by the actually selected proposed recipients. More fundamentally, where the proposed *cy pres* recipients already meet the standards under *Lane*, the question is not whether the Settlement could be better, but whether the Settlement is fair, adequate, and reasonable. *See Hanlon* 150 F. 3d at 1027.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809-EJD

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION

This Document Relates To: All Actions

CLASS ACTION

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* * *

DECLARATION OF MICHAEL J. ASCHENBRENER IN SUPPORT OF PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FEES AND FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Pursuant to 28 U.S.C. § 1746, I hereby declare and state as follows:

1. I am an attorney admitted to practice in the States of California, Illinois, and Minnesota, and represent Plaintiffs in the above-titled action. I am over the age of eighteen and am fully competent to make this declaration. This declaration is based upon my personal knowledge, except where expressly noted otherwise.

2. I am the Managing Principal of Aschenbrener Law, P.C., which has been appointed Class Counsel in this matter.

3. As Class Counsel, I am familiar with (i) the claims, evidence, and legal arguments involved in this settlement; (ii) the terms of the settlement; and (iii) the relevant defenses, evidence, and legal arguments made to date.

4. I obtained my law degree from Chicago-Kent College of Law in May 2007.

5. I have no affiliation with the Berkman Center at Harvard, the Center for Internet and Society at Stanford, or the Center for Information, Society and Policy at Chicago-Kent.

* * *

ASCHENBRENER LAW, P.C.

s/ Michael Aschenbrener
Michael Aschenbrener

Dated: August 22, 2014

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809-EJD

In re GOOGLE REFERRER HEADER PRIVACY LITIGATION

This Document Relates To: All Actions

CLASS ACTION

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* * *

DECLARATION OF KASSRA P. NASSIRI IN SUPPORT OF PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FEES AND FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Pursuant to 28 U.S.C. § 1746, I, Kassra P. Nassiri, hereby declare and state as follows:

1. I make this declaration of my own personal knowledge, except for those matters stated on information and belief. If called to testify, I could and would do so competently about the matters stated herein.

2. I am an attorney admitted to practice in the State of California. I am a principal in the firm Nassiri & Jung LLP and represent Plaintiffs as co-lead counsel in this matter.

3. I am a 2001 graduate of Harvard Law School, and have been a licensed attorney since that year.

4. I have no affiliation with the Berkman Center at Harvard, the Center for Internet and Society at Stanford, or the Center for Information, Society and Policy at Chicago-Kent.

5. I declare under penalty of perjury that the foregoing is true and correct.

NASSIRI & JUNG LLP

s/ Kassra P. Nassiri
Kassra P. Nassiri

Dated: August 22, 2014

[1] UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. CV-10-04809-EJD

IN RE GOOGLE REFERRER HEADER PRIVACY LITIGATION

SAN JOSE, CALIFORNIA

AUGUST 29, 2014

PAGES 1 – 68

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFFS:

Aschenbrener Law, P.C.
By: Michael Aschenbrener
* * *

Nassiri & Jung LLP
By: Kassra Nassiri
* * *

Progressive Law Group, LLC
By: Ilan Chorowsky
Alex Stepick
* * *

(Appearances continued on the next page.)

Official Court Reporter:

Irene L. Rodriguez, Csr, Crr
Certificate Number 8074

Proceedings recorded by mechanical stenography, transcript produced with computer.

[2] APPEARANCES: (CONT'D)

FOR THE DEFENDANTS:

O'Melveny & Myers
By: Randall W. Edwards
* * *

Mayer Brown
By: Edward Johnson
* * *

ALSO PRESENT:

CCAF
By: Theodore H. Frank
* * *

[3] SAN JOSE, CALIFORNIA

AUGUST 29, 2014

PROCEEDINGS

(COURT CONVENED.)

THE CLERK: Calling case number 10-4809, In Re Google Referrer Header Privacy Litigation.

On for motion for class action settlement and motion for attorney's fees.

Counsel, please come forward and state your appearances.

MR. JOHNSON: Good morning, Your Honor. Ward Johnson for Google.

THE COURT: Thank you. Good morning.

MR EDWARDS: Good morning, Your Honor. Randall Edwards also for Google.

THE COURT: Thank you. Good morning.

MR. ASCHENBRENER: Good morning, Your Honor. Michael Aschenbrener on behalf of plaintiffs and the class.

THE COURT: Thank you.

MR. CHOROWSKY: Ilan Chorowsky for the plaintiff and the class.

THE COURT: Good morning.

MR. NASSIRI: Good morning, Your Honor. Kassra Nassiri for plaintiffs.

THE COURT: Thank you. Good morning.

MR. STEPICK: Good morning, Your Honor. Alan [4] Stepick for the plaintiffs.

THE COURT: Thank you very much.

MR. FRANK: And Theodore H. Frank for the objector.

THE COURT: Thank you. Thank you for being here, all of you. I appreciate that. I have read your filings and thank you for those. Those have been very helpful.

This is on today for final approval, and I note that – are there any other objectors present? I see or hear no response.

And I do have plaintiffs' reply memorandum, and this is Doc 75 in support of the final approval. This is on for final approval.

Let me ask you counsel, are there any changes, additions, deletions, augmentations to your filings in regards to final approval?

MR. NASSIRI: No, Your Honor.

MR. ASCHENBRENER: No, Your Honor.

THE COURT: Nothing from the defense?

MR. EDWARDS: Correct, Your Honor.

THE COURT: Okay. Anything from the objector? Anything additional to your –

MR. FRANK: I think our papers describe our position.

THE COURT: Okay. Thank you. Well, I will hear from the parties here as well as any objectors that are present [5] that wish to place objections.

Why don't I, why don't I give the floor to the objector, Mr. Frank, if I could for a moment. Let's hear from him first, please. Thank you.

MR. FRANK: Thank you, Your Honor.

THE COURT: You're welcome.

MR. FRANK: Our papers describe the position. In our view, Lane, the Supreme Court's denial of certiorari, Justice Roberts's decision, respecting denial of certiorari pointed out that the court was concerned about cy pres issues and a variety of factors relating to cy pres issues.

And I think this settlement presents exactly the sort of problems that the court was concerned about. This is a $0 settlement to the class where all of the money goes to cy pres and most, and perhaps even all of the cy pres recipients, are recipients that Google has already given money to.

In fact, several of them prominently say we're supported by Google on their website. So this is not even a new benefit to the class. It's a change of accounting entries to justify the attorney's fees.

So there are two possibilities here, either it's feasible to distribute money to the class, and we contend that it is feasible to distribute money to the class.

THE COURT: How would that work with the sheer size of the class?

[6] MR. FRANK: Well, obviously you can't just mail a check for $0.06 to every class member, but if you have a claims process, the reality is 0.5 percent of members of the class file claims on average, maybe less.

The Fraley versus Facebook settlement, it's very similar to this one, gigantic class of over 100 million people, they just said, okay, we'll have a claims process and see who files claims and we'll give everybody $10. And so few people file claims that they ended up giving everybody $15.

We have $6 and a half million here that could be distributed, maybe even more if the attorney's fees –

THE COURT: What is the class size here?

MR. FRANK: The papers say over a hundred million. It's not clear from what I understand.

THE COURT: But let's say it's 90 million.

MR. FRANK: Well, even if it is 100 million, at a 1 percent claims rate, and we never see 1 percent claims rate in a settlement like this, it's still feasible to distribute $6 million to a million class members and what is more likely is a half a million class members.

THE COURT: What if there is an aberration that when we see 10 percent, 15 percent response?

MR. FRANK: Well, that would be close to unprecedented for a consumer settlement.

THE COURT: There's always a first, isn't there?

[7] MR. FRANK: There's always a first. And at that point the parties can come back and say, well, this is not feasible and it would be more expensive to distribute and then at that point cy pres may be appropriate, though the cy pres would need to be something that isn't already affiliated with Google if it's actually going to be a class benefit and that's Dennis versus Kellog, that's section 3.07 and that's what the Court implies in Marek versus Lane.

THE COURT: Would that be a situation where if Google was generous and donated to just about every charitable organization in the world, wouldn't it mean that all of those people would be conflicted out? It's much like a client going to talk with all of the high powered lawyers who specialize in a particular field and they conflict out those lawyers?

MR. FRANK: Well, I think Google's model is Don't Be Evil and so maybe they are giving to every charity in the world. They're not giving to me and so I am charity.

THE COURT: Are you a 501(c)3.

MR. FRANK: I'm a 501(c)3.

THE COURT: I see.

MR. FRANK: But we wouldn't take cy pres money any way. But in any event, there are two possibilities. So it either is feasible to give money to the class through some sort of claims process in which case cy

pres is appropriate or let's say that it is infeasible to give money to the class, at which [8] point, well, why is this a class action then.

The point – a class action, before it can be certified, has to be superior to other means of adjudication, and with other means of adjudication class members get nothing. With this means of adjudication, class members get nothing. That's not superior. That's the same.

The only beneficiary are the attorneys who get $2 million and Google, which gets a waiver, the class gets nothing.

They point to the injunctive relief, but, again, there's one of two things happening here, either Google is doing something illegal in which case this is being settled for far too little, or Google is doing something illegal, and in which case why are the attorneys collecting $2 million for a change in the business practices that is meaningless?

THE COURT: How would you value the damage issue in this case?

MR. FRANK: Well, I think that's certainly a problem in bringing the litigation, and that's why it's settling for so little.

But, you know, we don't contest that Google has the right to settle this for very little money but if – once you realize that the 6 million bulk of the settlement fund is just a change in accounting entries, Google was going to give money to the Harvard Berkman Center or to Stanford and it's now attributing it to the class action settlement rather than to their normal [9] outflow of charitable funds, the attorneys are collecting the entire benefit.

THE COURT: But what would, what would the – getting back to my question, what is the damage to the class?

MR. FRANK: Again, that's up for the plaintiffs to justify why they haven't violated rule 11 in bringing this lawsuit.

Again, we're not saying Google has to settle this for $100 million or Google has to settle this for $200 million.

Google can settled this for basically what is $2 million, but we protest that these attorneys are getting all of that $2 million and nobody else is getting anything.

THE COURT: Which gets back to my question is how much, I suppose, should – I'm asking you to be the jury, I suppose, in the trial.

MR. FRANK: I'm not saying that Google cannot settle this for very little money. If the parties in an arm's length negotiation say that this is how much the settlement is worth, we're not challenging that, we're not privacy experts. We're class action people.

And what we're saying is, is that the bulk of the settlement funds are going to the class counsel and there is this illusory $6 million that the change in accounting entries to justify the 2 million fee.

Maybe the proper relief to the class is a peppercorn and [10] Google is over paying, but if Google is overpaying, the class is entitled to the proportionate share of the overpaying.

THE COURT: It sounds like you take a little bit of an issue with the attorney's fees portion of the settlement? Is that an understatement?

MR. FRANK: Well, that's generally a problem with class action litigation as discussed in cases like Eubank – I apologize. I'm talking way too fast. Eubank versus Pella Corporation, 753 F. 3d 718 and a number of other cases that talk about the inherent conflict of interest in class action settlements.

The optimal settlements when class members are absent from the table is something that pays the attorneys a lot and the class members very little and you structure the settlement to create the illusion of relief to justify the attorney's fees, to justify the defendant getting out of the case.

And everybody is happy and except for, perhaps, the class members who are frozen out but don't have the incentive to come forward and object because they have too little at stake.

THE COURT: Uh-huh. It's interesting you being a student and academic of class actions, I'm sure you have done a historical view of class action litigation and it's changed, hasn't it?

Perhaps because of the electronic frontier that we now live on. Class actions in the past were suing, perhaps, an [11] automobile manufacturer because the door lock didn't operate correctly. And I'm sure there are still those lawsuits, but you could identify who bought a Ford Fairlane – and I'm not picking on Ford or anything, and I'm just using them as an example here – and that's a pretty identifiable class and there was cy pres, but it really wasn't, historically I'm talking about, and you can please correct me here and you can teach me this morning about this analysis, but there wasn't a – cy pres really wasn't that big of an issue because you could usually identify your class.

And, of course, there were some people who moved from Ford to General Motors and they didn't care anymore, perhaps. So there was some remainder. And it wasn't that, that big of a deal, to put it that way, inelegantly.

Now, however, when you have got people who are using Google and all of these other type of internet type of companies and things worldwide, classes, it's no longer limited to the people who bought a Ford Fairlane in 1968. It's now just hundreds of millions of people.

And the law has to – class action law, you know, you get those size of classes, and it's my goodness, how do you – which is back to my point again, how do you, how do you structure something that allows for consumer recovery under rule 23 in a class action lawsuit?

It's a challenge, isn't it?

[12] MR. FRANK: Well, either the case is meritorious and in which case you have a large class and you have large damages or the case isn't meritorious in which case why are the attorneys collecting so much of what the settlement benefit is?

THE COURT: Have you been engaged in a trial and seen a trial involving 100 million individuals in a class action?

MR. FRANK: Again, I never contested the idea that a class can be large. And, again, we're not contesting that Google and the plaintiffs can agree that this case isn't worth very much.

What we're contesting is the creation of the illusion of relief calling what is really a $2 million settlement an $8 and a half million settlement and having the attorneys collect all of that $2 million and having

Google change its accounting entries to rationalize the attorney's fees without the class getting any additional benefit.

THE COURT: Okay. Thank you. What else would you like me to know, sir?

MR. FRANK: If you have any questions for anything that is in our papers, I think we have acquitted ourselves well.

THE COURT: Thank you for being here. I appreciate you being here. Your input is always important, always important for the court to have as much information as possible [13] when it rules on a final approval of the class, any class action. They're all important.

So I appreciate you being here. I'm sincere in that. I appreciate your papers. I appreciate the time you took in filing your papers. They have been helpful, and I think they have been helpful to all of us here.

MR. FRANK: Thank you very much, and I'll see you in a month in another case.

THE COURT: Oh. Well, thank you for the heads up.

All right. Counsel, why don't I hear from plaintiffs as to your thoughts on whether or not the court should approve this.

MR. NASSIRI: Thank you, Your Honor. It is an interesting discussion about how class actions have changed and these mega class actions have changed the landscape, and, frankly, changed the mechanics of how these settlements work.

We worked very – the $6 and a half million that we're proposing for cy pres here is not illusory.

The proposals, I think, we took measures to make sure that the proposed recipients, which we did it like a grant proposal and we tried to implement best practices and transparency, and we have over 100 pages of detailed proposals from each of these recipients, or potential recipients and these projects are impressive and should result in substantial relief for consumers going forward on privacy issues.

[14] You know, if we were able to distribute money to the class here, it would be something under a dollar per class member, and I don't know what that is worth in today's world anyway.

THE COURT: Is it worth $2 million of attorney's fees?

MR. NASSIRI: Yes, Your Honor, it is. I mean, what we're asking for here is the common fund. We're asking for a Ninth Circuit benchmark. It's up to the court to use it's discretion and judgment.

You know, with respect to attorney's fees, there are no signs of collusion here. We didn't have a clear sailing agreement, and we leave it to the court's discretion to determine whether or not we brought value to the class.

THE COURT: So let me – I interrupted you, and I apologize for that. Let me go back. You were talking about the cy pres recipients and your process, and I do have some questions about that.

My first question was going to be whether or not you have considered direct payment to the class, and I think you just touched on that and you suggested maybe it would be a dollar or something like that.

MR. NASSIRI: Or less, Your Honor. There's no evidence before the court here that the claims rate would be low enough to make direct payments feasible.

And when thinking about this ex ante and how we were going [15] to reach a settlement with the defendant and design a claims or settlement process, this – we followed in the footsteps of some cases before us, Netflix and Beacon and Buzz and others, and given the tremendous size of the class here, it's just not feasible under any reasonable circumstances to make a direct payment.

THE COURT: Okay. Well, I appreciate your investigation into that topic. I think that's, perhaps, one of the first reviews that a court should make same as fiduciary for the class as to what is the benefit, the real benefit for the class and can they have some direct benefit.

And you have talked about the sheer numbers here, and what you're telling me is that you have done thorough investigation on that issue and in your opinion you feel like it would be just de minimus.

MR. NASSIRI: Yes, Your Honor.

THE COURT: Okay. Well, let's move to the next of the cy pres that you were talking about as well. You talked about –

MR. NASSIRI: Your Honor, is it cy pres or is it cypress? Because I have been told it's cy pres.

THE COURT: Well, in this courtroom here I'm saying cy pres.

MR. NASSIRI: That is what it is here today.

THE COURT: That's how my civil procedure professor [16] drilled it into my head and god forbid he should walk in and hear me say something else.

So let's talk about that. You did tell me, you did tell me – let's see, that was in August, wasn't it?

MR. NASSIRI: Almost a year ago.

THE COURT: Yeah, yeah. We all aged well.

MR. NASSIRI: Thank you.

THE COURT: And you told me back then that you were raising the bar in regards to cy pres recipients and you said I'm raising the bar, I think, raising the bar for all cy pres settlements like this to follow.

I remember those words, and I asked staff to get the transcript to see if I had it incorrectly or not. And you said, as you just did, we're treating this cy pres allocation like a grant proposal or a grant making organization, prospective grant.

And I have looked at some of the proposals and they do, they do speak as to an application for a grant.

And I guess my threshold question is what was the process for – what was your process used to publicize the grant proposals?

What did you do to raise that bar to publicize to get people to respond to this grant proposal?

MR. NASSIRI: Well, to clarify, Your Honor, the very first step in the process was not like a grant proposal. We [17] didn't publish a general request for proposal like you might in a grant proposal because we couldn't here, Your Honor.

It was a matter – the potential cy pres recipients were subject to agreement between the parties.

And I believe we briefed up and our preliminary approval papers generally describe the process by which we decided on the final proposed recipients, which, you know, at this point we're calling proposed recipients.

We had to go through a process with the defendants of narrowing down potential cy pres recipients. So that aspect of the process was not like a grant making proposal.

THE COURT: Is that transparent anywhere in the papers, that process, that negotiation with the defendant here identifying those?

MR. NASSIRI: Yes, Your Honor, provided that some details were withheld because this was in the context of a confidential mediation, and I believe Your Honor said that you didn't want to know too much about the actual like who was considered and who was rejected and that kind of thing.

But we did generally describe the number of recipients proposed or potential recipients that were considered in route to narrowing it down to the six and now five proposed recipients.

THE COURT: And these are the same ones that you mentioned in August?

[18] MR. NASSIRI: That's right, Your Honor.

THE COURT: So it begs the question, what has changed in the year? We stayed the same with our youthful appearance, but what has changed as far as the identification, these people that you've – you told me about them in August and you went through this process that is going to raise the bar for this case and all cases in the future.

MR. NASSIRI: Oh, I see, Your Honor.

THE COURT: And it's the same individuals. What has changed?

MR. NASSIRI: The process was the process of getting these proposals together, making sure that the proposals meet the criteria set by the Ninth Circuit in Lane and just generally constitutional requirements for a cy pres recipient for spending the cy pres funds.

So what we focussed on was getting these proposals in final form. So we worked carefully. Again, we did not dictate what these projects were going to be there. They are the privacy experts. We're not. They're academics research institutions and technology developers. But what we did was we guided them to make sure they met certain criteria that we believe are important for a cy pres recipient.

THE COURT: And so how were they selected? I mean, the elephant in the room, of course, is that many of these are law schools that you attended.

[19] MR. NASSIRI: Your Honor, we – there is a – there is kind of a short list of entities, organizations that do this kind of work. Law schools are prominent in that list as are organizations that are not affiliated with law schools.

And we did – we conducted independent research. It was based on our experience and our knowledge of the space and ultimately out of a list – and forgive me, Your Honor, I didn't know this was going to come up again – but I think we had 40 proposed recipients on the table and we ultimately narrowed it down to 6, and it was a matter of what we could agree to, what 6 we could agree to.

THE COURT: You and Google?

MR. NASSIRI: That's correct.

THE COURT: You talk about the issue of – I don't want to use the word "collusion" but perhaps conflict of interest with the law schools being law schools that you all graduated from. And you point me to, I think it was, what was it an EZ Pay case in San Diego?

MR. ASCHENBRENER: Easysaver, Your Honor.

THE COURT: Yes, Easysaver, thank you. And where the good judge there suggested the recipients, and there wasn't anything untoward about that, but particularly where the recipients didn't receive any less than the greater share.

And I look at your pleading, document number 75, page 5, your page 5, page 9 on the ECF calendar, and you break down the [20] percentages, don't you, about the recipients?

And you have Carnegie Mellon at 21 percent; and the World Privacy Forum at 17 percent; and then the alumni recipients, if you will, Stanford, Center for Internet and Society, 16 percent; Chicago Kent, College of Law Center for Information Society and Policy, 16 percent; AARP, 15; and the Berkman Center, 15 percent.

So you're about four points, five points below.

It looks like it was intentionally created –

MR. NASSIRI: I can explain how.

THE COURT: – to stay under and stay within the EZ case in San Diego.

I just tell you that it gives that blush like, you know, I tell you, I remember a phrase, and forgive me and maybe I shouldn't use the phrase, but you remember the old basketball scandals about point shaving.

MR. NASSIRI: Yes.

THE COURT: It looks like, was this – it had to be calculated to keep those percentages under the mark like the good judge in San Diego did.

MR. NASSIRI: It was not, Your Honor.

THE COURT: Okay.

MR. NASSIRI: I'll tell you exactly how we arrived, and we thought about different ways to – different methods for proposing the allocation.

[21] In the end what we did was we asked these recipients to give us a budget and we – these numbers are exactly pro rata against the budgets that they requested without any input from us.

So Carnegie Mellon is getting the most because they asked for the most, and Harvard is getting the least because they asked for the least. It was that simple. It was very objective.

All of these proposals we're impressed with, and we believe that that was the most efficient, equitable way to allocate the money.

THE COURT: So you told these people that you had a certain pool of money available?

MR. NASSIRI: Correct.

THE COURT: And Carnegie Mellon said we would like $1,249,656.34?

MR. NASSIRI: To the penny.

THE COURT: The $0.34 is important to us. Chicago Kent college said we need 949,875 and no cents; and, Berkman said we need $935,000; and, Stanford said we would like $971,400; and, the World Privacy Forum said we would like $1,020,000.

MR. NASSIRI: Correct.

THE COURT: In those figures?

MR. NASSIRI: Exactly those figures. We added them [22] up, and these are the proposed allocations based on the requested amounts, which also the other reason we did it this way is because more or less money may be available and it will scale up easily as percentage points.

But this is directly derived from what they requested in their budgets.

THE COURT: And, again, getting back to my transparency question, was the information, the invitation to the grant, was that something that you worked out with Google as well?

MR. NASSIRI: We did not, Your Honor. And I believe I attached either to our supplemental declaration in support of the preliminary approval or the preliminary approval motion e-mails that we sent to these potential recipients laying out what the requirements were for being considered.

THE COURT: You know, I think I talked you and I used the word perhaps too colloquial, but I think I used the phrase "usual suspects."

MR. NASSIRI: Yes, Your Honor.

THE COURT: And I don't mean and I did not mean at that point and at that time, and I don't today mean to disparage at all the good work that any of these identified cy pres recipients do.

I think, and I hope you appreciate the spirit of my comment was, because these issues were so important, as you [23] have told me, should we cast a wider net to capture, perhaps, additional research from other individuals?

And that's what – when you talked to me about setting the bar higher for this case and others to follow, I'll be very candid with you, I'll be very candid, that's what I thought you were going to do.

I'll tell you candidly again that I'm disappointed that the usual suspects are still usual.

You point out, I think, on page 7 of document 75, your page 7, in footnote 10 you tell me that, in fact, Berkman Center has been received before so you should approve it again. I suppose that's why you put that footnote there.

You remind me that in Google Buzz Privacy Litigation, a $500,000 cy pres donation or cy pres allocation was made there, which I think, if you'll pardon me, supports my view of usual suspects.

And I think I tried in some cumbersome way at that time to say, you know, they're doing good work and I know this is a moving target again, and it's a fluid issue, but if their job is to get notice out and to inform people about how best to protect, either their literature is not being read or it's being ignored in some fashion.

And, again, I'm not being critical of their good works. Perhaps it's just the state of the affairs in this regard and there is a certain apathy that exists in the public regarding [24] these issues, I don't know, which then gets to the value of the settlement, doesn't it?

MR. NASSIRI: You know what is interesting, Your Honor, is that in Lane in the dissent – you know, there's no clear guidance from the courts on this issue, but I would say that the consensus seems to be that the institutions receiving the money should have a

track record. And, you know, the dissent in Lane highlighted this very clearly.

We do have a relative newcomer in Chicago Kent, and AARP is not necessarily a usual suspect in this kind of a case, but the other proposed recipients, they do fantastic work.

THE COURT: Oh, I am not – and I agree. I agree. I absolutely agree.

And it's not for me to tell you I want you to identify this person or that person. I'm not going to do that.

But I guess I think between the Pacific ocean and the Atlantic, you know, these individuals are identified, and as you point out, Berkman has received a lot. I just scratch my head and think, aren't there other – aren't there other institutions in the Bay Area? Isn't there a law school on the other side on the east bay somewhere? Isn't there a law school about ten miles from here? Isn't there a law school about 394 miles in southern California? And there's a lot of them down there. There's one on the coast.

So I scratch my head a little bit, you know? There's [25] around the Great Lakes, I think there's a couple of law schools there that are accredited.

Your colleague is eager to speak.

MR. NASSIRI: He is eager to speak, and I'm just hogging the podium.

MR. ASCHENBRENER: Your Honor, there are a couple of points to be made there. One, Mr. Nassiri is right that the guidance from case law suggests that it is good that recipients have a track record. And it's a bit of a double edge sword.

THE COURT: It is.

MR. ASCHENBRENER: To put forward potential recipients without track records then we would potentially be attacked on that basis.

And in terms of geography, it's a good point Your Honor makes because some of the guidance I believe in Easysaver suggests that it's a problem where the recipients are not geographically diverse and here AARP and the World Privacy Forum are national in scope. We have the Center for Internet and Society at Stanford on the west coast. We have the Center for Internet – or Information Society and Policy in Chicago. We have Carnegie Mellon in Pennsylvania. We have Berkman Center in Massachusetts.

THE COURT: You didn't say Pittsburgh. Do you have something against Pittsburgh.

MR. ASCHENBRENER: I have nothing against [26] Pittsburgh. I do not have experience in Pittsburgh one way or the other.

So we have geographic diversity there and I believe we also have demographic diversity, which is important, especially with the inclusion of AARP. And that leads really to what Mr. Nassiri was speaking to a year ago before the court in terms of what we feel is raising the bar and understanding that there is some misunderstanding there as to what we meant.

But what is different here, what has happened in the last year, to answer that question, Your Honor, is that the proposals were made. And instead what we have seen in prior class action settlements of this nature are, well, here are recipients that generally do this kind of work and they will use it for this purpose, but here the public – there's complete transparency. The class, the court, and the public gets to see exactly

how the dollars will be spent and what the deliverables will be.

THE COURT: I appreciate the transparency. And in that regard you have that before us.

I guess the lack of transparency is the selection process.

MR. ASCHENBRENER: And that was a negotiated point in the settlement process.

THE COURT: I appreciate that. And that raises, you know, candidly, it raises a red flag, and I won't say a banner, but I will say a flag, to me in that it speaks, perhaps, to [27] something that Mr. Frank talked about. It just – when I looked at that, and I'm being very candid with you, and I'm not being critical, you understand that, I'm being candid with you, when I look at the lack of transparency, I understand this was a mediated process and that's protected and that's sacrosanct and we can't get into that, but you add that fact that that's not public information. And then I look at it and I say, okay, and the public sees that all of the affiliates – not all, pardon me – but a number of the affiliates are alum, nothing wrong with that as Easysaver tells us and other cases tell us when the amounts are not greater than anyone else. And I looked at the percentages here and they just, you know, I'm trying to squeeze a size 9 and a half into a size 9 shoe and it fits comfortably, and I can do that.

It just looks, honestly, it just gives me – it doesn't pass the smell test I guess is the easiest way for me to say that.

MR. ASCHENBRENER: Your Honor, the court and the Ninth Circuit in Lane addressed much of that very concern that the court has today.

And what the Ninth Circuit said in regard to that and the specific context in Lane versus Facebook to this point was that where the recipients of funds in that case, where actually the board would be held, positions on the board would be held by members of Facebook.

[28] THE COURT: Sure.

MR. ASCHENBRENER: And, of course, that settlement was affirmed by the Ninth Circuit and rehearing en banc was denied and cert petition was denied.

But what the court said was that it's okay if when a settlement is the product of negotiation, as it always is, of course it's going to serve the party's prospective interest to some degree or another.

And so even though members of Facebook would be on the board of that, that's acceptable, that is fair, adequate, and reasonable because the settlement necessarily is going to serve the interest of the parties.

And so here we have – we're at least one step, and I believe multiple steps removed from that factual scenario. There are no members of Google on any boards and counsel is not on any boards in any of this proposed recipients.

The alma mater institutions – what is important here on multiple levels is that there are no affiliations with the actual centers receiving money.

And Mr. Frank has objected within the institution's housing centers, the Berkman Center, for example, or the center for information society and policy at Chicago Kent.

As I stated in my declaration, I have no affiliation with that.

Mr. Frank has attempted to couch this that this is just an [29] accounting change for Google. One, I take issue with that. I think that's incorrect. Even if true, and it's not, but even if true, under the guidance in Lane, that's probably not a problem.

But fortunately we do not have that issue here today. These are specific proposals. The money will be used for specific purposes, which means that it's not just an accounting change.

THE COURT: I appreciate that.

MR. NASSIRI: Your Honor, may I say one thing?

THE COURT: I guess I'm returning to, you know, my expectations raised as was the bar promised to be raised and that's where I have some disappointment, I guess, where I look at it as the song with the phrase going "the same as it ever was."

MR. NASSIRI: Well, I believe the transparency that you have already acknowledged, and I'm happy to note that you have acknowledged it, I believe that raises the bar in a substantial way.

But I want to just say one more thing at the risk of saying too much, Your Honor. To some degree I have to draw on my experience in order to propose cy pres recipients.

And I saw what the Berkman Center did firsthand, and I knew some of the people who founded it, and Charlie Nesson was my torts professor and John Zittrain taught my first internet [30] and society classes at 2L.

So I can't – I mean, I think of them as leaders, smart people who do good work and care and who have interests that are aligned with what is underpinning this lawsuit.

And the fact that I went there shouldn't disqualify them from my mind as someone who could do great good with the money here.

So it's not really surprising that I might think of my alma mater and the work they do there at the Berkman Center. And just to clarify on the record, I don't have any affiliation and I have never had any affiliation with Berkman Center or with Harvard since leaving. I simply got my law degree there, and that's simply the end of it.

MR. ASCHENBRENER: And, Your Honor, to bring it back to your central concern, the appearance of this and whether the bar was raised, we certainly think it was, but regardless, the standard, of course, for final approval is whether the settlement is fair, adequate, and reasonable. It's not whether the parties or the plaintiffs raise the bar.

So whether we did or did not is not the standard for approval. The Ninth Circuit has made clear that the standard –

THE COURT: You're telling me everything I have talked about this morning doesn't matter?

MR. ASCHENBRENER: No, Your Honor, I don't think [31] that's true.

THE COURT: That's what I hear you saying. Judge, I appreciate your concerns, you have raised them, and it's good, and it's a nice conversation for a Friday before a three-day weekend, but it doesn't matter, judge, because the court says if it's fair, adequate, and reasonable, approve it and all of these other things are just incidental.

MR. ASCHENBRENER: No, Your Honor, that's not what I'm trying to suggest. And I apologize if that is –

THE COURT: No, no, no. I say that and I have said that only because I want you to know that this is very important to me.

MR. ASCHENBRENER: Uh-huh.

THE COURT: And I'm struggling with this because all of the things I mentioned earlier, I think they're a problem.

And I appreciate your helping me out through this problem, I do. I do have some problems with this and all of these little, these little issues to me create a larger issue that cause me some concern, notwithstanding is this settlement fair, adequate, and reasonable? It may be, it may very well be, but the mechanisms, I think, are problematic, and I am having some problem with that.

And, again, it's not because, just because – I appreciate, Mr. Nassiri, you have no further affiliation. I'm sure Harvard is very disappointed they're not receiving alumni [32] checks from you, and that's between you and them.

But these type of cy pres recipients, they shouldn't serve as a substitute, should they, for alumni checks? And they shouldn't serve as a substitute for, oh, this is one of our grads and look what they're doing in their litigation, they're directing cy pres to us. You should be free from that.

MR. NASSIRI: Absolutely, Your Honor.

THE COURT: You should not – I don't want to put either of you in a situation where you're subject to personal criticism for directing funds to your alma maters in some untoward way.

So in one respect I also want to protect you prophylactically in some type of way and measure to

make sure that you are free from that type of criticism. And I don't want to eliminate your philanthropic ideals when you discuss cy pres. That's very important.

Again, getting back to the other question, I'd like to, it just seems to me that a wider, a broader, a larger net can be cast to capture people who are doing additional work.

You know, if you say, well, gee, these people are doing all of the work and we need to have a track record of people, well, you know what the social implications of that are?

MR. NASSIRI: Yes.

THE COURT: That's why we haven't had women be lawyers for the long time because, you know, we just don't [33] allow them to come in because we never looked at them before and so why should we let women practice law now. You understand that. It's not in this case.

But, again, I'm talking about in a social – in a greater measure. There has to be a first.

MR. NASSIRI: I agree, Your Honor. This is a very interesting issue, and there's very little guidance.

THE COURT: Perhaps, we'll create it. Here's a wonderful opportunity for us to give guidance, and I appreciate the invitation.

MR. NASSIRI: It always is, Your Honor, but we did the best we could.

THE COURT: No, no. And I'm not – again, this is not criticism, gentlemen.

MR. NASSIRI: I understand.

THE COURT: It's an effort, it's an effort and an invitation to do better, I suppose.

MR. NASSIRI: Yes, Your Honor. You know, I think at the heart of this in terms of cy pres's proposed recipients, this is a settlement and there had to be some agreement so we had to negotiate this.

And so that does – that's a very real constraint.

THE COURT: Sure.

MR. NASSIRI: And I don't know how we get around that even with direction from the court.

[34] THE COURT: I hope our conversation is going to assist you. You have brilliant lawyers sitting at the table over there, and I know that they're listening to this, and they're not having to stand and listen to it. They have the pleasure of being seated behind your backs and listening to it.

They're not grinning, and they're not smiling. They're taking notes and absorbing this, I think.

Well, let me move to another issue, if I may, and we may come back to the cy pres, but I think it's appropriate to move to the notice issue. And I know you were present in court when I was discussing notice with the other case earlier this morning. And I talked about the imprimatur of a government seal or something like that. I think that appears in this? Does it? Do you have something like that here?

MR. NASSIRI: I believe it's the seal behind you, Your Honor.

THE COURT: Right, right. Not quite as elegant and majestic, though, on your notice. It's one dimensional, of course. And I looked at that and I thought, this is what raised the question, and, perhaps, I'm searching

for nits to pick, but I thought does this appear like something that, you know, like the e-mail from Uncle George in London who lost his wallet that would get ignored?

It just, to me, it looked like one of those, candidly, and then that caused me to think about the, as you point out in [35] your pleadings, the objections were – how many were there? There were four? What were there?

MR. NASSIRI: There were 4 with 13 opt-outs.

THE COURT: Right. And in regards to the class, and you pointed out, judge, this must mean approval because we had so little, little negative response, if you will, adverse response to the settlement, and I appreciate that that's an observation that could be made.

The other side of that coin is that maybe the notice was bad and people didn't get it, and so they didn't know to respond? Maybe it was the uncle in London with the lost wallet and they, you know, clicked the delete button because it was something that was not real to them.

MR. NASSIRI: One of the benefits, Your Honor, of technology and –

THE COURT: Is it brings us these wonderful class action lawsuits?

MR. NASSIRI: Well, no, no, Your Honor. It's that a notice program like the one we implemented is measurable. And this was a very successful notice program. It would – none of this could have been treated as spam, and we can measure the response from the class member.

I believe we had over 200 million impressions and we – Richard Simmons is here, who was leading up

the effort on behalf of the settlement administrator is here, and he is [36] available to answer detailed questions if Your Honor would like. But based on the measurements that he took, we reached over 70 percent of the class with this notice.

Now, I don't think the measurements could tell us exactly what they thought of the notice, but I think we had a highly effective successful notice campaign.

THE COURT: You pointed out the Netflix case as the similar size and similar case, and I note in that case there were, perhaps proportionately more, hundreds of responses. I mean, they got more responses in that case.

And did you look at their notice and copy of their notice? And I'm just curious –

MR. NASSIRI: We looked at that case carefully, Your Honor, especially since it came out of your courtroom, and I believe we did take some lessons from it, but this is a different case with a different class and why we hired Mr. Simmons is because he has expertise and helped us design the best notice practicable here.

THE COURT: I was curious about that and I compared that, and, of course, it was a different case and different facts and different products and things, and maybe the class there is more identifiable. Maybe they're more inclined to receive these types of notices from netflix being a consumer specific.

But there were more responses. And when I look at the – [37] just the parse number of responses, my first reaction was that it must not have been an appropriate notice. Could that many people just completely ignore this? Would they?

What are the conclusions we draw from it?

MR. ASCHENBRENER: Well, we, as Mr. Nassiri pointed out, are somewhat left to speculate as to what consumers thought of the substance.

THE COURT: Sure.

MR. ASCHENBRENER: But what we did in working with analytics, the class administrator, was relied on their expertise primarily but worked with them to devise a notice plan that we really thought would be effective.

And, again, I believe that's the issue of whether the number of opt-outs and objectors is a double edge sword because the Ninth Circuit guidance says if that's a low number, that's good. Of course, I understand the court's concern that a low number may indicate a lack of understanding of the settlement and toward that notice was ineffective.

But what we have here is we used the most measurable means possible for notice currently and tools to effectuate notice to the greatest number of persons and then we were able to measure.

So we used the best tools available to us to effectuate notice, and the notice comports with the guidelines promulgated by the Federal Judicial Center. And so we worked with – there [38] is clear guidance on this issue than, perhaps, in, say, cy pres, and we worked within those guidelines and to meet and exceed that were possible and unlike, say, print campaigns or other forms of notice, we were able to bring to the court for the hearing today, and in our papers leading up to this, the measurements as opposed to having to make even more guesses as would be necessary in other sorts of cases.

THE COURT: Okay. Thank you.

Well, let's turn to attorney's fees. And I have your lodestar amount and I read, as you did, Mr. Frank's objections. And we know, of course, now the Ninth Circuit's opinion of at least one of the causes of action in this particular lawsuit.

What would happen? Let me just ask the hypothetical, what would happen if the case were to go to trial right now?

MR. NASSIRI: Nobody knows better than you, Your Honor. We did go through this in our Facebook class action before the Ninth Circuit.

These are untested claims. The primary claim here is for statutory damages under a statute that is hopefully outdated. We believe there was a violation here, and we're ready and are ready and willing to take the case as far as we can.

But there were – there are tremendous risks involved here at every step of the way going forward from class certification to summary judgment on, you know, whether or not we stated a claim, and then if we did state a claim under the SCA, they're [39] waiting in the wings as a Due Process argument that these penalties are too big.

So I don't know what would happen, Your Honor.

And we believe that the settlement here is a good – it's a good compromise. It provides for certain relief and, you know, we stand behind the settlement.

THE COURT: Well, in regards to risk, a risk analysis in the attorney's fees discussion, what does that mean? What is that? What is the risk?

MR. ASCHENBRENER: The risk is of not getting paid at all and of the case being disposed of in the defendants' favor and that the plaintiffs' lawyers would receive nothing.

THE COURT: That's something that – isn't that in every case there's a risk? That's universal in the practice of law, you might lose.

MR. ASCHENBRENER: Well, it's unique in the sense that in these cases the fees are usually paid on a contingent basis.

THE COURT: Right.

MR. ASCHENBRENER: And so I don't know the fee structure between defendants' counsel and the defendant, but oftentimes it's not contingent in nature. So win, lose or draw, counsel on one side gets paid while counsel on the other side does not.

THE COURT: So the risk analysis for the court to [40] look at is, judge, we've taken on this case and its contingency and if we lose this, we could stand to lose thousands of hours, hundreds of hours of labor.

MR. ASCHENBRENER: That's correct, Your Honor.

THE COURT: And, therefore, that should be a consideration in giving us attorney's fees.

MR. ASCHENBRENER: Well, it's a consideration in this case specifically – yes, Your Honor. And in this case specifically it goes to the lodestar crosscheck.

Our reading of the case law suggested in this case that the primary mechanism for determining attorney's fees is based on the percentage of the fund, but the court is directed, we believe by the Ninth Circuit, to also employ a lodestar crosscheck and within that

lodestar crosscheck the court is allowed to take into account the risk factor.

THE COURT: And I know I've read in your pleadings, you're a respected firm. Your expertise is in these classes. So am I – I just have to assume that you're skilled, as you told me you were, relying on your expertise, Mr. Nassiri, you're skilled at picking winners. You reject a lot of cases, I'm certain, that come in the door because they're either nonmeritorious or they're cases that are not going to be winners, I mean, they're not going to win. You pick winners. That's the nature of the practice, isn't it?

MR. NASSIRI: That is certainly a consideration. We [41] do have to pay the bills and keep the lights on.

THE COURT: Sure.

MR. NASSIRI: But these cases were bigger risks than, say, your standard wage and hour case where it's not a novel legal theory. It's not a class that can fill football stadiums.

Here this was an extra risky case to take on but what we believe a very meritorious case and one that had enough probability of success that it met that calculus.

THE COURT: So the relief here is not a change in the practice; is that right?

MR. NASSIRI: No, Your Honor. Of course, there is prospective relief here that is a change in practice.

We have – Google is now obliged permanently going forward to disclose how it handles search queries and in particular whether it discloses them to third parties in URL's.

THE COURT: That's the change.

MR. NASSIRI: That's the change. And just one thing, Your Honor, is that to the extent that there have been objectors saying that Google could continue to go on doing its legal practice, we haven't stopped them.

Again, particularly under the SCA, if Google has user consent to disclose search queries, then there's nothing in the law preventing Google from doing so. And so the prospective relief here goes directly towards the consent portion of the [42] SCA.

So we have addressed the issue and Google – this is permanent prospective relief, Your Honor.

THE COURT: I asked Mr. Frank the question of the evaluating of the damages. Can you answer that question?

MR. NASSIRI: Best day in court, trillions and trillions of dollars, Your Honor. It's absurd. I believe Judge Seeborg said in cases like this, are they too big to settle or to resolve or to bring? They're monstrous. There are some issues here, and this is one of those mega cases.

THE COURT: Okay. So why should the court grant a multiplier in this case? Why would that be appropriate in this case if it is at all?

MR. NASSIRI: Because of the tremendous risk that we took, because the majority of cases, these privacy cases are disposed of on 12(b) motions, Your Honor. There aren't that many cases that settle, and we believe it was our good work that got us to a settlement that is reasonable compared to a handful of privacy class actions that have settled before us.

And, you know, we also believe that the cy pres component of this we have done better than the cases before us.

So we're providing real relief to the case, the permanent prospective relief requiring disclosures from Google and a sizeable cy pres fund that is going to be used for projects specifically related to the subject matter of the complaint.

[43] THE COURT: Some of the proposals I look at, I think it was maybe our – it might have been Carnegie, the language was very general as to what they were going to do.

It almost looked like they had a standard, and I don't mean to be critical of them, but it looked like the responses were pieces that describe the work that the institutes do in general.

And then there was, you know, insert here and then there was the description of, you know, we're going to do studies, we're going to meet with leaders in the field, we're going to then have an investigation done, we're going to publish records and meet with the leaders to inform the public better, et cetera, et cetera.

And maybe that's – maybe they can't be more specific than that. I think one of the others, and I can't remember which, and I apologize, spoke to going to Washington, D.C. and meeting with leaders and then having subsequent meetings and publicity and that was probably greater specificity as to what at least their goals were as far as the project line but – and maybe it was too much to ask the recipients to give us a timeline of what exactly they're going to do with these particular issues.

Do you want to comment on that?

MR. NASSIRI: Yes, Your Honor. I noticed the same thing. Some proposals are more specific than others.

Carnegie Mellon, Your Honor, was one of the very specific [44] ones and in part because the deliverable that they're able to provide includes technology.

So, of course, when you've got technology and you're trying to develop a specific tool, it's probably easier to bring some specificity to the proposal.

AARP on the other hand is primarily an organization that educates older Americans and they work with law enforcement and other regulatory bodies to try and make sure that people's interests are protected.

So I agree that that proposal was a little more general and it talked about training trainers, developing toolkits and that sort.

But it also does have specific deliverables. It's going to add sections to its call center to address online privacy protection issues.

It did say it was going to offer a consumer tool to help consumers evaluate their current privacy practices and make their current recommendations. They didn't go further than that so I don't know what that means.

But the other thing that we thought was important here was to require each of these entities to publish reports on the results.

So AARP, for example, at the end of this, will let us know whether they reached their standing goal of serving at least 1 million people with – through it's call center or the number [45] of people that it was actually able to train with its toolkit. So each one of these proposals includes kind of a report card phase at the end and so we can see what happens.

THE COURT: Is that something that future courts can look at when they consider whether or not the recipient is appropriate?

MR. NASSIRI: Absolutely. It goes a little bit outside of the scope of this case, but it starts to create much like what is happening in the grant world generally or in the charity world generally I should say.

It starts to build on their reputation so that next time someone proposes AARP to receive money in the context or outside of the context of the lawsuit, this is something that everyone will be able to look at.

So, yes, all of these reports will be published.

THE COURT: Has Berkman done that? We know that they received at least half a million dollars in a previous case. Do we have a report from them?

MR. NASSIRI: Your Honor, I don't know if they have done it previously, but we did require them to include it in their proposal here, that they will do it here.

So everything that they do in terms of the research and the policies that they propose, the conferences will all be available on the website.

And they're also publishing what they're calling one [46] midterm and one final report, because they're a school, where they will report on how the money has been spent and what has happened.

THE COURT: Maybe there should be – maybe we should create – you know, when you said there's not much law in this area, maybe we should create some policy on this so there's a cy pres central so that people can go to that to look at the good works that these organizations do. Just a thought.

One of the other proposals, I can't remember which one though when I went down the list of work that they were going to do, they also talked about smartphone privacy which has little, I think, to do with this case, or does it?

MR. NASSIRI: No, it has a lot to do. I mean, I could talk for days –

THE COURT: Let me ask counsel if they have the time.

MR. NASSIRI: Do you guys have time?

While they're leading the effort, their client is anyway, and everything is moving to the mobile platform and particularly search.

I mean, at the bottom of this case is this notion that when we search for things, Google knows what we're thinking, what we're looking for, what we want, and what our habits are and all of that. And right now it's cumbersome, and I think we'll one day look back and it's a primitive process where we [47] have to type keyword searches into a box on a computer and somewhere down the road they will just be plugged into their brain. And I know I sound crazy to some people, but that's kind of what is happening and mobile is facilitating this kind of more fluid communication where consumers get what they want and get their questions answered by companies like Google.

And I think there is ample evidence. And you asked what has changed in the last year? More and more of the world is moving towards mobile, more developers of applications are focussing on mobile, and all of the major providers like Google, Facebook, Twitter, and the like are focussing on mobile.

So for Stanford to focus on mobile, and I think Stanford is the proposed recipient you're referring to, I think it is great because that is where the world is headed and that's where the research is headed, Your Honor.

THE COURT: And that has a nexus with this lawsuit and the issues attendant to it?

MR. NASSIRI: Absolutely.

THE COURT: So I made my comments about the cy pres. I think, candidly, I am troubled by that. Perhaps I had greater expectations.

I have some problems with that whole selection process. It is, you know, to use that paraphrase, it is the same as it ever was. It was the same we talked about a year ago, those [48] same groups were listed.

Well, let me hear from your colleagues opposites, Mr. Edwards and Mr. Johnson, and any comments they might have. Thank you very much.

MR. NASSIRI: Thank you, Your Honor.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: Good morning. You have had the privilege, I suppose, of sitting and listening to our conversation.

Anything you want to add to the conversation?

MR. JOHNSON: Well, I would yield to my colleague, Mr. Edwards, on the cy pres issue, but I will say that we have listened intently and your comments were very much heard and registered, Your Honor.

One observation, though I would make right off the bat is that neither Mr. Edwards nor my alma maters

were colead counsel in this case and were represented in any way in the settlement.

THE COURT: Okay. Thank you. Mr. Edwards.

MR. EDWARDS: Just to start with, that was a critical opening fact.

THE COURT: experienced trial lawyers know when to make the appropriate opening, don't they?

MR. EDWARDS: Just a few supplemental points and then, of course, I am happy to answer any questions that you might have of Google on some of the issues that you have [49] raised.

But Google doesn't control and didn't control the process of developing the specific proposals. It doesn't control the expenditure of those funds.

The settlement agreement in paragraphs – in paragraph 3.3 has a sentence that describes that the cy pres funds should be used generally for internet privacy educational purposes.

And the reason for the inclusion of that and the settlement agreement was to ensure that the cy pres was directionally appropriate just from that language alone so that it wasn't a situation where we'll just give money to the American Red Cross. They do good work.

But the design coming out of the preliminary approval process and implementing the settlement was plaintiffs had responsibility and did solicit very detailed proposals from the list of cy pres recipients and ensured and allowed the court and the public and the objectors to all evaluate the very detailed proposals that each of those recipients provided.

One of the potential recipients that was identified in the settlement agreement actually dropped out, Your

Honor may have noticed, because they didn't feel they were going to be able to submit an appropriate proposal with the right criteria and they were not the right recipient in this case.

And I think that helps speak to the appropriateness of this process because ultimately when you're evaluating is a [50] settlement fair, reasonable, and adequate – are these appropriate – is this an appropriate use of cy pres funds? You know, the proof is in the pudding. The proof is in what the proposals will do.

And it may very well be that had a different defendant and a different plaintiff negotiated a privacy settlement on a similar subject matter that they might have chosen – my alma mater is Northwestern, for instance, but that's not what happened here. That doesn't – and it could have been obviously an unaffiliated school or other institution of some kind.

But here each of the institutions that are the proposed recipients have identified very specifically, some a little more detailed than others, but all much more detailed than I have ever seen before the court is evaluating final fairness, are these appropriate uses of the funds consistent with Kellog and the other controlling case law?

And I would submit that they clearly satisfy that. There's a connection between the work that is proposed and there is, you know, detail and accountability with all of that work and the general concerns of the allegations in the case.

And so I think that part of the process – and I understand and I heard Your Honor's comments about the selection and you might have thought that there would be a different or supplemental recipient as well,

but one of the [51] things that this settlement I think is unique in is the level of detail that has been presented to the court but how the money is actually going to be used.

So from that perspective, I think that that really strongly supports the fairness, the reasonableness, and adequacy of the settlement.

THE COURT: Okay.

MR. EDWARDS: In terms of – I think that also addresses the selection in the following sense, that the concern with selection is that settlement funds might be steered into an inappropriate way.

Again, use the Red Cross as an example. And let's pretend that my sister was the president of the American Red Cross and we would like to steer the funds because we would like to make her life better. I mean, here the court can evaluate are these appropriate uses of the funds, and are these institutions credentialed, and do they have a track record and the experience to actually do it? And so that we're not throwing funds that won't be used.

And I believe that the experience of these institutions, which is detailed, and it's also for, I believe all of them or most of them, fairly known, but it's also detailed that they're experienced and they can deliver the kinds of projects that they do and they're different projects ranging from technology development to the AARP proposals.

[52] It was not as detailed technically, but they have experience and they had a multiyear plan and this is what will happen in year one, year two, year three to achieve the goals in their way that they believe are appropriate.

So I think that that touches on the selection process. I'm happy to answer any additional questions there.

THE COURT: Okay.

MR. EDWARDS: You know, I guess may be I should add one additional point, which is Mr. Frank's argument that this is just a change in Google accounting entries.

And, again, I think the level of detail of these programs and the lack of Google's involvement in the development of these programs rebuts that.

These were, these were – it is not just a donation to the American Red Cross. It's not even just a donation to an institution that Google may at some point in the past have provided some money for for some purpose.

These are very specific proposals that are funded out of very specific funds. And so when you compare this to, for instance, the cy pres in the Lane versus Facebook case, this is, I believe, multiple steps away from that in terms of the involvement of the defendant and in terms of the concreteness of what may come out of an approval of the settlement that allows the funds to be implemented in the way that has been described.

[53] And so we fully understand that, perhaps, the preliminary approval process there may have been a little bit of a disconnect in terms of communication with Your Honor about where the unprecedented nature of the cy pres process exists and to the extent that the parties didn't communicate that appropriately, we obviously want to address and remedy that now.

We think that the settlement agreement and certainly the notice identified the recipients and now

we have a much more robust record concretely of what would happen.

And we think that that fully supports the appropriateness of both the selection and the use of those funds.

So I'm happy to address issues there.

THE COURT: Well, thank you. So I think these are appropriate issues to drill down and talk about with greater detail because this is a pure cy pres. And so the recipients, I think, are very important, and that's why I'm asking questions and focussing so much of our morning on that, which does include the transparency of the selection process, the protocol of how these institutions, and I reiterate, I'm not being critical of the work that they do. And I think your point is well taken. They're guided and they have an excellent track record.

It's the kind of work that is appropriate to this class, the lawsuits, the issues that are in this lawsuit. So I [54] understand that and perhaps my greatest focus is on just the selection process.

And as I said earlier, when you put and when I look at it, the usual suspects, I keep using that inelegant phrase, but that and then the percentages to, perhaps, get around, I suppose, or to come within the opinion and in the Easysaver case, all of those things, I look at it and it just causes some question.

And I'm not a naturally suspicious person, I promise you, but it just raises an issue for me of can we do better? And in this case that was – the bar was to be raised, not by you, but in the selection process.

I understand now and I learn today that that's protected because it was part of mediation, and I hope

you appreciate how that doesn't help my thought process. It creates more curiosity, I suppose.

I'm not trying to say that we should not approve this because those organizations aren't deserving, and I'm not trying to say that you should fund startup organizations somewhere else that can do additional work, because as we said, a track record or something I need to be cognizant of.

But at some point shouldn't a wider net be cast or shouldn't there be additional numbers and particularly numbers of applications and particularly here when that isn't, to me, transparent.

[55] MR. EDWARDS: Well, let me try to address as much of that as I can before I get uncomfortable without talking to counsel.

THE COURT: Sure, of course.

MR. EDWARDS: But let me start with the allocations. Just to be clear, Google did not have involvement, and I think Mr. Nassiri explained, you know, plaintiffs received proposals and not everyone chose the exact same numbers.

And then depending on what Your Honor's decisions are on the attorney fee issue, I suppose that will influence the total dollars that are otherwise available.

But Google didn't identify in the proposals and didn't say that we want you to submit for x dollar amount.

And so, you know, there was no involvement from my client and from everything that I understand from plaintiffs either in terms of steering we want 1 percent less of one from one to another.

These are all generally within the ballpark. A comment that Google did share at the outset was that although it was not taking those specific proposals and dictating dollar amounts, it would have been disappointed and would have had significant issues if, one, recipient had received 95 percent of all of the funds and the other recipients received $10 each.

But beyond that extreme situation that was not an area where there was any influence exercised or decision made by [56] Google about how those dollars came in, they come in at slightly different amounts because of the different natures of both I suppose what was being proposed and also what each of these proposed recipients thought they could get and justify.

So I don't know that I can say much more than that because there was no involvement by Google in the selection of that.

I think that they all are – there was involvement by Google as well as plaintiffs, of course, in identifying the recipients.

And the thinking is that you don't want to have 100 recipients necessarily. All kinds of reasons.

THE COURT: Sure.

MR. EDWARDS: And in this case the decision was made on both sides that you also don't want to have one or two. It's a nice cross-section. They're doing different kinds – different recipients are doing different kinds of things and it's a manageable number, and it's a number in which as we can see from looking at the proposals we can get legitimate significant proposals that address the subject matter.

And I, you know, in a counter-factual world we can speculate if we doubled the number of recipients and

cut it in half, each of the proposals, what would those proposals look like? Perhaps it would also be fair, adequate, and reasonable to do something like that. Perhaps. I can't judge.

But what we can judge is I think a half a dozen, I think [57] originally seven, half a dozen, came through the process with proposals for which they're broadly speaking is the appropriate amount of money requested to do things that we believe are appropriate or certainly supportable.

Again, it's not a Google design and chose these specific research projects and development projects, but certainly within the range is this a fair, reasonable, and adequate part of a package in terms of the settlement coupled with the disclosure provision?

You know, I think that – I'll end on this note where I began which is the proof is in the pudding. You can look at it and you can see. There may be other settlements where you can have a different group of recipients but there's nothing wrong with this group in terms of their credentials and what they would do and hearkening back to Lane, well within the bounds of what precedent would say is appropriate.

THE COURT: I guess the distinction here might be the conflict of interest issue which gets to – and I talked about with Mr. Nassiri and whether or not that's a real issue, whether or not it's something that the court should be concerned about.

And to that end, I was curious about, again, the publication of the request for an invitation to apply I suppose. That would have been interesting to know what that process was and what was the target audience for those ROI's, [58] or whatever it was that was sent out. That would have been nice to know.

And the response rate to that would have been instructive also. You know, was Berkeley one of those targeted people? Was USD, Santa Clara? I can name any school. And do they have programs that might, might also fall under the Lane rubric of approval?

And, again, getting back to the history of this case, these recipients were named previously, and so I guess that's the disappointment, if I have any. What is different now than in August of 2013.

MR. EDWARDS: Well, let me try to answer that starting with your last point what is different now than in August of 2013?

In terms of the recipients, you know, it's not as if there were additional recipients added. I think Mr. Nassiri acknowledged that as well.

What is different is the very detailed submission. How are these funds to be used? Are these appropriate uses for the funds? Does it fit within the confines of Kellog and Lane and the other precedential authorities on this point?

And that is really what is new.

In fact, you know, from preliminary approval until now, you know, at the time we had an agreed upon list of what we believed would be appropriate organizations, and as we noted [59] earlier, and the MacArthur Foundation dropped out because they, likely appropriately, decided that they didn't feel that they could submit a proposal that would satisfy the criteria that the settlement contemplated here.

But at the time that they were identified for preliminary approval that, you know, we have this, what we believe was a reasonable number, an appropriate cross-section of recipients, now let's go and make sure

that they can do what the agreement is that they will do and do something that the court will find to be appropriate in terms of a direction for the cy pres funds.

And that's, you know, and that's what was delivered then coming back.

THE COURT: Okay. Well, let me ask you what might be an uncomfortable question, but do you wish to comment on any of the other topics that I raised, the notice topic and the attorney's fees topic?

MR. EDWARDS: So let me turn it over to Mr. Johnson to address notice and the other aspects of the settlement.

On the attorney fee issue, Google is not going to assert – there's no clear sailing provision in the settlement, but we're not asserting a position on that. We believe that's appropriately decided by Your Honor and the agreement defines, you know, whatever Your Honor's award is.

The monies are not reverted back to Google and that's [60] really the only thing we have to say on the attorney fee point.

THE COURT: Okay. Thank you very much.

MR. JOHNSON: Your Honor, on notice, we believe that the plan that the court approved its preliminary approval was a good one and a sound one and Mr. Simmons is here to talk about its implementation which seems to be equally sound.

I would just make the observation, and it was cited in the plaintiffs' brief, the Cohorst case, which is at a final approval, absent newly discovered evidence some kind of a problem, notice that has gone out typically is not reconsidered at final approval.

THE COURT: Thank you. I appreciate that. I raise the topic this morning because of the, candidly, the low response.

MR. JOHNSON: And I think I felt and took the import of Your Honor's comments, and, you know, you read the stats here and you see what was done.

It was reasonable, it was tried and true methods. It's – I understand and sense maybe almost a disappointment in that it is like an election is well turned out.

But sometimes it could depend not on the vehicle or not on how people vote but on how exciting the candidates are and how strongly they feel about the conduct alleged here.

THE COURT: Which gets back to the damage question that I was asking Mr. Nassiri earlier, perhaps.

[61] All right. Anything further you would like me to know?

MR. EDWARDS: No, Your Honor.

MR. JOHNSON: No, Your Honor.

THE COURT: Thank you very much.

MR. EDWARDS: Thank you.

THE COURT: Mr. Nassiri, you are on your feet.

MR. NASSIRI: May I address the court briefly?

THE COURT: Yes.

MR. NASSIRI: Again, at the risk of saying too much but this is interesting because it is new and you focussed some time this morning on the selection process, and I'm trying to imagine what an alternative selection process would look like.

If you open it up to the public, I mean, you can have an American Idol type competition where it's open to votes but people oppose – the public isn't a common wisdom and outsourcing is not always the best way to make a selection like this and it may not stand up to constitutional scrutiny.

THE COURT: I am not advocating for that. I appreciate you are not.

MR. NASSIRI: I am brain storming, Your Honor. And we thought about this going into the settlement, too.

The other thing is that if we had said, okay, let's have an open bid process and then we'll decide. I mean, again, this is a settlement. We have to get signoff from Google. It's unavoidable.

[62] It may have been – we may have been worse off, and I'll tell you why. One thing we had to fight for was control over the process once the recipients, proposed recipients were selected.

THE COURT: So I don't want you to speak to anything in regards to your mediation.

MR. NASSIRI: I won't, Your Honor. I won't cross over any lines. Let me know if I do.

But it was important that these entities were able to decide how to best spend the money in a way where they weren't under the influence from, in my perspective, from defendants.

And you'll see that some of these proposals go directly towards Google and are aimed directly at Google and in making sure that Google is accountable and it adheres to its privacy policies.

I'm thinking specifically about Carnegie Mellon's proposal for creating a tool that would allow third parties, regulators, policy makers, policy advocates to, from outside of the Google ecosphere, to see whether or not Google was actually adhering to its privacy policies. That's not something that Google would necessarily agree to fund.

Stanford, the F.T.C. fine of $22 and a half million dollars because Google circumvented the Apple Safari privacy browser selection, that was a result of Stanford's work.

So by – if we had had an open bid process, I'll circle [63] back now to my point, if we had an open bid process where we took bids and proposals from 100 potential recipients and then made our decision, we may have been worse off because anything that Google found to be threatening that we thought was actually very effective, they might not have ever agreed to.

So we believe this is a good process, and I think Mr. Edwards put it well, we ended up with proposals where if you look at the proposals on the merits, they're very good proposals and very effective, and I think they should be approved, Your Honor.

THE COURT: Okay. Mr. Frank, you're on your feet.

MR. FRANK: Thank you, Your Honor. Two things very quickly, and I'm going to avoid repeating myself, but if you go to the Stanford web page and you look at their doners, number one right there is Google.

And so, yes, this is a separate program, but, you know, I have applied for separate grants for programs, and, again, it's just an accounting entry. You can't tell me that Google is not going to have any influence of

what Stanford does with its money because Stanford depends heavily on that funding.

And you go to the web page and number one was Google and right under it is all of the law firms that have given it cy pres.

THE COURT: And did the founders of Google attend that institution?

[64] MR. FRANK: And founders of Google attended Stanford. That is where they started.

The parties rely a lot on the Easysaver case and the court indicated it was giving it some consideration, and I would caution against that. We have that case on appeal. I have briefed it. We'll argue it at some time in 2015 or 2016, or whenever the Ninth Circuit schedules it, but I invite the court to read those briefs at 13-55373 and I – it's a fool's errand to predict ever what the Ninth Circuit is ever going to do but if you put a gun to my head on any Ninth Circuit case, that's the one I would stake my life on.

If you have any other questions, I'd be happy to answer them.

THE COURT: No. Thank you. I appreciate your participation.

MR. FRANK: Thank you.

THE COURT: Anything further from your table, Mr. Nassiri?

MR. NASSIRI: No, Your Honor.

THE COURT: Mr. Johnson?

MR. JOHNSON: No, Your Honor.

THE COURT: Well, thank you for the conversation this morning. I appreciate you suffering my concerns, and I appreciate the conversation.

I do have real concerns, and I need to give it some [65] additional thought here.

I should tell you in reviewing my notes and reviewing your pleadings, which were helpful, including Mr. Frank's, my initial reaction was in my note to self here and in my paper in front of me says to not approve and get an order out telling you what I think needs fixing.

And that's probably what I'm going to do. I don't want you to be in suspense leaving here waiting for the order, but I'll tell you that's probably what – I do have some concerns.

And they might be, you know, they might be nits that I'm picking here and maybe plaintiffs' table will, you know, strike their foreheads and say, gee, what is this guy thinking? And at least I'll share my thoughts with you in an order.

You've been helpful today describing to me and for me the process but I just, I think I have indicated those indicators that cause me some concern, and I do feel that the transparency about the selection process has not been great, notwithstanding your explanation of it. I appreciate that.

I guess it gets back to this whole net issue and whether or not it should be larger or not, particularly when there's the alleged conflict of interest. I'm not going to call it a real conflict of interest, just this allegation of that, the percentages, you know, why Carnegie Mellon thinks $0.34 is appropriate to ask for in their response is interesting to me.

And, again, I'm not being critical of those organizations [66] and the work they do, it's just that whole process causes me some concern.

The attorney's fees portion is interesting, and maybe, Mr. Nassiri, if you would rise to speak further as to, again, why you think a multiplier is appropriate in this case, I should afford you that opportunity.

MR. NASSIRI: Well, Your Honor, again, this was a very risky case, and these are very difficult cases. And the majority of them are dismissed without any relief whatsoever to the class.

Google obviously had not just one but two nationally prominent recognized law firms and they're fantastic lawyers.

And we don't have a lot of precedent to work with, so we're kind of, you know, working in a little bit – there's not a lot of modeling in here so we had to be innovative and creative, and I believe we were able to get permanent prospective relief and a substantial sum of money that is a testament to the good work that we did over the course of years now.

I believe it's also appropriate for the court to consider the likelihood that should we get approval, that this will go up on appeal and maybe up again and it could be six or eight years from the time that we filed and started putting money into this case that we ever get paid, if at all.

I run a small firm. This is – this was a big risk and a [67] big investment, and so I believe that the results justify this. This is comparable to the mega privacy class action settlements that have come before ours. It's no worse. And in some ways I believe it's better, Your Honor.

THE COURT: Okay. Thank you very much.

MR. NASSIRI: One more thing, Your Honor. I mean, if there's – the selection process and to the extent that it's covered by the mediation process, if that is an impediment here and if it would make any difference to the court's ruling, you know, maybe we could confer with the defense counsel now and there's not a whole lot more to tell you to be honest. It was a negotiation, but, you know, we might be able to offer you more information if we can agree and it would be useful to the court. Maybe it would and maybe it wouldn't.

THE COURT: Well, you have heard my concerns, and I suppose they're based on our conversation a year ago and part and parcel in the transcript that I read to you.

MR. NASSIRI: And I try never to set expectations with my clients that are incorrect, and I am kicking myself now. I thought I was clear, Your Honor, and apparently I wasn't.

But, you know, we had our list of proposed recipients in the settlement agreement. It has been fixed because it was a matter of agreement.

THE COURT: No. I appreciate that. You mention [68] them and then you talked about setting the bar high and the process.

MR. NASSIRI: Yeah.

THE COURT: And it gets back to my rejoinder about, well, what is different? Other than we keep getting younger.

That's the only difference I suppose.

Well, thank you. Thank you very much, and we'll get the order out, and we'll see where it goes.

MR. NASSIRI: Thank you, Your Honor.

MR. JOHNSON: Thank you, Your Honor.

MR. EDWARDS: Thank you, Your Honor.

(COURT CONCLUDED AT 10:55 A.M.)

* * *

No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a class-action settlement that provides a *cy pres* award of class-action proceeds but no direct relief to class members comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate" and supports class certification.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Theodore H. Frank and Melissa Ann Holyoak were objectors in the district court proceedings and appellants in the court of appeals proceedings.

Respondents Paloma Gaos, Anthony Italiano, and Gabriel Priyev were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondent Google LLC was the defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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INTRODUCTION

Petitioners, as class members, challenge an $8.5 million class settlement negotiated between class counsel and the defendant that pays the class no money, but instead directs millions to class counsel and funnels the remainder to third parties, including class counsel's *alma maters* and nonprofits to which the defendant already contributes. This is a clear abuse and must be curtailed.

This Court has long recognized that Rule 23(b)(3) opt-out class actions are an "adventuresome" innovation fraught with potential conflicts. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614, 625–26 (1997). Rule 23 must be "applied with the interests of absent class members in close view." *Id.* at 629. The Court has consistently rejected the use of procedural tactics by plaintiffs or defendants to game class actions. *E.g.*, *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013).

Because of conflicts of interest inherent in the class-action process—especially with regard to settlements—careful judicial scrutiny is necessary lest class counsel and the defendant bargain away the rights of the class members on terms that minimize payoff by the defendant, maximize benefit to class counsel, and leave injured class members out in the cold. Yet the Ninth Circuit below took the opposite approach, declaring that close scrutiny of the terms of a *cy pres* settlement would be "an intrusion into the private parties' negotiations" and therefore "improper and disruptive to the settlement process." Pet. App. 15.

The majority of class actions that survive motions to dismiss are resolved by settlement. As one court has noted, "Inequitable settlements are an unfortunate recurring bug in our system of class litigation." *Pearson v. Target Corp.*, – F.3d –, 2018 WL 3117848, at *1 (7th Cir. Jun. 26, 2018) (Wood, C.J.) ("*Pearson II*"). In the absence of legal rules providing proper incentives, the negotiating parties' preferences—readily achieved even in the absence of explicit collusion—are to structure a settlement that maximizes the class attorneys' share of the settlement value of the case while minimizing cost to the defendant, all at the expense of absent class members. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013) (Kethledge, J.); *see generally* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 Notre Dame L. Rev. 859, 874–903 (2016) ("Erichson"). Parties structure settlements to hide the economic reality, create the appearance of a larger recovery, and thus support a larger claim for attorneys' fees. This case involves one of the most notorious devices used to create the "illusion of compensation," so-called *cy pres* recovery. Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010) ("Redish").

The Ninth Circuit treated the *cy pres* arrangement here as equivalent to a class settlement paying $8.5 million to class members. In fact they got zero. All the money went to class counsel and to favored non-profit organizations affiliated with class counsel and the defendant. It is not fair or reasonable under Rule 23(e) for class attorneys to arrogate millions for themselves and nothing for their clients. In ratifying the district court's approval of this settlement, the

Ninth Circuit adopted several holdings that create perverse incentives that encourage both gamesmanship at the expense of absent class members and meritless class actions designed to benefit only attorneys. If this Court affirms the Ninth Circuit's approach, *cy pres* settlements like this one, previously substantially deterred by other appellate courts' refusal to endorse them, will become dramatically more common, even supplanting settlements that currently directly pay class members tens of millions of dollars. The Court should reverse the judgment below, thereby making clear that class counsel has a fiduciary duty to class members, and that Rule 23(e) requires courts to align the interests of class counsel with the interests of their clients.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 869 F.3d 737 and reproduced at Petition for Writ of Certiorari Appendix at Pet. App. 1. Of the two opinions of the District Court for the Northern District of California, one is reported at 87 F. Supp. 3d 1122 and the other is unreported; they are reproduced at Pet. App. 31 and Pet. App. 62 respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2017. A timely petition for rehearing *en banc* was denied on October 5, 2017. Pet. App. 67. Petitioners timely filed their petition for writ of certiorari with this Court on January 3, 2018, which was granted April 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1). As class members who objected to the settlement, Petitioners have standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

RULES AND STATUTE INVOLVED

Federal Rule of Civil Procedure 23(a)(4) provides that one or more members of a class may sue as representative parties on behalf of all members only if, *inter alia*,

> the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) provides that a class action may be maintained if, *inter alia*,

> the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Rule 23(e)(2) provides, with respect to a proposed settlement of a class action:

> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

Rule 23(g)(4) provides:

> Class counsel must fairly and adequately represent the interests of the class.

Rule 23(h) provides:

> In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement.

Under 18 U.S.C. § 2707(c):

> The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

STATEMENT OF THE CASE

A. The *cy pres* doctrine in class-action settlements.

Cy pres originated in trust law. Short for the French "*cy près comme possible*," or "as near as possible," it referred to a court's power, typically under statute, "to save testamentary charitable gifts that would otherwise fail." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 473–74 (5th Cir. 2011) (cleaned up); *see generally* Redish at 625. For example, a 19th-century court applied the doctrine to repurpose a trust created to support the abolition movement to instead provide assistance to poor African-Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867).

The application of the *cy pres* doctrine, or something resembling it, to class-action settlements is a more recent phenomenon. The "most adventuresome" of the 1966 amendments to Federal Rules of Civil Procedure was the addition of Rule 23(b)(3)'s provision for

"class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem*, 521 U.S. at 614–15. That provision empowered attorneys, armed with a few representative plaintiffs, to file actions on behalf of large and diffuse classes, aggregating members' paltry claims into litigation well worth an attorney's time. When these suits prevail, usually through settlement, the proceeds typically flow into a fund out of which disbursements to individual class members are made.

It is a unique feature of class actions that, unlike in bilateral civil litigation, funds often remain unclaimed, particularly where class members' claims are small or the claims process is burdensome. "Traditionally, such funds would revert to a defendant—often an unpopular result because reversion of the funds undermines the deterrent effect of the suit and leaves the defendant largely with the benefit of his illegal activity." Redish at 631. In the 1970s, a law student comment proposed the *cy pres* doctrine as a solution for this "problem" of unclaimed settlement funds that could achieve the "next best" result to compensation by indirectly compensating absent class members, without undermining the deterrent effect of liability. *Id.* at 631–34.

Around the same time, plaintiffs experimented with the related concept of fluid recovery. Fluid recovery involves "an effort ... to approximate the injured class of consumers through the provision of relief to future consumers." *Id.* at 662. But several federal appellate courts rejected fluid recovery as unauthorized by law and constitutionally problematic. *Id.* at 662–63 (citing cases).

With fluid recovery rejected, the use of *cy pres* awards in class actions quickly moved beyond its modest origins to become an integral component of many settlements. In these cases, settlement agreements expressly provide for awards to charities or foundations in addition to, or in place of, funds earmarked for distribution to class members. Redish at 656–57. As critics have documented, these types of *cy pres* awards "create the potential for conflicts of interest by ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." John Beisner *et al.*, Cy Pres: *A Not So Charitable Contribution to Class Action Practice* 13 (2010) ("Beisner"). Despite these concerns, the use of *cy pres* awards in class-action settlements has grown quickly since the 1980s, accelerating sharply recently. Redish at 653; Natalie Rodriguez, *Era of Mammoth Cases Tests Remedy of Last Resort*, Law360 (May 2, 2017) ("Rodriguez, *Era*").

B. Plaintiffs launch a privacy class action against Google.

Google operates the eponymous search engine that internet users query billions of times each day. When a user enters search terms into Google, the service returns a search-results page listing relevant websites. Each results page has a unique address—known as a "Uniform Resource Locator," or "URL"—that contains the user's search terms. And when a user clicks on a search result, the user's web browser (Chrome, Internet Explorer, etc.) typically transmits a "referral header" containing the URL of the referring search-results page, including the user's search terms, to the destination website. This is not unique to Google; clicking any links on the Web will cause

referral headers to be sent, unless the user has disabled them. Websites, in turn, use this referral information to inform their editorial decisions and marketing efforts. Joint App. 17.

In October 2010, Paloma Gaos filed a putative class action in the United States District Court for the Northern District of California against Google. She sought damages for the disclosure of her search terms to third-party websites through referral headers sent when she conducted "vanity searches" for her own name and other personal information and then clicked on results links. The complaint alleged claims for fraud, invasion of privacy, breach of contract, breach of the covenant of good faith and fair dealing, breach of implied contract, and unjust enrichment under California law and for violation of the federal Stored Communications Act, which provides for statutory damages of at least $1,000 per violation and attorneys' fees for a successful action—over $100 billion across the class. 18 U.S.C. § 2707(c). It sought certification and money damages for a class of United States-based Google users. Pet. App. 3–4, 32–33; Joint App. 25, 27.

C. Class counsel and Google propose an $8.5 million *cy pres*-only settlement that awards class members nothing.

Some of Gaos's claims were initially dismissed for failure to plead an injury that would support Article III standing. Joint App. 23–31. After Gaos amended her complaint, the parties stipulated to consolidate her action with a similar one filed by Gabriel Priyev for purposes of settlement proceedings and filed a proposed settlement. Pet. App. 34.

Under the settlement, Google would obtain a release of any and all privacy-related claims of the estimated 129 million people who used Google's search engine in the United States between 2006 and the settlement class notice date in 2014. Pet. App. 5. In exchange, the company would pay a total of $8.5 million into a settlement fund and continue to include in its "Frequently Asked Questions" webpages an explanation of referral headers, a known feature of the Web since at least 1996, two years before Google's founding.[1] Pet. App. 5, 82. The settlement specifically provided that Google "will not be required or requested to make any changes to ... the practices or functionality of Google Search" or other services. Pet. App. 82.

Class counsel and Google agreed that attorneys' fees would be drawn out of the settlement fund. Pet. App. 92. Ultimately, class counsel sought, and was awarded in full, $2.125 million in fees, equal to 25 percent of the settlement fund and more than double counsel's asserted lodestar. Pet. App. 54–57. Class counsel made no claim that the minimal injunctive relief entitled them to fees, and acknowledged that Google had already changed its practices long before the settlement and those changes had no known connection to the litigation. Dkt. 66 at 2–4; Joint App. 42.

The settlement was less generous to class members. Other than "incentive awards" of a few thousand apiece to the named plaintiffs, class members would receive no compensation at all. Pet. App. 83. Instead, their money would be disbursed to organizations that

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[1] *See* Internet Engineering Task Force, Hypertext Transfer Protocol HTTP/1.0, RFC No. 1945 (May 1996), https://tools.ietf.org/html/rfc1945#section-10.13.

"agree to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." Pet. App. 84. Class counsel and Google selected six recipients: the Center for Information, Society and Policy at Chicago-Kent College of Law; the Berkman Center for Internet and Society at Harvard University; the Stanford Center for Internet and Society; World Privacy Forum; Carnegie Mellon University; and AARP, Inc. Pet. App. 5. Though there were forty applicants for *cy pres* money, the parties did not disclose the proposals that were rejected or whether class counsel or Google had unilaterally vetoed any in particular. Joint App. 126, 133, 159. The district court complained about the opacity of the selection process, but never required the disclosures it sought. Joint App. 133, 159, 166.

D. Petitioners object.

Petitioners and class members Theodore H. Frank and Melissa Holyoak objected to approval of the settlement, class certification, and class counsel's fee request. Pet. App. 112. Petitioners are public interest attorneys with the Center for Class Action Fairness, which has won over $100 million for class members through objections to abusive class-action settlements since Frank founded it in 2009. Dkt. 70-2; Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, Bost. Globe (Dec. 17, 2016) (reprinted at *Arkansas Teacher Retirement Sys. v. State Street Bank & Trust Co.*, 232 F. Supp. 3d 189, 200–07, 205 (D. Mass. 2017)); *Pearson II*, 2018 WL 3117848 at *1.

Petitioners argued that it was feasible to use a standard claims process to compensate class members, citing undisputed evidence that claims rates in class

actions for payments of $10 or less are typically well below one percent. Pet. App. 120–23 (discussing *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939 (N.D. Cal. 2013) (approving $20 million settlement in 150-million-member privacy class action providing for $15 payments to those class members who filed claims)). And if the court were to find that any distribution to class members was infeasible, then that made class certification improper. Pet. App. 131–34.

Petitioners also objected to the parties' selection of *cy pres* recipients that had preexisting relationships with Google and class counsel. Pet. App. 125–31. Prior to the settlement, Google was already a donor to several of the recipients, especially Stanford. Likewise, three of the *cy pres* recipients—Harvard, Stanford, and Chicago-Kent—were *alma maters* of class attorneys who signed the settlement. Petitioners objected that even the appearance of divided loyalties of counsel precluded *cy pres* awards to these recipients, especially since none of these potential conflicts were disclosed to the class. Pet. App. 126–28. They asked the Court to "require the parties to certify that the beneficiaries have no ties to the parties or the lawyers." Pet. App. 128.

The parties did not make any such certification. Google filed no response to Petitioner's objection. While the class attorneys each asserted in one line of declarations submitted after the objections that they "have no affiliation" with the recipients (Joint App. 108–10), they did not deny that the *alma mater* status played a part in their selection of some of the recipients, instead arguing that selecting an *alma mater cy pres* beneficiary did not demonstrate a conflict of interest, that Ninth Circuit precedent permitted parties to self-deal in selecting beneficiaries, and that

there was no requirement to choose the best possible beneficiaries. Joint App. 101–06, 133–36.

Petitioners also objected to being compelled as a class member to subsidize the AARP's advocacy and lobbying on controversial policy issues, which Petitioner Frank often opposes. Pet. App. 131.

Finally, Petitioners objected to the $2.125 million fee request, on the basis that its "percentage-of-recovery" approach assumed that the district court should treat *cy pres* funds as equivalent to actual monetary compensation. Pet. App. 134–39.

E. Relying on Ninth Circuit precedent, the district court approves the settlement.

Although the district court at the fairness hearing stated it probably would not approve the settlement (Joint App. 166), repeatedly expressed "disappointment" (Joint App. 135, 160), criticized the parties' conflicts of interest and "lack of transparency" in selecting *cy pres* recipients (Joint App. 133, 137, 156–57, 166), compared the amounts chosen per recipient to "point shaving" (Joint App. 127–28), and mused that the alumni contributions raised a "red flag" and did not "pass the smell test" (Joint App. 133), it ultimately overruled all of Petitioners' objections. Their objections to the approval of a *cy pres*-only settlement, it stated, were inconsistent with "the law of this circuit which permits cy pres settlements such as this one." Pet. App. 58 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)).

As for the selection of the *cy pres* recipients, it was enough that their activities were "sufficiently related" to the subject matter of the case. Pet. App. 59. While "the potential for a conflict of interest is noted, there is no indication that counsel's allegiance to a

particular alma mater factored into the selection process" because beneficiaries' identity "was a negotiated term included in the Settlement Agreement and therefore not chosen solely by Harvard alumni." Pet. App. 59–60.

As for the fee award, the court stated simply that it disagreed with Petitioners and believed the amounts approved were consistent with Ninth Circuit authority. Pet. App. 60.

F. A split panel of the Ninth Circuit affirms.

In affirming approval of the settlement, the Ninth Circuit agreed with the district court that its own precedents disposed of all objections.

On the threshold question of whether an all-*cy pres* settlement was permissible, it found that the court's "prior endorsement of *cy pres* awards that go to uses consistent with the nature of the underlying action" carried the day. Pet. App. 10. Whether or not there are "'possible' alternatives" that compensate class members, a district court may approve a *cy pres*-only settlement that it finds to be "'fair, adequate, and free from collusion.'" Pet. App. 9–10 (quoting *Lane*, 696 F.3d at 819). And the district court satisfied that standard when it found that dividing $5.3 million in net settlement proceeds among all of the estimated 129 million class members would be "infeasible." *Id.*

The court likewise made quick work of the objection that a class action is not "superior" to other means of adjudication, and that class certification is therefore improper, when a money-damages class is structured to preclude actually compensating class members. To the contrary, it thought, the very same features that can make individual litigation "economically infeasible" and thereby support class adjudication also

provide "the rationale for the *cy pres*-only settlement." Pet. App. 11.

As to the particular *cy pres* beneficiaries, the panel majority was untroubled by the appearance of a conflict of interest based on their prior relationships with class counsel and the defendant. Pet. App. 14–18. That Google was already funding and working with several of them was of no moment "without something more, such as fraud or collusion." Pet. App. 17. And the majority categorically "reject[ed] the proposition that the link between the *cy pres* recipients and class counsel's *alma maters* raises a significant question about whether the recipients were selected on the merits." Pet. App. 18. Echoing *Lane*, the panel explained that any closer scrutiny of the settling parties' selection of *cy pres* recipients would be "an intrusion into the private parties' negotiations" and therefore "improper and disruptive to the settlement process." Pet. App. 15 (quoting *Lane*, 696 F.3d at 820–21). Instead, it required only that *cy pres* "be[] tethered to the objectives of the underlying statute and the interests of the silent class members," a standard that it found satisfied here. Pet. App. 12.

Finally, the panel summarily rejected the objection "that the settlement should have been valued at a lower amount for the purposes of calculating attorneys' fees simply because it was *cy pres*-only." Pet. App. 21. A fee equal to 25 percent of the settlement fund, it held, was generally permissible as a "benchmark" whether or not class counsel obtains any actual compensation for its putative clients, class members. Pet. App. 22.

Judge Wallace dissented in part. He took no issue with the panel majority's application of circuit precedent to resolve the challenges to the use of *cy pres*

relief and the fee award, but was troubled by the district court's failure to probe the preexisting relationships between class counsel and the *cy pres* recipients. Pet. App. 23–29. The "burden should be on class counsel to show ... that the prior affiliation played *no role* in the negotiations, that other institutions were sincerely considered, and that the participant's alma mater is the proper *cy pres* recipient." Pet. App. 27.

The court subsequently denied rehearing and rehearing en banc. Pet. App. 67–68.

SUMMARY OF ARGUMENT

Petitioners ask this Court to hold:

1. A settlement that compromises a class's claims, but seeks to pay class counsel an amount disproportionate with the actual and direct benefit to the class, is not fair or reasonable under Rule 23(e). (Section I.)

2. *Cy pres* awards are inappropriate in class-action settlements where it is feasible to distribute settlement proceeds to class members. Whether it is feasible to distribute settlement proceeds is determined by whether such relief can be distributed to some identifiable class members (through a claims process or other means) and not whether the proceeds could be distributed to *every* potential class member. (Section II.A.)

3. If a class-action settlement cannot provide direct relief to the class, the settlement class cannot be certified. (Section II.B.)

4. If *cy pres* is to be permitted at all, there should be strict restrictions against the payment of money to

recipients with any significant current or prior relationship with the parties, attorneys, or judge. (Section II.C.)

5. At a minimum, courts should substantially discount *cy pres* distributions relative to direct payments to class members for purposes of calculating attorneys' fees based on a percentage of the recovery. (Section II.D.)

As applied here, where the class receives no direct benefit, but the attorneys are to receive over $2 million, the settlement must be rejected. "Because the settlement yields fees for class counsel and zero benefits for the class, the class should not have been certified and the settlement should not have been approved." *In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 557 (7th Cir. 2017) (Sykes, J.) (cleaned up).

I. The problem of *cy pres* is part of a larger problem of conflicts of interest in class-action settlements, where perverse incentives tempt class attorneys to breach their fiduciary duty to class members.

A. There are recognized conflicts of interest between class counsel and the class, because the defendant cares only about its total cost of settlement, while every dollar going to class members is a dollar that will not go to class counsel's fees. In the absence of legal rules explicitly forbidding such gamesmanship, class counsel and settling defendants have a variety of gimmicks available in a class-action settlement to maximize class counsel's proceeds while minimizing the cost of settlement to the defendant. And when courts permit the gimmicks, class attorneys have every incentive to use such subterfuge, because scrupulous class counsel would sacrifice millions

of dollars by demonstrating fidelity to the class by engaging in more straightforward settlements. Some courts have stepped in to rectify these problems, but many others defer to abuses of the system, mistakenly thinking that the lack of explicit collusion is enough to protect absent class members.

B. *Cy pres* is a square manifestation of this conflict of interest, and one that raises a number of other fundamental concerns. When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class attorneys' natural preference will be to favor their favorite charities and causes over thousands or millions of anonymous class members. This is especially true when, as here, the defendant has a similar preference to benefit charities it likes. But "settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474. Courts and class counsel should not have the authority to divert that property to third parties any more than attorneys for individual clients do.

Cy pres presents other systemic problems. The availability of an illusory *cy pres* remedy incentivizes meritless class actions that a class counsel might otherwise not be able to bring and settle profitably; many abusive class actions and settlements that other courts have legitimately struck could be restored, validated, and insulated by the illusory *cy pres* the Ninth Circuit endorsed here. *Cy pres* can also infringe upon the First Amendment rights of class members by requiring them to subsidize political organizations they disapprove of without their explicit consent. And *cy pres* is an invitation to corrupt the judicial process by involving judges in the legislative task of grant-making.

C. Rejecting settlements that do not tie class counsel's fee award to the direct and actual recovery by class members properly aligns the interests of class attorneys with those of their clients. When courts establish such rules, class attorneys find ways to distribute settlement proceeds to their clients, and millions of dollars more flow to class members.

II.A. The Ninth Circuit's decision exacerbates the problems of conflicts of interest in class-action settlements, and should be rejected. By holding that a settlement fund is "non-distributable" if every class member cannot be feasibly compensated, the Ninth Circuit sweeps nearly every consumer class-action settlement—potentially billions of dollars—into a *cy pres*-only category, because such settlements rarely compensate more than a tiny fraction of class members. It is almost always possible to find a mechanism to distribute money to *some* class members. The Ninth Circuit's refusal to require class counsel to prefer such distributions to *cy pres* ignores class counsel's fiduciary duty to the class and class members' property rights.

B. Moreover, if it is really the case that it is impossible to distribute settlement proceeds to class members, class certification is inappropriate. "If the class settlement does not provide effectual relief to the class and its principal effect is to induce the defendants to pay the class's lawyers enough to make them go away, then the class representatives have failed in their duty under Rule 23 to fairly and adequately protect the interests of the class." *Subway Footlong*, 869 F.3d at 556 (cleaned up). Likewise, the class device cannot be a superior means of resolving litigation if settlement benefit does not distinguish between class members and non-class

members: a faithful agent for the class would costlessly opt out every single absent class member from the settlement rather than waive their rights.

C. Even if *cy pres* were sometimes permissible, the Ninth Circuit's disregard for class counsel's fiduciary duty to absent class members pollutes its conflict-of-interest inquiry. *Cy pres* recipients with significant prior affiliations with the parties or class counsel that create even the appearance of impropriety raise substantial questions about the selection process and tar the judicial system. Requiring absent class members to show collusion relating to undisclosed conflicts of interest fails to adequately protect absent class members and encourages collateral litigation that would unfairly penalize parties settling in good faith, because such collusion could only be demonstrated with intrusive discovery. The settlement should have been rejected for this independent reason.

D. At a minimum, the Ninth Circuit errs in refusing to create *any* incentive for class counsel to prefer distributions to the class over *cy pres*, especially if defendants are permitted to steer *cy pres* contributions to preferred allies. A defendant will always prefer to give more to an affiliated charity than to absent class members, and if doing so invariably increases the attorneys' fee, the defendant can, without any collusion, seduce class counsel into agreeing to an illusory settlement at class members' expense.

ARGUMENT

I. This *cy pres*-only settlement is not fair or reasonable under Rule 23(e) because it provides no direct or actual compensation to the class in consideration for compromising the class's claims.

Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with widely diffuse harms. *Amchem*, 521 U.S. at 617.

But as this Court has recognized, class-action *settlements* create special problems for our adversary system. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *Amchem*, 521 U.S. at 619–620. "Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *Dry Max Pampers*, 724 F.3d at 715.

Class attorneys, like other attorneys, have a fiduciary duty to their clients, the class members; so do class representatives with respect to the absent class members. *Id.* at 718; *In re General Motors Corp. Pick-Up Truck Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) (Becker, J.); American Law Institute, *Principles of the Law of Aggregate Litigation* § 1.05 cmt. (f) (2010) ("*ALI Principles*"); *cf. also Standard Fire*, 568 U.S. at 594 (citing *Back Doctors Ltd. v. Metropolitan Property & Cas. Ins. Co.*, 637 F.3d 827, 830–31 (7th Cir. 2011) (Easterbrook, C.J.)); *see also* Rule 23(a)(4), (g)(4). But in the absence of sufficient judicial scrutiny under Rule 23(e), it is simple for class counsel to game class-action settlements to self-deal at the expense of their

clients, be it with *cy pres* or other gimmicks. When courts permit class counsel to use class settlements to self-deal freely, it improperly enriches class attorneys at the expense of their clients. Furthermore, because class attorneys no longer have to fairly share the settlement value of the case with their clients, it becomes profitable to bring cases that have little to no merit, and whose settlement value is solely the litigation expenses plaintiffs can force the defendant to incur.

Rule 23(e)'s mandate requires courts to only approve settlements if they are "fair, reasonable, *and* adequate" (emphasis added). But, as with class certification decisions, those decisions must constitute more than simple "appraisals of the chancellor's foot kind ... dependent upon the court's gestalt judgment or overarching impression." *Amchem*, 521 U.S. at 621. Instead, the integrity of class-action suits is contingent on *how* courts scrutinize such settlements. Courts must determine, with rigor, whether class attorneys are fulfilling their fiduciary duty.

Courts that have insisted on holding class counsel to that duty have achieved materially superior results both in increasing compensation to class members with relatively meritorious claims of injury and in discouraging dubious and unmeritorious litigation. All that courts need to accomplish this result is to apply a simple principle to the Rule 23 fairness hearing: regardless of whether a settlement is "adequate," it is not fair or reasonable if the settlement pays attorneys' fees that are disproportionate to the *actual* and *direct* benefit realized by the class compromising its claims. A court must reject settlements structured to preclude judicial correction of this allocation problem. This rule not only addresses the vast

majority of problems related to *cy pres*, but deters other forms of gamesmanship in the settlement process.

A. *Cy pres* is part of a larger problem of conflicts of interest in class-action settlements where gamesmanship exploits recognized incentive problems.

1. While both class counsel and a defendant have an incentive to bargain fairly over the *size* of a settlement, they critically lack similar incentives to decide how to divvy it up—including the portion allocated to counsel's own fees. The defendant cares only about the bottom line, and will take any deal that drives it down. Meanwhile, class attorneys have an obvious incentive to seek the largest possible portion for themselves, and will accept bargains that are worse for the class if their share is sufficiently increased. "From the selfish standpoint of class counsel and the defendant, ... the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (Posner, J.).

While a defendant and a class counsel might happily agree to a settlement where the defendant simply writes a check to class counsel in exchange for the release of the class's claims, something so blatant is rarely seen outside of John Grisham novels. The problem, however, is that class counsel have various tools for obscuring some of the allocative decisions that get made between counsel and class recovery, and can very subtly trade benefits to defendants for bigger fees. These tools primarily function by inflating the settlement's *apparent* relief, which will in turn justify outsized fee requests absent rigorous doctrinal tests designed to weed them out, accomplishing a result

that is effectively economically equivalent to more blatantly abusive settlements.

To see this, imagine a hypothetical settlement where class counsel tried to compromise the consumer class action *Coyote v. Acme* with a straightforward cash settlement paying him $14 million, while paying the class a total of $3 million in compromise of the class's much larger claims. Most courts would reject that deal. *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (counsel receiving even 38.9% of settlement benefit is "clearly excessive"). Accordingly, to have any chance of surviving review, settling parties must structure the deal to obfuscate the true allocation. This is accomplished by larding the analysis with hypothetical class recoveries and amorphous "benefits" that ultimately have little value to the class, but are cheap for defendants to provide and so easy to include in the deal.

2. One tool to game class-action settlements is spurious injunctive relief. The defendant agrees to something that makes no material difference to the class, or to something it was doing anyway, and class counsel releases class claims for damages and uses the injunction to rationalize attorneys' fees. Erichson at 874–78. For example, in *Poertner v. Gillette Co.*, 618 F. App'x 624 (11th Cir. 2015), Gillette "agreed to a labeling change on a product that it no longer manufactured, marketed, or sold." Erichson at 875; Erin L. Sheley & Theodore H. Frank, *Prospective Injunctive Relief and Class Settlements*, 39 Harv. J. L. & Pub. Pol'y 769, 783–84 (2016) ("Sheley/Frank"). Indeed, until 2016, there were dozens of class actions every year challenging nearly every merger of publicly-traded companies with the intent of settling quickly for meaningless disclosures and attorneys' fees. *In re*

Walgreen Co. Stockholder Litig., 832 F.3d 718, 721 (7th Cir. 2016); Jill E. Fisch *et al.*, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 Tex. L. Rev. 557 (2015); Sheley/Frank at 779–80. Courts split on whether district courts have the discretion to find that spurious injunctions benefit the class. *Compare, e.g.*, *Subway Footlong*, 869 F.3d at 556 ("No class action settlement that yields zero benefits for the class should be approved") (quoting *Walgreen*, 832 F.3d at 724) *with In re Motor Fuel Temp. Sales Practices Litig.*, 872 F.3d 1094, 1118 (10th Cir. 2017) (no error for district court to ignore evidence that injunction would make class as a whole worse off economically),[2] *and Poertner*, 618 F. App'x 624. *See also Pearson v. NBTY, Inc.*, 772 F.3d 778, 784–86 (7th Cir. 2014) (Posner, J.) (expressing appropriate skepticism about value of "superfluous" labeling changes) ("*Pearson I*").

3. The most infamous tool to create the illusion of relief is the coupon settlement. The settlement awards the class expiring coupons or vouchers or credits to purchase defendants' goods or services; class counsel seeks a fee award based on the face value of the coupons; the parties know that the vast majority of the coupons will expire unused, costing the defendant nothing, while the redeemed coupons may be viewed by the defendant as simply a marketing cost. Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*,

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[2] *See generally* Lester Brickman, *Lawyer Barons* 348, 366 n.58 (2011) (calling *Motor Fuel* injunctive relief "economically worthless" and noting California Energy Commission's cost-benefit analysis found proposed injunctive relief "negative or a net cost to society"); Sheley/Frank at 795–800 (same).

18 Geo. J. Legal Ethics 1343 (2005); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445, 1448 (2005) (coupon redemption rates are typically less than 3%); *e.g.*, *Rouse v. Hennepin County*, 2016 WL 3211814 (D. Minn. Jun. 9, 2016) (only 45 vouchers redeemed in 283,000 member class, with class counsel receiving over fifty times as much as absent class members); Perry Cooper, *Charity Loses $700K Award After Complaining About Gift Cards (Corrected)*, BNA (Aug. 16, 2017) (describing *Hochstetler v. Pac. Gateway Concession, LLC*, No. 14-cv-04748 (N.D. Cal.), where class claimed only $700 worth of gift cards, while attorneys were paid $200,000). So a settlement might provide "$100 million" worth of coupons, supposedly rationalizing class counsel's $14 million fee request. But the class will typically actually receive less than $3 million in benefit—the same upside-down ratio as our obviously unacceptable hypothetical *Acme* settlement above.

4. Similar to the coupon settlement is a "claims-made" structure where defendants agree to make a large amount of money hypothetically *available* but pay out only on the claims that class members actually file, retaining the rest. Erichson at 889–93; Daniel Fisher, *Banner Ads Are A Joke In The Real World, But Not In Class-Action Land*, Forbes (Sep. 15, 2016). The defendant agrees to make an amount available to all of the many people who might be eligible to make a claim—say, $5 each for 10 million possible claimants in our *Acme* hypothetical. The settling parties then call this a $50 million settlement in press releases and court papers based on the amount "available," and the fee request is made on this basis. *E.g.*, Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Actions: Improving Investor Protection* 7 (2005)

(noting AT&T/Lucent consumer class settlement characterized as worth "$300 million," though class members received only $8 million from the claims process, while lawyers received over $80 million).

But the predictable result is that most class members go totally uncompensated because they don't file a claim: so predictable that third-party services offer to forecast the cost of a claims-made class-action settlement with actuarial certainty and assume 100% of the risk should payouts be higher. Ted Frank, *Settlement Insurance Shows Need for Court Skepticism in Class Actions*, OpenMarket blog (Aug. 31, 2016). "[A]mong defense counsel, low participation rates under claims-made class action settlements are both common knowledge and a selling point: class members recover—and a defendant pays—much less when class members opt in than when a defendant disburses funds directly to class members." *Gascho v. Global Fitness Holdings LLC*, 822 F.3d 269, 298–99 (6th Cir. 2016) (Clay, J., dissenting).

Claims rates are rarely disclosed, but Respondent Google's counsel of record's firm performed a study that suggested claims rates are typically in the single-digit percentages. Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 7–8 (Dec. 11, 2013). "Single-digit percentage" is probably an overstatement: one settlement administrator acknowledged that the median claims rate is far less than 1% in settlements without direct notice and without easy claims processes. *See, e.g.*, *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366 at *4 (N.D. Cal. Aug. 25, 2016) (citing authorities); *Pearson I*, 772 F.3d at 782 (same); Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, Reuters (May 9, 2014); Daniel Fisher,

Odds Of A Payoff In Consumer Class Action? Less Than A Straight Flush, Forbes (May 8, 2014). Even when the class is directly mailed, response rates "rarely exceed seven percent." *Sullivan v. DB Investments*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (*en banc*).

Courts have split on whether district courts are permitted—or even required—to value a settlement based on the hypothetical recovery. *Compare Pearson I*, 772 F.3d at 780–81, *and Allen v. Bedolla*, 787 F.3d 1218, 1224 n.4 (9th Cir. 2015), *with Gascho*, 822 F.3d at 283–88, *and Wilson v. EverBank, N.A.*, 2016 WL 457011, at *18 (S.D. Fla. Feb. 3, 2016) (*Poertner* forbids consideration of actual recovery). Because many courts honor the fiction that a claim that will never be made is as valuable as a check that is actually cashed, the resulting "class action math" allows the "fee collected by the plaintiffs' attorneys [to] outsize the benefit paid to consumers, an outcome that is increasingly more common." Jacob Gershman, *Value of Beck's Beer Settlement a Case Study in Class Action Math*, Wall St. J. (Oct. 22, 2015); *see also* Roger Parloff, *Should Plaintiffs Lawyers Get 94% of A Class Action Settlement?*, Fortune (Dec. 15, 2015).

5. No explicit collusion is needed to accomplish such results. All that is required to allow such gamesmanship are legal rules that do not forbid such settlements, and settling parties responding to the resulting incentives to benefit themselves at the expense of absent class members. Indeed, when legal rules permit such behavior, class attorneys would punish themselves if they sought a better settlement for their clients: every dollar reserved to the class is a dollar that will not be paid to class counsel. *Pearson I*, 772 F.3d at 783, 787. A rule requiring evidence of collusion before rejecting a class-action settlement—as the

Ninth Circuit required here—will green-light many abusive settlements. Erichson at 871; *Dry Max Pampers*, 724 F.3d at 717–18 (non-collusive adversarial process does not protect absent class members from class counsel's breach of fiduciary duty).

This case involves *cy pres*, another option in the toolkit to create the illusion of relief to minimize settlement cost to defendants while increasing attorneys' fees to class counsel, all at the expense of absent class members.

B. *Cy pres* is especially prone to abuse.

As the Chief Justice recognized in *Marek v. Lane*, *cy pres* settlements raise "fundamental concerns." 134 S. Ct. 8, 9 (2013) (Roberts, C.J., respecting denial of certiorari). Unfettered use of *cy pres* awards has been subject to substantial criticism by courts and scholars alike. There are at least six specific concerns regarding the type of *cy pres* award upheld in this case.

1. When courts award attorneys' fees based on the size of the *cy pres* fund rather than on the amount the class actually directly received, it "ensur[es] that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." Beisner at 13. Such awards create the illusion of relief that can "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." Redish at 661. As a result, class attorneys are financially indifferent as to whether a settlement is structured to compensate their clients or direct settlement proceeds to third parties. Where *cy pres* can be used to facilitate an early settlement with a profitable

fee award, class attorneys are encouraged to sell their putative clients down the river.

Cy pres can also be an enticing settlement feature for lawyers interested in promoting their own personal political or charitable preferences. It is not uncommon to see publicity photographs of attorneys handing oversized checks to their selected *cy pres* recipients or to see recipients issue public statements of gratitude to the class attorneys. *E.g.*, Florida Bar Foundation tweet (Jun. 8, 2018), archived at http://archive.li/h0YaV; *see also* Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs*, 163 U. Penn. L. Rev. 1463, 1484 (2015) ("Many law firms tout their cy pres victories as public service," citing example of self-promotional website of law firm with their *cy pres* recipients) ("Chasin"). Class attorneys have used *cy pres* awards to fund the development of future litigation and to make sizable donations to their *alma mater*. *See, e.g.*, Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (Dec. 3, 2007) (describing $5.1 million *cy pres* award to George Washington University School of Law to create a "Center for Competition Law").

In one case, the plaintiffs' attorney and an attorney from the *cy pres* recipient even jointly presented a continuing legal education program titled "Cy Pres for Reproductive Justice: Using Class Action Settlements to Get Money for the Movement," promoted with the hashtag "#CyPres4RJ," in which they advised participants on how non-profit organizations could best position themselves for *cy pres* awards. If/When/How Events (May 16, 2018), archived at http://archive.is/8VJ82. The program employed a case study exemplifying some of the problems inherent with allowing attorneys to dole out the class's damages to unrelated

third parties of their choosing. In *Ye v. Sephora USA, Inc.*, No. 3:14-cv-05237 (N.D. Cal.), plaintiffs alleged that Sephora discriminated against the class on the basis of race and national origin when Sephora deactivated the loyalty program associated with email addresses with certain Chinese domains. After fewer than 2000 class members filed claims for a capped recovery amount, the court awarded at class counsel's request the "substantial amount" that remained to the National Asian Pacific American Women's Forum, even after the plaintiffs' attorney admitted that the organization did little to address consumer rights (such as those at issue in the litigation) and instead tended to address issues such as "the pay gap, and adverse stereotypes against Asian American women that lead to abortion bans." *Id.*, Tr. of Proceedings 17 (May 30, 2017) (Dkt. 176).

"By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members." Redish at 650. Class attorneys are tempted to shirk their constitutional duties to adequately defend class members' legal rights because their compensation is no longer tied to such advocacy. *Id.* When courts treat a dollar of *cy pres* as equivalent to a dollar of direct class recovery, class attorneys' all-too-human predilection will prefer to fund their favorite charities or causes over thousands or millions of anonymous and likely ungrateful class members.

2. Defendants, facing no resistance from class attorneys, use *cy pres* awards to structure settlements to minimize costs or even benefit themselves. The *Lane v. Facebook* settlement, for example, directed all of its *cy pres* to a new charity "to be funded by Facebook,

partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel." 696 F.3d at 829, 835 (Kleinfeld, J., dissenting). Microsoft attempted to resolve an antitrust class action by directing a *cy pres* donation of computers and software to schools—which the court suggested was an attempt to flood the educational market with Microsoft products at the expense of then-market leader Apple. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 528 (D. Md. 2002).

Google and Facebook have directed *cy pres* awards in other privacy-breach cases to the Electronic Frontier Foundation, a nonprofit that "is often an ally of Google and Facebook when it comes to staving off liability to rights holders over user-generated infringing content" and on other public policy issues. Roger Parloff, *Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting criticism in *Google Buzz* case that *cy pres* awards were steered to organizations otherwise paid by Google to lobby or consult for the company). At the same time, those companies have apparently vetoed awards to privacy-focused nonprofits that they view as "too aggressively devoted to combatting the wrongs that allegedly harmed the class." *Id.* Respondent Google, in particular, has been sharply criticized for using its funding decisions to influence the research and advocacy of nonprofits. *See* Kenneth P. Vogel, *Google Critic Ousted From Think Tank Funded by the Tech Giant*, N.Y. Times (Aug. 30, 2017).

In another recent Google *cy pres* settlement, the beneficiaries substantially overlapped with the Google-related beneficiaries in this case. *In re Google Inc. Cookie Litig.*, 2017 WL 446121 (D. Del. Feb. 2,

2017), *appeal pending*, No. 17-1480 (3d Cir.). One small difference between the two settlements was that that settlement benefited Public Counsel, a charity where the *Google Cookie* class counsel was chairman of the board, instead of Chicago-Kent Law School, an *alma mater* of class counsel in this case.

Even if class-action defendants like Google and Facebook ultimately receive no direct benefit from *cy pres* awards, they still are able to take credit for their charity. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) ("it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"). And defendants have reasons to prefer giving money to *cy pres* to reduce the chances of having their customers learn that they have paid money to resolve claims of wrongdoing. Russell M. Gold, *Compensation's Role in Deterrence*, 91 Notre Dame L. Rev. 1997 (2016).

In some cases, a *cy pres* award may simply redirect money that the defendant would have given to a charity anyway, creating the illusion of relief when all that the settlement changes is the labeling of accounting entries. *Dennis*, 697 F.3d at 867–68 (*cy pres* awards that overlap with charitable gifts to which the defendant has already committed are a "paper tiger" in terms of deterrence). One *cy pres* recipient here, for example, is the Stanford Center for Internet and Society, to which Google has contributed millions of dollars in donations and whose scholars regularly support Google's positions on a variety of policy issues, including privacy litigation. *See* Jeffrey Toobin, *The Solace of Oblivion*, The New Yorker (Sep. 29, 2014); John Hechinger and Rebecca Buckman, *The Golden Touch of Stanford's President*, Wall St. J. (Feb.

24, 2007) ("'It might as well be the Google Center.'" (quoting director of Dartmouth's Ethics Institute)). *Cy pres* awards to organizations that Google already donates to are the functional equivalent of the much-criticized reversion clause where unclaimed class funds revert to defendant. *Cf. Pearson I*, 772 F.3d at 786–87 (finding no "justification" for reversion clause).

3. As in this case, *cy pres* awards typically fail to redress class members' alleged injuries for which they are waiving their rights. The Seventh Circuit stated the problem plainly: "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). "[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members." *Klier*, 658 F.3d at 474 (citing *ALI Principles* § 3.07 cmt. (b)). This would unquestionably be the case had class members pursued individual litigation under the same substantive law. Rule 23 cannot operate to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Neither lower courts nor class attorneys should have the discretion to distribute that property to third parties before class members have been compensated and, more generally, to certify classes structured so as to stymie or preclude class members' recovery. *Cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 (1989) ("There is no constitutional principle that gives one person the right to give another's property to a third party.").

The problem is compounded the further away from "next best" the *cy pres* award is. For example, a settlement of securities litigation proposed giving bank shareholder class members' money to a charity that sues banks over foreclosures. *In re Citigroup*

Securities Litig., 199 F. Supp. 3d 845, 852–53 (S.D.N.Y. 2016). A settlement over Pfizer's marketing of the diabetes drug Rezulin donated $2 million to Lubavitch Chabad of Illinois. Ameet Sachdev, *Charities Reaping Lawsuit Dividends*, Chi. Tribune (Sep. 9, 2007).

Even worse was a settlement resolving challenges to Google's unauthorized disclosure of its users' email contacts when it launched its "Buzz" social network. Class members—some of whom had suffered disclosures that aided stalkers, jeopardized confidential journalist sources, or hinted at affairs—received no part of the $8.5 million settlement, while class counsel received over $2 million and the remainder was divided among fourteen charities, including the local YMCA and the Brookings Institution—and, by the *sua sponte* order of the district court, a center at a university where the district court judge taught as a visiting law professor.[3] *In re Google Buzz Privacy Litig.*, 2011 WL 7460099, at *3 (N.D. Cal. Jun. 2, 2011); Pamela A. MacLean, *Competing for Leftovers*, California Lawyer (Sep. 2, 2011); *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 687 F. Supp. 2d 1 (D.P.R. 2010) (proceeds from hotel fire litigation paid

[3] While not present in this case, *cy pres* aimed at local charities at the expense of a national class is also a persistent problem. *Compare Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989), *with, e.g., Perkins v. Am. Nat'l Ins. Co.*, 2012 WL 2839788 (M.D. Ga. July 10, 2012), *and In re Easysaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013) ($3 million to local San Diego schools including *alma mater* of counsel for both parties), *rev'd on other grounds*, 599 F. App'x 274 (9th Cir. 2015), *settlement approved again on remand*, 2016 WL 4191048, *appeal pending*, No. 16-56307 (9th Cir.); *see generally* Sam Yospe, *Note, Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1030–31.

as *cy pres* to Animal Legal Defense Fund); *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414–15 (S.D.N.Y. 2009) (collecting numerous cases where *cy pres* awards "stray[ed] far from the 'next best use'").

4. Before succumbing to the administrative convenience of *cy pres* settlements in more recent decisions, the Second Circuit expressed concern that the availability of *cy pres* relief would permit otherwise unthinkable class certifications and would "induce plaintiffs to pursue doubtful class claims for astronomical amounts and thereby generate leverage and pressure on defendants to settle." *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987) (cleaned up); *see also Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124–25, 1129 (9th Cir. 2017) (because *cy pres* remedies are available, class proponents are not required to "demonstrate that there is an administratively feasible way to determine who is in the class"); *cf. also McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–33 (2d Cir. 2008). In this way, *cy pres* incentivizes both the bringing of otherwise unprofitable "strike suits" that would be infeasible to litigate due to unmanageability or questionable merit and their settlement on terms mutually agreeable to class counsel and the defendant. Redish at 639–40; *cf. also Shady Grove Orthopedic Assoc. v. Allstate Ins.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (noting that class certification creates "pressure on the defendant to settle even unmeritorious claims"). "Indeed, in many class actions it is solely the use of cy pres that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys' fees and to make the entire class proceeding seemingly worthwhile." Redish at 621.

For example, the Seventh Circuit in *Walgreen* and *Subway Footlong* rejected illusory injunctive-relief settlements of meritless litigation that provided no material benefit to the class. "The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket." *Walgreen*, 832 F.3d at 724; *accord Subway Footlong*, 869 F.3d at 553, 556. But the Ninth Circuit's rule of decision, if affirmed by this Court, would create a loophole for unscrupulous attorneys to resume the "racket" condemned by the Seventh Circuit. All that would be required to transform the *Walgreen* and *Subway Footlong* settlements into appeal-proof paychecks for class counsel in the Ninth Circuit is the sort of illusory *cy pres* settlement in *Lane*. Merger strike suits "substantially" declined after *Walgreen* and a similar Delaware state case. Caleb Hannan, *This Lawyer Is Making It Less Profitable to Sue When Companies Merge*, Bloomberg Businessweek (Aug. 2, 2017). If class counsel can game the system with economically equivalent *cy pres* settlements, such extortionate suits can be expected to return to pre-2016 levels.

5. Many *cy pres* recipients, including some in this case, Pet. App. 131, have political valence sympathetic to the preferences of class counsel or the defendant, but contrary or offensive to a substantial proportion, or even the majority, of class members. *E.g.*, *Citigroup*, 199 F. Supp. 3d at 853–54; *cf. also Motor Fuel Temp.*, 872 F.3d at 1113–14 (affirming settlement that established fund for class counsel to use for political lobbying). Requiring class members to surrender their rights to "subsidize speech by a third party that he or she does not wish to support" raises serious First Amendment concerns. *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). Settlements' implementations of

the Rule 23(b)(3) opt-out right usually have requirements that would impermissibly burden class members under this Court's precedents, and rarely have any effect on class counsel's ability to transform the class-action procedure into a political funding mechanism. Moreover, silence is not consent. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312–22 (2012).

6. Finally, *cy pres* awards often create the appearance or reality of judicial conflicts of interest, as in the *Google Buzz* settlement discussed above. New York University's Samuel Issacharoff, Reporter for ALI's *Principles of the Law of Aggregate Litigation*, has described *cy pres* relief as "an invitation to wild corruption of the judicial process." Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007) ("Liptak, *Doling*"). Charities are increasingly lobbying judges for a cut of the proceeds in class-action settlements. *Id.* And "[a]s part of their effort to secure judicial approval of proposed settlements, the parties often include a *cy pres* award that benefits a charity with which the judge or his or her family is affiliated." Beisner at 13; *see also* Erichson at 885.

These tactics can create a conflict between the interests of the presiding judge and those of class members, who would be better served by direct compensation. *Klier*, 658 F.3d at 482 (Jones, C.J., concurring) ("[D]istrict courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations."); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 180 n.16 (3d Cir. 2013). "[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety." *Bear, Stearns*,

626 F. Supp. 2d at 415; *see, e.g.*, *Perkins*, 2012 WL 2839788 (approving $1.5 million *cy pres* award to the presiding judge's *alma mater*).

Indeed, it is even conceivable that "parties can effectively judge-shop by selecting *cy pres* recipients that would force recusal." Ted Frank, Fraley v. Facebook *update*, Point of Law (July 12, 2012) (noting district judge recusal for unspecified reasons after parties proposed *cy pres* settlement that named charitable beneficiaries affiliated with judge and her husband); *but see Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038, 1042 (9th Cir. 2011) (permitting parties to select judge's spouse's charity as *cy pres* recipient without requiring recusal).

More generally, an open-ended *cy pres* doctrine is fundamentally incompatible with the judicial role, which "is limited to providing relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Tyson Foods Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (cleaned up). If it is untenable to compensate non-injured class members, it is all the more untenable to compensate non-injured third parties, who do not even fall within the zone of risk of injury.

> Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more "deserving" of limited funds than others; and we do not have the institutional resources and competencies to monitor that "grantees" abide by the conditions we or the settlement agreements set.

In re Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006); *accord Keepseagle v. Perdue*, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (Brown, J., dissenting). Yet those things are exactly what federal judges are asked to do when faced with a proposed *cy pres* settlement.

C. Rule 23 standards that align class counsel's interests with those of the class are the best way to prevent conflicts of interest in settlements and require rejection of the settlement here.

1. Any settlement, like this one, that provides no direct benefit to the class, cannot be approved. "Because the settlement yields fees for class counsel and zero benefits for the class, the class should not have been certified and the settlement should not have been approved." *Subway Footlong*, 869 F.3d at 557 (cleaned up).

The solution to the problems created by *cy pres* settlements and by class-action settlement conflicts of interest in general is a simple proportionality rule that aligns class counsel's incentives with the class's interests: a settlement that compromises a class's claims, but seeks to pay class counsel an amount disproportionate with the actual and direct benefit to the class, is not fair or reasonable under Rule 23(e). Any other rule will create perverse incentives to structure a settlement allocation to favor class counsel and the defendant at the expense of the class.

The "'ratio that is relevant'" when assessing a fee award "'is the ratio of (1) the fee to (2) the fee plus what the class members received.'" *Pearson I*, 772 F.3d at 781 (quoting *Redman v. RadioShack Corp.*,

768 F.3d 622, 630 (7th Cir. 2014)). That approach excludes settlement funds dissipated through *cy pres* awards from the calculation, and thereby "gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class, rather than to connive with the defendant in formulating claims-filing procedures that discourage filing and so reduce the benefit to the class"—and, as in this case, where the settling parties made it literally impossible to file claims, increase the benefit available to *cy pres* recipients. *Id.*

Pearson I did precisely this, reversing a district court's approval of a settlement where class counsel received $2.1 million, the class received $865 thousand, and $1.13 million went to *cy pres*. (There was also an injunction that *Pearson I* thought superfluous.) *Cy pres* "did not benefit the class" and could not be included in determining the reasonableness of the settlement or fee request. 772 F.3d at 784. Even though there were over 12 million class members, and the settlement as a whole provided only pennies per class member, a *cy pres* beneficiary can "receive money intended to compensate victims of consumer fraud only if it's infeasible to provide that compensation to the victims—which has not been demonstrated" because it was conceivably possible to simplify the claims process, improve notice, or make a direct distribution to class members. *Id.*

This settlement is worse than the one whose approval was reversed in *Pearson I*: class counsel received a similar Rule 23(h) award, but the class received $0 instead of $865 thousand. The injunctive relief involved no change in the practices alleged to be

illegal, and involved the sort of "superfluous" disclosure criticized by *Pearson I* and *Walgreen*.[4] To top it all off, the *cy pres* beneficiaries had ties to class counsel or defendant or both. Under Petitioners' proposed proportionality rule, the $2 million to $0 ratio means that the settlement in this case was not fair or reasonable as a matter of law and must be rejected.

Throughout this case, Google has argued that the settlement is "adequate" because the class's claims are low in merit or because damages are remote. *E.g.*, Google Br. in Opp. 11. But this is beside the point: that a settlement is adequate does not mean it is fair and reasonable. Perhaps the class deserves no more than a peppercorn in consideration for releasing their claims, but Google was willing to pay millions of dollars to settle the suit. If that is a windfall because Google overpaid, the fiduciary duty of class counsel, plus Rule 23(e)'s fairness and reasonableness requirements require class counsel to share that windfall with the class. Any other result would have the perverse effect of incentivizing low-merit class actions: the lower the quality of the suit, the less the obligation of class counsel to share settlement proceeds with the class. *Compare, e.g.*, *Dry Max Pampers*, 724 F.3d 713, *with id.* at 723 (Cole, J., dissenting).

2. Class counsel will respond to court-imposed incentives of the proportionality rule to "maximize the settlement benefits actually received by the class."

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[4] Injunctive relief can provide direct, actual class benefit. For example, the settlement in *In re Volkswagen "Clean Diesel" Litig.* provided for replacement or repair of class members' vehicles. 2016 WL 6248426 (N.D. Cal. Oct. 25, 2016). This case does not raise the issue of how to value such injunctive relief when assessing a reasonable fee.

Pearson I, 772 F.3d at 781. That is more than abstract theory; it is borne out by experience:

- While *Baby Products* left open the possibility of approving *cy pres* settlements, it reversed a settlement approval and ordered the district court to consider whether class counsel had adequately prioritized direct recovery in both terms of settlement approval and the fee award. 708 F.3d at 178. On remand, the parties arranged for direct distribution of settlement proceeds, and paid an additional $14.45 million to over one million class members—money the parties initially directed to *cy pres* before a successful objection led to an "exponential increase" in class recovery. *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660 (E.D. Pa. 2015).
- In *Fraley v. Facebook*, the district court refused preliminary approval of an all-*cy pres* $20 million settlement, though the class was even larger than the one here, some 150 million in size. Though the settlement fund was less than $0.14 per capita, the parties were, at the behest of the district court, able to create a claims process that distributed $15/claimant to over 600,000 claimants. 966 F. Supp. 2d 939.
- After objection to a claims-made settlement in a consumer class action over aspirin labeling where the vast majority of funds would have gone to *cy pres*, the parties used subpoenaed third-party

retailer data to identify over a million class members (instead of the 18,938 who would have been paid $5 each in the original claims-made structure), and paid an additional $5.84 million to the class. *In re Bayer Corp. Litig.*, No. 09-md-2023, 2013 WL 12353998, at *3 (E.D.N.Y. Nov. 8, 2013); *id.* Dkt. 218-1.

- A similar successful objection to residual *cy pres* in an antitrust settlement increased class recovery from $2.2 million to $13.7 million. *Pecover v. Electronic Arts, Inc.*, No. 08-cv-2820, 2013 WL 12121865 (N.D. Cal. May 30, 2013); *id.* Dkt. 466.
- On remand in *Pearson I*, the parties renegotiated to give class members at least $4 million more in cash. Settlement ¶¶7–8, No. 11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2015).

In short, as *Pearson I* reasoned, if courts make lawyers direct money to clients in order to get paid, that is *exactly* what happens. Alison Frankel, *By Restricting Charity Deals, Appeals Courts Improve Class Actions*, Reuters (Jan. 12, 2015) ("Frankel, *Restricting*"). After appellate courts reject disproportionate settlements, class counsel in colorable class actions like *Pearson I* and *Baby Products* come up with more appropriate settlements; class counsel in meritless class actions like *Dry Max Pampers*, *Walgreen*, and *Subway Footlong* slink away and dismiss their cases. Whether one thinks the main purpose of class actions is to facilitate compensation or to deter bad behavior by defendants, everyone should want the class-action system to promote good cases and discourage bad ones.

3. A common refrain in support of *cy pres* is that it would be too difficult to distribute small sums to class members. But that argument disregards the typically low claims rate in consumer and privacy class-action settlements. If the claims rate in the *Gaos* class was similar to that in *Fraley*, each claimant would receive $7.

Carrier also approved a privacy class-action settlement that distributed a net settlement fund of $5.9 million amongst a 30-million-member class. As *Carrier* observed, "if all 30 million people were to make claims, then each person would get approximately 20 cents. ... However, that is not what actually happens under the settlement." 2016 WL 4474366 at *2. The *Carrier* settlement funds were distributed *pro rata* to eligible claimants, with a contingent *cy pres* provision only if distribution proved "economically unfeasible." *Id.* Ultimately, only 42,577 class members (0.14% of the class) filed claims, resulting in individual payments of well over $100. Such a low claims rate is customary. *Id.* at *4; *see* discussion in Section I.A.4 above. Even if the *Carrier* class size had been five times larger, and the claims rate five times higher, claiming class members still would have received over $5.50 each.

Even if claims rates were abnormally high such that it would be prohibitively expensive to distribute money to every claimant, random lottery distribution to a percentage of claiming class members would successfully distribute the fund. Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 Geo. Wash. L. Rev. 1065 (2011). As arbitrary as that sounds, it is less arbitrary to distribute $5 million of settlement money to 50,000 or 1,000,000 class members than nothing to

class members and $5 million to third-party charities affiliated with class counsel and Google, and no more arbitrary than the typical claims-made settlement that leaves over 99% of the class uncompensated.

4. Below, Google complained that it would be less just to distribute proceeds directly to a small percentage of the class than to provide indirect benefits to the entire class. But this argument proves too much. As discussed in Section I.A.4, nearly every consumer class-action settlement leaves over 90%, and often over 99%, of the class uncompensated. Google's argument would imply that it is preferable for virtually every consumer class-action settlement to refuse to distribute any funds to the class and be an all-*cy pres* settlement, essentially destroying the village in order to save it. But no appellate court has ever so much as implied that, so long as some class members go uncompensated, it would be unfair to directly compensate *any* class members. Trial courts engage in "judicially impermissible misappropriation" when they conclude that class members are less deserving than a charity. *In re BankAmerica Corp. Securities Litig.*, 775 F.3d 1060, 1065 (8th Cir. 2015).

5. Respondents might argue that Petitioner's proposed rule is unfair because it does not compensate class counsel for achieving larger societal benefits. But that argument ignores class counsel's fiduciary duty to his or her clients.

> The general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship .... Unless the principal consents, the general fiduciary principle ... also requires that an agent refrain from

> using the agent's position or the principal's property to benefit the agent or a third party.

American Law Institute, *Restatement (Third) of Agency* § 8.01, cmt. (b) (2012).

This contrasts with civil rights and discrimination cases where "vindication of important [civil] rights" proceed "under a private attorney general theory" "even when large sums of money are not at stake." *Farrar v. Hobby*, 506 U.S. 103, 121–22 (1992) (O'Connor, J., concurring). In contrast, private-law class actions for consumer injury or statutory damages *do* reflect rights that are pecuniary in nature, and Rule 23 decisions in those cases should reflect that fees—and settlements designed to provide fees—"depend on obtaining substantial monetary relief." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (plurality opinion of Brennan, J.). The Court may thus reasonably decide here or in another case to limit the extent to which Petitioners' proposed proportionality rule applies to class settlements of 42 U.S.C. § 1983 and other civil rights actions.

This Court's fee-shifting jurisprudence, for better or worse, imposes a number of protections against abusive civil-rights litigation generally not present in private-law class actions today. Multipliers of lodestar are common in fee awards in private-law class-action settlements (including this one, Pet. App. 56), but are only available under federal fee-shifting statutes providing for a "reasonable" fee in extraordinary circumstances. *Perdue v. Kenny A.*, 559 U.S. 542 (2010).[5] This settlement would pay class counsel

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[5] Indeed, class counsel received a higher multiplier in this case by settling it than they would have been entitled under *Kenny A.* for winning it outright.

twice their lodestar, but did not give plaintiffs even so much as "the moral satisfaction of knowing that a federal court concluded that their rights had been violated in some unspecified way." *Farrar*, 506 U.S. at 114 (cleaned up). In contrast, in 42 U.S.C. § 1988 cases, there must be *some* private relief before the public benefit to non-parties can justify an award of fees. *E.g., id.*; *Hewitt v. Helms*, 482 U.S. 755 (1987). Section 1988 fee applicants cannot obtain compensation for work related to unsuccessful claims in the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Nor can they claim credit for actions voluntarily undertaken by defendants. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598 (2001). In 42 U.S.C. § 1983 lawsuits, qualified immunity protects defendants from damages against all but clearly established violations of law. *E.g., District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). That jurisprudence gives § 1983 defendants leverage to protect themselves against meritless litigation that private-law defendants do not have. The topsy-turvy result in the Ninth Circuit is that it is more lucrative—and often less risky—to bring and quickly settle a low-merit private-law class action that returns little or nothing to the class than it is to litigate a fully meritorious civil rights claim. Petitioners' proposed proportionality rule would begin to restore the balance intended by Congress in passing 42 U.S.C. § 1988.

An arm's-length settlement reflects a case's settlement value, be that the expected value of fully litigating the case (the probability of success multiplied by the potential recovery), the value to the defendant of avoiding the financial and publicity burden of continuing litigation, or some combination of the two. When the parties allocate that settlement value amongst the

class, the class counsel, and non-class members, every dollar going to "larger societal benefits" is a dollar that isn't going to class members. Notwithstanding the preferences of some academics, Rule 23 is merely a procedural joinder device. *Shady Grove*, 559 U.S. at 408 (plurality opinion of Scalia, J.) (class action is a "species" of joinder). It does not expand substantive rights and class attorneys in private-law cases are not deputized private attorneys general. *Microsoft Corp. v. Baker*, 137 S. Ct. at 1717 (Thomas, J., concurring). Instead, class attorneys are attorneys with clients and fiduciary duties to those clients. *Dry Max Pampers*, 724 F.3d at 718. Class members are supposed to be the "foremost beneficiaries" of class settlements. *Baby Products*, 708 F.3d at 179. The rules for determining the reasonableness of fees and settlements under Rule 23 should reflect that, and not reward breaches of fiduciary duty.

6. The reason a rule of decision applying to all Rule 23 settlements is preferable to a narrower rule applying only to *cy pres* settlements is because the conflicts of interest that lead to *cy pres* abuses do not go away if only *cy pres* is barred or limited. Just as parties could get around bars on spurious injunctive relief settlements of low-merit class actions by structuring them as *cy pres* settlements (Section I.B.4, above), parties will be able to use other tools in the abusive-settlement toolbox (Section I.A, above) to construct functionally economically equivalent settlements with the same self-dealing and lack of benefit to class members.

A decision applying only to *cy pres* settlements merely continues the game of whack-a-mole, where settling parties move on to the next tactic to self-deal at the expense of class members. *Cf.* Rodriguez, *Era*

(suggesting that *cy pres* settlements rose in popularity in response to increased restrictions on coupon settlements).

II. The Ninth Circuit's holdings create serious perverse incentives and should be rejected.

In the alternative, if the Court declines to adopt a ruling applying to all Rule 23 settlements, it should still reverse the Ninth Circuit's judgment, which exacerbates the conflict-of-interest problem in class actions. A bright-line rule is required because of "the substantial history of district courts ignoring and resisting circuit court *cy pres* concerns and rulings in class action cases." *BankAmerica Corp.*, 775 F.3d at 1064; *cf. also* Hillary A. Sale, *Judges Who Settle*, 89 Wash. U. L. Rev. 377, 411 (2011). And here, the district court spoke of a desire to reject the settlement, but felt constrained by Ninth Circuit law to approve it.

A. *Cy pres* is a breach of fiduciary duty when it is feasible to distribute settlement funds to some class members.

Cy pres awards are inappropriate in class-action settlements if it is feasible to distribute cash to *any* absent class members. Under the standard set by the Ninth Circuit, it is not considered "feasible" to provide any compensation to class members when it would be infeasible to compensate *all of them*. The result is that, by defining a sufficiently large (or unascertainable) class, class counsel can ensure that direct compensation is *never* required, opening the door to a *cy pres*-only settlement that denies class members any real relief. Most other courts to consider the question

hold that "because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible only when it is not feasible to make further distributions to class members" who have not yet been fully compensated with what the complaint requested. *BankAmerica Corp.*, 775 F.3d at 1064 (cleaned up); *accord Klier*, 658 F.3d at 475; *Pearson I*, 772 F.3d at 784; *Ira Holtzman, CPA v. Turza*, 728 F.3d 682, 689 (7th Cir. 2013) (Easterbrook, C.J.). That a class counsel claims identifying class members would be "difficult and costly" is insufficient to justify *cy pres*. *BankAmerica Corp.*, 775 F.3d at 1064. As discussed in Section I.C.3, it is nearly always feasible to distribute settlement funds to *some* class members.

The Ninth Circuit's definition of feasibility would permit *almost every consumer class-action settlement* to completely ignore payments to class members. The vast majority of consumer and privacy class-action settlements are for less than a dollar or two per class member. The settlement of a 2015 data breach of insurer Anthem was for a record $115 million—but after attorneys' fees and settlement administration costs, there would be only about $0.65 per class member for the 79-million member class. Editorial Board, *The Anthem Class-Action Con*, Wall St. J. (Feb. 11, 2018). The Ninth Circuit's test would have permitted the parties to divert all of that money to *cy pres*.

Similarly, the Ninth Circuit recently affirmed a settlement of an antitrust suit that established a $27 million gross fund and paid class members about $14.1 million net in cash and gift cards to 35 million class members. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015). $27 million

divided by 35 million class members is less than 80 cents a class member. Under the rationale of the decision below, it would not be economically viable for the *Online DVD* parties to distribute money to the class. But they did. It was feasible through a *pro rata* claims process that ultimately paid 1.1 million class members a little over $12 each. An affirmance here would permit the settling parties in a similar case to give zero dollars to the class and donate the entire $14.1 million to their favorite charities.[6]

Even the $135,400,000 settlement fund in *Sullivan v. DB Investments* would qualify as "non-distributable" under the Ninth Circuit's approach. After attorneys' fees, there would be less than $1-$2/class member left for each of the 67 to 117 million consumer subclass members. 667 F.3d at 290.

Cy pres to an outside beneficiary (or better yet, escheat under 28 U.S.C. § 2042) may be appropriate as administrative convenience when, in a large class action, there is a five-digit sum left over from the settlement fund because of uncashed checks. But class attorneys owe a fiduciary duty to class members. Section I.C.5, above. Thus, *cy pres* distribution when distribution to some of the class is possible is "contrary to the interests" of the class. *BankAmerica Corp.*, 775 F.3d at 1068. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either."

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[6] As it was, the settling parties attempted to divert over $2 million in uncashed checks to charities such as the Geena Davis Institute on Gender in Media; an objection resulted in that money being distributed to the class. *In re Online DVD-Rental Antitrust Litig.*, No. 09-md-2029, Dkt. 659, 661, 668 (N.D. Cal. 2016).

Baby Products, 708 F.3d at 178. It should be "unfathomable that the class's lawyer would try to sabotage the recovery of some of his clients." *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015) (Easterbrook, J.). The ruling below both ignores class counsel's fiduciary duty to the class, and incorrectly holds there's no reason to require a cash distribution if class counsel prefers *cy pres*. These holdings are both error, and create perverse incentives. Section I.B, above.

There was no factual dispute in this case that it was feasible to distribute the settlement fund to some class members. Pet. App. 120–123. The Ninth Circuit simply refused to require consideration of possible alternatives, Pet. App. 9–10, and this was error.

The Chief Justice's expression of interest in *cy pres* in *Marek* deterred a number of potential *cy pres* settlements. Frankel, *Restricting*. But if the Court affirms the Ninth Circuit's permissive standard, we can expect a boom in *cy pres* settlements nationwide, even for settlements the size of *Sullivan* or *Anthem*. Indeed, Google in another class action has just filed under seal a settlement with *cy pres* recipients likely overlapping the ones here, with proceedings stayed pending the resolution of this case. *In re Google Street View Elec. Commc'ns Litig.*, No. 3:10-md-2184 Dkt. 154 (N.D. Cal. Jun. 15, 2018).

B. A court cannot certify a settlement class if the settlement cannot provide any direct benefit to class members.

Even if one credits the *ipse dixit* claims of Respondents that it is somehow impossible to make any distribution to the class, that simply suggests that it was error to certify this settlement class. There

is no benefit accruing to class members in this settlement that is not equally accruing to non-class members and opt-outs. In other words, class members are receiving no marginal benefit in consideration for the waiver of their claims. A faithful fiduciary agent of the class would choose to opt out every single class member so that class members would obtain the settlement benefit while retaining their right to sue; only a breach of that fiduciary duty results in the waiver of the class's claims. (And here, unlike in, say, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 333 (2013), a meritorious individual action is not negative-value given the statutory damages and entitlement to attorneys' fees. 18 U.S.C. § 2707(c).)

In short, the class action is not "superior to other available methods for fairly and efficiently adjudicating the controversy" because every single class member is worse off than if they opted out and reserved their claims to litigate individually. Rule 23(b)(3) is not satisfied, and it is error to certify the class.

The Second Circuit affirmed a district court's rejection of certification under Rules 23(b)(3) and (a)(4) where the costs of litigation "would be disproportionate to the benefit accruing to the class members"—a 16.5-cent payment. *Gallego v. Northland Group*, 814 F.3d 123, 129–30 (2d Cir. 2016). It "appeared that the intended result of the settlement was 'mass indifference, a few profiteers, and a quick fee to clever lawyers,'" and the district court was correct to refuse to certify. *Id.* If one is to credit Respondents' claims that it was never feasible to compensate the class, then this was litigation brought primarily to benefit the attorneys and their favored

third-party beneficiaries, and is an abuse of the class-action system.

Faced with a similar holding from a district court, the Seventh Circuit held that Rule 23(b)(3) is the wrong paradigm to object to class certification, but nonetheless affirmed and rejected class certification under Rule 23(a)(4). "A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred" when no incremental relief to the class was possible "is not adequately protecting the class members' interests." *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 751–52 (7th Cir. 2011) (Easterbrook, J.); *accord Subway Footlong*, 869 F.3d at 557; *Walgreen*, 832 F.3d at 724.

Whether characterized as a (b)(3) issue or an (a)(4) issue, if Respondents persist in asserting that any distribution to the class is infeasible, then the settlement class should not be certified.

C. When selecting *cy pres* recipients, class counsel must avoid even the appearance of impropriety and disclose any conflicts.

Because class counsel owes a fiduciary duty to the class—and because absent class members have little or no say who represents them—courts should not allow even the appearance of divided loyalties or "potentially conflicting interests." *Hansberry v. Lee*, 311 U.S. 32, 44 (1940) (class representatives); *cf. also Young v. United States ex rel. Vuitton et Fils SA*, 481 U.S. 787 (1987) (prosecutors). The distribution of *cy pres* funds to class counsel's *alma mater* instead of the class cannot stand—especially when there was no claim that that decision was merely a coincidence, and especially where the class attorneys hid their

relationship with the beneficiary from the court and failed to disclose it in the class notice.

The district court's reasoning for finding no conflict of interest was a *non sequitur*. Pet. App. 59–60. True, the decision to donate to Chicago-Kent was not made solely by Chicago-Kent alumni, but by the district court's reasoning, it would be appropriate to designate *cy pres* to a charity run by a class attorney's husband, because not everyone negotiating the deal was married to the same man.

The Ninth Circuit's requirement that class members must show fraud or collusion before they can undo such a blatant undisclosed conflict has the additional problem of creating unnecessary collateral litigation. If *cy pres* is permissible, and settling parties have no obligation to disclose prior relationships, but class members have the affirmative obligation of demonstrating fraud or collusion, then the only way class members can protect themselves is through engaging in expensive discovery on the attorneys and the parties in every *cy pres* settlement. This unfairly burdens absent class members and the judicial system faced with the inevitable motions practice and collateral discovery disputes. An "agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency." *United States v. Carter*, 217 U.S. 286, 305–06 (1910).

The better rule is to require settling parties to have the burden to demonstrate that neither the court nor any "party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient

was made on the merits." *ALI Principles* § 3.07, cmt. (b). "Conflict of interest" refers to the *risk* of *potential* impairment. The Ninth Circuit's holding that a selection where the conflict exists might be hypothetically proper because of "compromise" and the supposed sufficiency of the programs selected thus misses the point. Even if there were no reason to doubt evidence demonstrating a proper selection and the attorneys' claim to have acted in good faith, "this is irrelevant to the appearance of impropriety." *Wright v. United States*, 732 F.2d 1048, 1055 (2d Cir. 1984) (Friendly, J.); *accord Wendt v. Fischer*, 243 N.Y. 439, 443–44 (1926) (Cardozo, J.); *Meinhard v. Salmon*, 249 N.Y. 458, 465, 467–68 (1928) (Cardozo, J.). The "'appearance' of divided loyalties refers to differing and potentially conflicting interests and is not limited to instances manifesting such conflict." *Keyes v. Pacific Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995).

Distribution to an *alma mater* is the archetypical example of a conflict, identified as a problem in *cy pres* years before this settlement was executed. Liptak, *Doling*; George Krueger & Judd Serotta, *Our Class-Action System Is Unconstitutional*, Wall St. J. (Aug. 6, 2008); *Bear, Stearns*, 626 F. Supp. 2d at 415; *see also* Erichson at 885; Chasin at 1473. The Ninth Circuit's holding must be rejected.

D. At a minimum, Rule 23(h) fees should entirely or substantially discount the value of *cy pres* to better align class counsel's incentives and deter abusive litigation.

"The class benefit conferred by cy pres payments is indirect and attenuated. That makes it inappropriate to value cy pres on a dollar-for-dollar basis." *In re Heartland Payment Sys., Inc. Customer Data Sec.*

Breach Litig., 851 F. Supp. 2d 1040, 1077 (S.D. Tex. 2012) (Rosenthal, J.). The Ninth Circuit's dollar-for-dollar valuation of *cy pres* for the purposes of calculating attorneys' fees leads to perverse incentives, because class attorneys will generally prefer donations to their favorite charities over diffuse distributions to absent class members. Section I.B.1, above. If *cy pres* is not to be valued at zero, as *Pearson I* holds, it should at least be heavily discounted in the fee calculation to better align incentives.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

THEODORE H. FRANK, ET AL.,
Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(b)(3) permits representatives to maintain a class action where so doing "is superior to other available methods for fairly and efficiently adjudicating the controversy," and Rule 23(e)(2) requires that a settlement that binds class members must be "fair, reasonable, and adequate." The question presented is:

Whether, or in what circumstances, a class-action settlement that provides a *cy pres* award of class-action proceeds but no direct relief to class members comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate" and supports class certification.

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IN THE

Supreme Court of the United States

NO. 17-961

THEODORE H. FRANK, ET AL.,

Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR CLASS RESPONDENTS

INTRODUCTION

This case concerns the circumstances in which Fed. R. Civ. P. 23(e) permits settlement proceeds to be distributed to third parties to perform work that benefits class members. Such distributions are referred to as "*cy pres*" distributions because they resemble the equitable doctrine that allows funds in trust to be put to their next-best use when the original purpose becomes infeasible. In the class-action context, *cy pres* distributions are rare. They are permitted only where payment of the funds to class members is infeasible.

Petitioners propose a judicial ban on such distributions or, alternatively, specific rules governing attorney's fees (rules Congress imposed in other contexts but declined to impose here). Petitioners, however, find no support in the text, structure, or history of Rule 23 or any relevant law. Petitioners instead offer a dissertation—largely based on dubious anecdotes—assailing class actions generally. Their arguments reduce to accusations that the bar will engage in "self-deal[ing]," "subterfuge," "gamesmanship," and "gimmicks" that "sell their putative clients down the river." And they accuse the district courts charged with implementing Rule 23 of "ignoring and resisting circuit court" precedent to "permit class counsel to use class settlements to self-deal freely." Petitioners resort to attacking the bar and bench because every traditional rule of construction forecloses their proposals. And the accusations have no relevance to *this* case or *this* settlement. Petitioners ignore or mischaracterize the prospective relief the settlement provides, which brings genuine change for class members. And they ignore the carefully delineated uses to which the *cy pres* recipients will put the monetary fund, which likewise benefit class members.

Rule 23(e) permits class-action settlements where the terms are "fair, reasonable, and adequate." Outside the class-action context, parties can agree to settlements that do not provide direct monetary compensation, opting instead for injunctive relief and payments to third parties for the plaintiff's benefit. Rule 23(e) imposes no prohibition on class settlements that do the same thing. Petitioners would deem that sort of settlement unfair and unreasonable even where class members otherwise would get absolutely *nothing*. Petitioners nowhere explain why a provision requiring settlements to be fair, reasonable,

and adequate would require the less fair, less reasonable, less adequate relief of no remedy whatsoever instead.

Petitioners' brief ultimately offers a series of legislative proposals based on policy arguments. But the Federal Rules are promulgated through a rigorous process that includes consideration by the Advisory Committee, Judicial Conference approval, this Court's review, and submission to Congress. That process "limits judicial inventiveness," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997), leaving this Court "no warrant to encumber [class-action] litigation by adopting an atextual requirement * * * that Congress, despite its extensive involvement in the * * * field, has not sanctioned." *Amgen Inc.* v. *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013). Petitioners seek to impose precisely such atextual requirements here.

STATEMENT

I. LEGAL FRAMEWORK

Federal Rule of Civil Procedure 23 governs the certification and administration of class actions in federal court. Rule 23 is intended to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" by aggregating individual claims into a single proceeding. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment; see *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979).

A. The Federal Rules Process

The Federal Rules are promulgated only "after an extensive deliberative process involving many reviewers." *Amchem*, 521 U.S. at 620. New rules and changes to existing rules are proposed by the Advisory Committee on Civil Rules. 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1001 n.16 (3d ed.). Proposals are then

reviewed by subcommittees, circulated to the public for comment, and revised by the Advisory Committee before being submitted to the United States Judicial Conference. *Ibid.* If a proposed rule or amendment is accepted by the Judicial Conference, it is submitted to this Court. *Ibid.*

If this Court accepts the rule, it sends it to Congress for consideration. 4 Wright & Miller, *supra*, § 1001; see 28 U.S.C. § 2074(a). The rule "becomes effective" the following December "unless Congress takes action to alter or reject it." 4 Wright & Miller, *supra*, § 1001 n.16; see 28 U.S.C. § 2074(a). "The text of a rule thus proposed and reviewed" necessarily "limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered * * *." *Amchem*, 521 U.S. at 620.

B. Rule 23's Requirements for Class Actions

Rule 23(a) establishes four prerequisites for class actions, requiring judicial findings that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

This case involves an "opt-out" class action for damages. Such actions are appropriate where the recoveries are too small to "'provide the incentive for any individual to bring a solo action prosecuting his or her rights.'"

Amchem, 521 U.S. at 617. Rule 23(b)(3) imposes two additional prerequisites for such cases. One is "predominance": "[Q]uestions of law or fact common to class members" must "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The other is "superiority": A class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." *Ibid.*

C. Rule 23's Protections Governing Settlements

To assure procedural fairness for absent class members, Rule 23(e) provides that class actions may not be "settled, voluntarily dismissed, or compromised" without district-court approval. The court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "Any class member may object to the proposal," *id.* 23(e)(5), or "request exclusion" from the class and thus opt out of any final judgment, *id.* 23(e)(4). The court may approve the proposed settlement, voluntary dismissal, or compromise "only after a hearing and on finding that it is fair, reasonable, and adequate." *Id.* 23(e)(2).

Rule 23(h) provides for court oversight of attorney's fees. Class counsel's request for fees must be made by motion, and notice must be provided to the class. Fed. R. Civ. P. 23(h)(1). Class members may object. *Id.* 23(h)(2). The court may award only "reasonable attorney's fees." *Id.* 23(h). And the court "must find the facts and state its legal conclusions" supporting its decision. *Id.* 23(h)(3).

"Class counsel must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). Class counsel are thus required to "'act as conscientious fiduciaries.'" *Eubank* v. *Pella Corp.*, 753 F.3d 718, 724 (7th Cir. 2014). The settlement-approval standards in Rule 23(e) likewise require district courts to "act[ ] as a fiduci-

ary guarding the rights of absent class members." *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001); see 4 W. Rubenstein, *Newberg on Class Actions* §13:40 n.4 (5th ed.) (collecting cases). "When reviewing settlements" under Rule 23(e), moreover, district courts "must ensure class counsel have met their ongoing duty" to class members. *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 n.12 (1st Cir. 2009).

D. Congressional Revisions to Class-Action Procedures

Congress has repeatedly revisited the rules governing class actions.

In 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, to address securities-litigation class actions and related issues. Among other things, the Act limited the attorney's fees that can be "awarded by the court to counsel for the plaintiff class" in securities-fraud cases to "a reasonable percentage of the amount of any damages and prejudgment interest *actually paid to the class.*" 15 U.S.C. §77z-1(a)(6) (emphasis added).

A decade later, Congress passed the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4. Among other things, CAFA created a role for Executive Branch and state officials in ensuring the fairness of class actions: It provides that the Attorney General of the United States, and the attorney general or appropriate official in each State, must be given notice of class-action settlements. 28 U.S.C. §1715(a), (b). The district court cannot approve a settlement until those officials have had 90 days to review it. *Id.* §1715(d). Federal and state governments can, and sometimes do, file statements of interest in response to such notices. U.S. Br. 1-2.

CAFA also created rules governing attorney's fees for "coupon settlements," in which defendants provide coupons for their goods or services to class members in exchange for a release from liability. CAFA provides that "any attorney's fee award to class counsel that is attributable to [an] award of coupons shall be based on the value to class members of the coupons *that are redeemed*." 28 U.S.C. § 1712(a) (emphasis added). Congress had considered but declined to enact broader limits. See, *e.g.*, *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary*, 108th Cong. 111-112 (2003) (discussing fee awards as "a percentage of the fund *actually disbursed* to class members").

E. Judicial and Congressional Consideration of *Cy Pres* Settlements

1. This case concerns a "*cy pres*" distribution. The term *cy pres*—short for *cy pres comme possible*, or "as near as possible"—entered the law as a trusts-and-estates doctrine. R. Mulheron, *The Modern Cy-près Doctrine: Applications & Implications* 2-3 (2006). In that context, *cy pres* can "save testamentary charitable gifts that would otherwise fail" by choosing "an alternate recipient that will best serve the gift's original purpose." *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002). The doctrine applies where fulfilling the testator's original directive "becomes unlawful, impossible, impracticable * * *, or * * * wasteful." *Restatement (Third) of Trusts* § 67 (2003).

Similar equitable principles have been invoked in class-action litigation. For example, when a class action results in a monetary payment, the parties may agree that, if some amount goes unclaimed after the claims process, the remainder shall go to "a charity working on

issues related to the group's underlying causes of action." 4 *Newberg*, *supra*, § 12:32.

In unusual circumstances, "the class members are so numerous and the individual claims so small that individualized distributions are, as a practical matter, impossible." 4 *Newberg*, *supra*, § 12:26. Where that occurs, the parties may agree, and a court may find, that "*all* of the class action recovery (net of fees and expenses)" should be "directed to a charity whose mission is consistent with the causes of action in the litigation." *Ibid.* Such distributions can provide non-monetary or indirect benefits to the class, while avoiding "the effective exclusion of a substantial number of small claimants from the benefits of any class action, the dilution of the deterrent effect of a recovery on behalf of the class, and the unjust enrichment of the defendant." S. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 448 (1972); see 4 *Newberg*, *supra*, § 12:26 (listing "deterrence," "indirect compensation to the plaintiff class," and "finality and repose to defendant" as relevant goals).

Such settlements were approved shortly after the modernization of Rule 23 in 1966, see, *e.g.*, *Miller* v. *Steinbach*, No. 66 Civ. 356, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974), and—in the ensuing half century—have been upheld or endorsed by seven federal courts of appeals where distribution to class members proves infeasible.[1]

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[1] See *Pharm. Indus.*, 588 F.3d at 35 (1st Cir.); *New York* v. *Reebok Int'l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172-174 (3d Cir. 2013); *Klier* v. *Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *Hughes* v. *Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013); *Powell* v. *Ga.-Pac. Corp.*, 119 F.3d 703, 706-707 (8th Cir. 1997); *Lane* v. *Facebook*, 696 F.3d 811, 819 (9th Cir. 2012).

But *cy pres* settlements remain rare. Between 1974 and 1990, fewer than one class action per year ended with a *cy pres* distribution. M. Redish, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 653 (2010). From 1990 to 2008, a tiny portion of the class actions that settled each year—an average of 5—resulted in *cy pres* settlements. *Id.* at 653, 658 (identifying 86 *cy pres* settlements over an 18-year period, including some where damages were paid directly to class members); see B. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 817-818 (2010) (340 class-action settlements per year in 2006-2007).

2. The courts of appeals have converged on the circumstances where *cy pres* distribution may meet Rule 23's "fair, reasonable, and adequate" standard. *First*, direct distribution of the funds to class members must be infeasible. Am. Law. Inst., *Principles of the Law, Aggregate Litigation* §3.07(c) (2010) ("ALI Principles"); *Klier*, 658 F.3d at 475. *Second*, the recipient of the funds must have a mission tied to rectifying problems similar to those underlying the case. ALI Principles §3.07(c); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012). That requirement ensures that, even if class members do not receive direct cash payment, they benefit from the distribution. The American Law Institute has identified a third requirement: The "court or any party" must not have "any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." ALI Principles §3.07 cmt. b.

3. Although Congress has repeatedly considered *cy pres* settlements, it has declined to overturn governing

standards. When Congress was deliberating over CAFA, the RAND Institute submitted a report addressing *cy pres* distributions. *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary*, 108th Cong. 111-112 (2003). *Cy pres* was mentioned throughout the legislative process. See, *e.g.*, S. Rep. No. 109-14, at 17, 19 (2005); *Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 106th Cong. 53 (1999) (John P. Frank). Congress provided special rules for "coupon" settlements, see p. 7, *supra*, but not *cy pres*.

Congress has returned to *cy pres* settlements since. See, *e.g.*, *Class Actions Seven Years After the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 2, 40, 96 (2012). Legislation addressing fees from *cy pres* settlements has passed one chamber of Congress and is pending in the other. See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. §1718. So too is legislation addressing the Justice Department's ability to enter into such settlements. See Stop Settlement Slush Funds Act of 2017, H.R. 732, 115th Cong. §2; H.R. Rep. No. 115-72, at 12-13 (2017). But Congress has not enacted those bills to date.

The Rules Advisory Committee has considered the issue, but found no reason to alter existing rules. One subcommittee developed "a possible rule amendment and a possible Committee Note" that drew "very considerable attention." *Report by the Committee on Rules of Practice and Procedure* 213 (2016). But it recommended against pursuing the amendment, noting that the circuits were converging around the ALI Principles, that some

commenters had raised Rules Enabling Act concerns, and that it would be challenging to "develop[ ] specifics for a rule provision." *Id.* at 213-214. "The Committee accepted this recommendation." *Id.* at 424.

II. Proceedings Below

A. Proceedings Before the District Court

This case arises from a previously little-known aspect of Google's web-search product. When users enter a query in Google Search, Google displays the results on a page headed with a Uniform Resource Locator ("URL") that includes the search terms. Pet. App. 4. For example, a search for "depression and medical leave" would return a page with a URL similar to "http://www.google.com/search?q=depression+and+medical+leave." See Pet. App. 4 & n.1. Web browsers report to websites the URL of the page containing the link that was clicked to reach their website—*i.e.*, the page that "referred" them. Pet. App. 4. Users' search terms thus are sent to third-party websites in the form of these "referrer headers." *Ibid.* "This information is then disseminated further, since several web analytics services" also "collect the search query from the referrer header." Pet. App. 32-33.

1. *The Complaints and Resulting Motions*

Alarmed by that privacy invasion, Paloma Gaos filed suit against Google in the Northern District of California in October 2010. The complaint alleged that Google's disclosure of her searches in "referrer headers" violated the Stored Communications Act ("SCA"), 18 U.S.C. §§2701 *et seq.* D. Ct. Doc. 1 ¶¶86-97. The SCA prohibits a provider of a "remote computing service" from "knowingly divulg[ing] * * * the contents of a communication while in electronic storage by that service," without the "lawful consent" of the communication's originator. 18 U.S.C. §2702(a)(1), (b)(3). Gaos also alleged violations of various

California laws. D.Ct. Doc. 1 ¶¶98-137. Filed on behalf of a putative class comprising all U.S. persons who submitted Google search queries after October 25, 2006, *id.* ¶74, the complaint sought "injunctive and other equitable relief as is necessary to protect the interests of Plaintiff [and] the Class," as well as actual and statutory damages, *id.* at 34.

Google moved to dismiss, urging that Gaos lacked standing. D.Ct. Doc. 19. In April 2011, the district court granted the motion. J.A. 16-22. Gaos filed an amended complaint that again alleged SCA violations, but replaced the state-law statutory claims with common-law claims. J.A. 23-25. In March 2012, the court granted Google's motion to dismiss Gaos's state-law claims, but denied the motion as to the SCA claim. J.A. 23-31.

In May 2012, Gaos filed a second amended complaint, adding another class representative and additional state-law claims. J.A. 84; C.A.S.E.R. 781-786. Google again moved to dismiss. D.Ct. Doc. 44; Pet. App. 70.

2. *Uncertainty and Mediation Drive the Parties to Settlement*

While the parties litigated, the U.S. District Court for the Northern District of California dismissed three other cases that likewise alleged SCA violations based on disclosure of referrer headers. See *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705 (N.D. Cal. 2011); *In re Zynga Privacy Litig.*, No. C 10-04680, 2011 WL 7479170 (N.D. Cal. June 15, 2011); *Low* v. *LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1023-1024 (N.D. Cal. 2012). While this case was pending, the Ninth Circuit affirmed the dismissal in *In re Zynga Privacy Litigation*, 750 F.3d 1098 (9th Cir. 2014).

Given the resulting uncertainty, counsel repeatedly met to discuss settlement. C.A.S.E.R. 61 ¶¶6-9 & 83 ¶6.

While the case was not going well for Gaos, Google confronted potentially staggering liability if she prevailed.[2] In 2013, the parties negotiated before an experienced class-action mediator, who made a proposal that became the framework for a settlement. C.A.S.E.R. 62 ¶¶11-12, 83-84 ¶¶8-9. The parties negotiated the details over two months. C.A.S.E.R. 62 ¶¶13-17, 84 ¶¶9-10. Throughout, class counsel insisted on "prospective relief designed to notify users as to Google's conduct so that users can make informed choices about whether and how to use Google search." C.A.S.E.R. 62 ¶18; see C.A.S.E.R. 84 ¶11, 132 ¶23.

Permanent prospective relief. Under the final settlement, Google was obligated to make new disclosures on three of its web pages—a general FAQs page, a Privacy FAQs for Google Web History page, and a Key Terms page—concerning its handling of search-query data. Pet. App. 82; see Pet. App. 73 (defining the agreed-upon disclosures). The SCA requires "consent" before certain information can be shared. P. 11, *supra*. As the district court explained, the changes to Google's disclosures "advise search users of [Google's] conduct and policies so that users can make an informed choice about whether and how to use Defendant's search engine." J.A. 92. Those disclosures now explain how search queries are disclosed to third-party websites. Pet. App. 109-111. While petitioners state that Google retained previously made changes, Pet. Br. 9, that is incorrect: As explained below (pp. 48-49, *infra*), the settlement required new and additional disclosures.

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[2] Because the potential class exceeded 100 million, Pet. App. 52, statutory damages of $1,000 per violation under the SCA, 18 U.S.C. §2702(c), could exceed $100 billion.

Monetary payments. The settlement also provided that Google would pay $8.5 million. The district court recognized that, "because of the size of the class"—estimated at over 100 million persons—"actual remuneration * * * to an individual class member is virtually impossible. * * * The cost of administration of that would dwarf any possible settlement." J.A. 33.

The parties therefore agreed that, after payment of fees and costs, the remaining funds would be distributed to third parties that would use the money "to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." Pet. App. 82-84. The "more robust" disclosures required, and "the cy pres efforts," were to "mak[e] sure that people are informed and give informed consent" concerning disclosure of their referrer headers. J.A. 38.

3. *The Selection of* Cy Pres *Recipients*

Class counsel sought *cy pres* recipients that (1) lacked conflicts of interest; (2) had track records on privacy issues; (3) targeted internet users nationwide; and (4) would use the funds to educate class members about the risks of sharing personal information with internet service providers, inform policymakers, and develop tools to address exploitation of personal data. C.A.S.E.R. 387 ¶21(a)-(c), (e). Candidates would submit detailed proposals. C.A.S.E.R. 387 ¶21(d). The parties narrowed the pool from over 20 to 7. C.A.S.E.R. 385 ¶¶14-15.

Six submitted detailed proposals to address internet privacy and the risks of involuntary information sharing. C.A.S.E.R. 387 ¶22; J.A. 53-81.[3]

- Carnegie Mellon University proposed developing new technologies to address online privacy threats, as well as computerized mechanisms to enforce the privacy policies of companies such as Google. J.A. 53-57 (App., *infra*, 48a-85a).
- The Stanford Law School Center for Internet and Society proposed "educat[ing] users" about "how to make effective online choices for privacy" and "how third party tracking and advertising practices work." J.A. 58-61 (App., *infra*, 114a-166a).
- The World Privacy Forum detailed a consumer-education campaign about privacy risks posed by online search boxes and referrer headers. J.A. 62-67 (App., *infra*, 167a-223a).

The other proposals similarly addressed online privacy risks. See, *e.g.*, J.A. 72-77 (App., *infra*, 86a-113a) (Center for Information, Society and Policy at IIT Chicago-Kent College of Law initiative to assist users in implementing privacy protections); J.A. 68-71 (App., *infra*, 9a-19a) (AARP anti-online fraud initiative); J.A. 78-81 (App., *infra*, 20a-47a) (Berkman Center for Internet and Society at Harvard University proposals for safeguarding internet privacy through policy reform, technological innovation, and consumer outreach). The court "carefully reviewed" those proposals. Pet. App. 48; see D. Ct. Doc. 65 at 6.

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[3] The Joint Appendix includes executive summaries of each. J.A. 53-81. For the Court's convenience, the full text of each proposal is attached as an Appendix to this brief. App., *infra*, 9a-223a.

4. *District Court Approval*

The district court preliminarily approved the settlement and certified a settlement-only class in March 2014, finding the requirements of Rule 23(a) and (b)(3) satisfied. J.A. 82-100. Class resolution, it found, was superior to other methods of adjudicating the controversy: The alternatives were "either millions of separate, individual proceedings * * * or an abandonment of claims by most class members." J.A. 90. The court preliminarily found the settlement fair, reasonable, and adequate under Rule 23(e)(2). J.A. 91-97. Distributing settlement funds to class members, the court found, was infeasible: The costs of verifying and distributing payments "would exceed the total monetary benefit obtained by the class." J.A. 95-96. The proposed uses of the fund "account[ed] for the nature of this suit, m[et] the objectives of the SCA claim, and further[ed] the interests of class members." J.A. 96-97.

Four class members, including the petitioners here, objected. Pet. App. 34. Petitioners conceded the settlement amount was adequate, suggesting "[m]aybe * * * Google is overpaying." J.A. 118. But they objected to the third-party distributions on fairness and superiority grounds; they further argued that three proposed recipients were improper because class counsel had attended law schools associated with some of them, and Google had donated previously to others. Pet. App. 125-134. Petitioners also objected to the attorney's fees request, urging the court to "reduce the fee award to no more than 10% of the $8.5 million *cy pres* fund." Pet. App. 134-139; see J.A. 114-121, 164-165.

At the fairness hearing, the district court focused on the feasibility of distributing settlement funds to class members. J.A. 115-116. It explored "the benefit * * * for

the class" from the settlement, as well as whether they could receive "some direct" monetary benefit. J.A. 122-123. The comparative sizes of the class and the fund, the court recognized, posed serious "challenge[s]." J.A. 119-120.

Responding to petitioners' concerns about connections between counsel and *cy pres* recipients, Pet. App. 126-128, both lead attorneys for the class explained they had no affiliation with the recipients housed at their alma maters, J.A. 107-110. As one put it: "[T]o clarify on the record, I don't have any affiliation and I have never had any affiliation with [the] Berkman Center or with Harvard since leaving. I simply got my law degree there, and that's simply the end of it." J.A. 136; see J.A. 134 (similar). The court "appreciate[d]" that, contrary to petitioners' argument, the *cy pres* distribution was not simply an "accounting change" for Google about donations it would have made regardless. J.A. 135. The court nonetheless "ha[d] real concerns" that required "additional thought." J.A. 166. The court was leaning toward denying approval, but noted that the oral arguments had been "helpful." *Ibid.*

Ultimately, the court approved the settlement. Pet. App. 31-61. It again found class certification appropriate under Rule 23(b). Pet. App. 35-38. The court applied heightened scrutiny because settlement preceded class certification. Pet. App. 42. But it found the settlement fair, reasonable, and adequate under Rule 23(e)(2). Pet. App. 39-52. During litigation, "the Ninth Circuit's decision in *Zynga Privacy Litigation*" and other decisions created "significant and potentially case-ending weakness." Pet. App. 58-59. Absent settlement, there "was little guarantee of any benefit to the class." Pet. App. 44. The prospective relief requiring new dis-

closures was fair. Pet. App. 49-50. And the monetary fund "compare[d] favorably to" settlements in similar cases. Pet. App. 45-46.

The court found *cy pres* distribution appropriate because the fund could not be distributed to class members: With over 100 million estimated class members, "requiring proofs of claim * * * would undeniably impose a significant burden to distribute, review and then verify," and "the cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class." Pet. App. 47. "Having carefully reviewed the[ir] proposals," the court found the *cy pres* recipients would "meet[ ] the objectives of the SCA, and further[ ] the interests of class members." Pet. App. 47-49. The court saw "no indication that counsel's allegiance to a particular alma mater factored into the selection process." Pet. App. 59.

The court approved attorney's fees of $2.125 million and incentive awards of $5000 for each class representative. Pet. App. 55-58. The settlement was not "easily secured" and came only after class counsel defended against "three motions to dismiss" and "extensive in-person negotiations." Pet. App. 54-55. Counsel's hours and rates "confirm[ed] the reasonableness of the percentage-based calculation." Pet. App. 56-57.

B. Proceedings in the Court of Appeals

The court of appeals affirmed. Pet. App. 1-23. It acknowledged that *cy pres* distributions are "the exception, not the rule." Pet. App. 8. But it found the district court did not clearly err or abuse its discretion in finding "the cost of verifying and 'sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.'" Pet. App. 8-9. The court of appeals rejected petitioners' arguments that the

district court was required to use a lottery system or claims-made process. Pet. App. 9-10. The court rejected petitioners' view that, if cash distributions to class members were infeasible, a class action could not be superior to other methods of adjudicating the controversy for purposes of Rule 23(b)(3). Pet. App. 10-11.

The court of appeals found no abuse of discretion in the district court's approval of *cy pres* recipients. Pet. App. 11-21. The district court properly found that the recipients were "established" and "independent," with "nationwide reach and 'a record of promoting privacy protection on the Internet.'" Pet. App. 12. Their "detailed proposal[s]" ensured funds would be used to benefit the class. Pet. App. 5, 12-13.

The court of appeals addressed whether "'any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits.'" Pet. App. 14 (quoting ALI Principles § 3.07 cmt. b). It found that no "substantial question[ ]" was raised. *Ibid.* That Google had previously donated to some was not disqualifying. "Google has donated to hundreds of third-party organizations whose work implicates technology and Internet policy issues," and "some of the recipient organizations have challenged Google's Internet privacy policies in the past." Pet. App. 16 & n.6. Barring any organization that received a past donation would have prioritized "less relevant or less qualified" organizations over "the interests of the class." Pet. App. 18. Moreover, the proposed recipients had "disclos[ed] donations received from Google" and "explain[ed] how the *cy pres* funds were distinct from Google's general donations." Pet. App. 17.

The court likewise found no abuse of discretion stemming from the fact that three recipients are housed at schools class counsel attended. Pet. App. 18-21. The district court analyzed "the nature of the relationship, the timing and recency of the relationship, the significance of dealings between the recipient and the party or counsel, the circumstances of the selection process, and the merits of the recipient." Pet. App. 14, 18-21. Each school "graduates thousands of students each year," and "[a]ll class counsel swore that they have no affiliations with the specific research centers." Pet. App. 19.

Finally, the court of appeals found no abuse of discretion in the attorney's fee award. Pet. App. 21-23. The award was "commensurate with the risk posed by the action and the time and skill required to secure a successful result for the class, given that class counsel faced three motions to dismiss" and conducted extensive settlement negotiations. Pet. App. 22.

Judge Wallace dissented on one issue. He agreed that a *cy pres* distribution is "appropriate in this case." Pet. App. 23. He saw no abuse of discretion in the fee award. *Ibid.* But he would have required live testimony on whether class counsel's educational histories affected the selection of recipients. Pet. App. 23-24.

SUMMARY OF ARGUMENT

I. Petitioners' proposed categorical ban on approval of *cy pres* settlements has no support in the Federal Rules or any relevant law.

A. Under Rule 23(e), courts may approve class-action settlements that are "fair, reasonable, and adequate." That standard gives courts discretion to be exercised case-by-case in light of all relevant circumstances. Petitioners cannot explain why a *cy pres* settlement—which

provides class members indirect benefits—cannot be fair, reasonable, and adequate, when the alternative is that class members receive *no* relief. The settlement here, moreover, directly benefited class members through prospective relief.

Petitioners' proposed ban defies Rule 23's history. *Cy pres* settlements have existed for decades and have been studied by Congress and the Rules Advisory Committee. Those bodies have revised class-action standards but have declined to impose petitioners' ban. Petitioners ask this Court to circumvent the rigorous process for amending the Federal Rules.

B. The federal courts have identified limited circumstances where *cy pres* settlements may satisfy Rule 23(e). The settlement funds must be so limited, and fund-administration costs so high, that distribution to class members is infeasible. The *cy pres* recipients must serve the class-member interests pursued in the suit, so class members benefit from the funds' use. And recipients must be selected on merit, not because of affiliation with the parties. Properly applied, those established principles limit *cy pres* to situations where it is the best means of providing relief.

C. Rule 23(b)(3) does not preclude class certification where there is a *cy pres* settlement. That rule allows certification if class treatment is "superior *to other* available methods *for fairly and efficiently adjudicating the controversy*." The realistic alternative to class certification in cases with undistributably small recoveries—the only cases where *cy pres* is appropriate—is *no* suit at all. Petitioners seek to rewrite Rule 23(b)(3). The Rule asks whether class treatment is superior to "alternative" means "of adjudication"—not whether an objector would prefer no adjudication at all.

D. Petitioners' First Amendment argument was neither pressed nor passed upon below. Anyone offended by the *cy pres* recipients (or the suit itself) can opt out. The claim that *cy pres* settlements violate Article III, by failing to "redress" the plaintiffs' injuries, is misplaced. The prospective relief in the settlement here redresses class members' injuries. Redressability, moreover, concerns whether courts can provide a remedy—not whether the actual outcome is good enough. And damages in cases involving privacy injuries are *substitute* relief in any event, not a reversal of the invasion. Outside class actions, plaintiffs and defendants often agree to channel that substitute relief to third parties. Nothing prohibits class-action plaintiffs from making the same choice if Rule 23's requirements are met. For those reasons, the government's supposed Rules Enabling Act concerns lack merit. Settlements, moreover, are contracts. Judicial approval of a private agreement does not expand the court's remedial powers.

II. Petitioners' categorical rules for attorney's fees fare no better. Petitioners urge that, in calculating fee awards, courts may consider only the "direct benefit to the class," excluding *cy pres* amounts. That argument is outside the question presented and waived. Congress, moreover, specifically imposed that rule for *securities* class actions, but declined to impose it for class actions generally; petitioners seek to reverse that choice. Rule 23(h), which governs attorney's fees, requires fees to be "reasonable," affording courts broad discretion. Petitioners propose a categorical prohibition nowhere in the Rules.

III. Petitioners' policy arguments rest on the claim that plaintiffs' counsel "sell their putative clients down the river" to "self-deal," and that district courts are com-

plicit. But petitioners do not contend that happened here. The law forbids such behavior, which would violate fiduciary responsibilities. That courts occasionally misapply existing standards (often resulting in reversal) is no basis for judicially blue-penciling in proscriptions not found in the Rules' text.

IV. Petitioners hardly dispute that *this* settlement satisfies Rule 23(e). Petitioners ignore the settlement's prospective relief, which redresses the informed-consent concerns underlying the case. They concede Google's monetary payment is adequate. And their attack on the courts' factual findings—that distributing the fund was infeasible and that the recipients were selected on the merits—mischaracterizes the decisions below.

V. The government identifies a potential jurisdictional question regarding injury in fact. That counsels dismissing the petition as improvidently granted, particularly given the myriad other vehicle problems plaguing this case. In any event, the harms alleged here—privacy invasions—are the sort of non-pecuniary injuries long held actionable by courts.

ARGUMENT

The Federal Rules of Civil Procedure are promulgated through "an extensive deliberative process" that includes consideration by the Rules Advisory Committee, circulation for public comment, subcommittee review, consideration by the Judicial Conference, this Court's consideration, and submission to Congress. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997). "The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered * * *." *Ibid.* Petitioners seek precisely such a judicial amendment here.

Nothing in Rule 23 or any other law supports petitioners' proposals. Their categorical prohibition on *cy pres* settlements has no textual basis. Petitioners' request that this Court pronounce new requirements for attorney's-fee calculations fares worse still. That request is not merely extra-textual; it is also not properly before this Court. Congress has adopted proposals like petitioners' for other contexts, but declined to impose them for class actions generally or for *cy pres* settlements specifically. Petitioners seek to overturn that deliberate choice. This Court "ha[s] no warrant to encumber [class-action] litigation by adopting an atextual requirement * * * that Congress, despite its extensive involvement in the * * * field, has not sanctioned." *Amgen Inc.* v. *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013).

Under the standards set forth by the Federal Rules, *cy pres* settlements should be (and are) rare. The courts of appeals have converged on limited circumstances where such settlements can meet Rule 23's standards. Among other things, *cy pres* is appropriate only if distribution to class members is economically infeasible. Petitioners press their alternative of categorical prohibition by impugning the bar's integrity and denigrating the district courts' capabilities. But petitioners' generalized accusations have nothing to do with this case. They ignore or mischaracterize critical features of the settlement here—notably, the prospective relief it provides class members. And their complaints about misapplications of Rule 23's existing standards cannot justify rewriting the Rules by judicial fiat.

I. THE FEDERAL RULES AND RELEVANT STATUTES DO NOT PROHIBIT *CY PRES* SETTLEMENTS

The Federal Rules are construed using "'traditional tools of statutory construction,'" *Beech Aircraft Corp.* v.

Rainey, 488 U.S. 153, 163 (1988)—*i.e.*, their "text, structure, and history," *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 135 S. Ct. 1970, 1975 (2015). Petitioners appear to argue that *cy pres* cannot be "permitted at all" in class-action litigation. Pet. Br. 15. A settlement "that provides no direct benefit to the class," they urge, "cannot be approved." Pet. Br. 39. None of the "traditional tools of statutory construction" support reading that prohibition into Rule 23. And common sense defies it.

A. The Text, Structure, and History of Rule 23 Do Not Support Petitioners' Prohibition on *Cy Pres* Settlements

1. *Petitioners' Categorical Ban Defies Rule 23(e)'s Clear Text*

Under Rule 23(e), the "claims * * * of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Rule 23(e)(2) provides an express standard governing approval: "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." That "general[] * * * standard" requires pragmatic balancing of "benefits and costs." *Nat'l Ass'n of Chain Drug Stores* v. *New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 45 (1st Cir. 2005).

District courts must exercise sound "discretion" on "a case-by-case basis, in light of all the relevant circumstances." *Evans* v. *Jeff D.*, 475 U.S. 717, 742 (1986). Relevant factors include the "'strength of plaintiff's case on the merits balanced against the amount offered in the settlement,'" *Synfuel Techs., Inc.* v. *DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006); and "'the range of reasonableness of the settlement fund'" in light of "'all the attendant risks'" of further litigation, *In re*

Prudential Ins. Co. Am. Sales Practice Litig., 148 F.3d 283, 317 (3d Cir. 1998).

Where Rule 23(e) establishes a generalized framework, petitioners propose a categorical rule: If the settlement "provides no direct or actual compensation to the class"—as opposed to injunctive relief or indirect benefits—it cannot be approved. Pet. Br. 20. But Rule 23(e) contains no such prohibition. Nor does it require class members to receive particular forms of relief such as cash. If Congress (or the Rules Advisory Committee or this Court) had intended such a prohibition, the Rule would state it. Courts "should be loath to announce * * * prohibitions that are unqualified by the statutory text." *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

Petitioners' categorical preclusion sets Rule 23(e) on its head. Rule 23(e) permits resolutions where the class obtains *no relief at all*. A court may find that "voluntary dismissal" of class claims is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e), (e)(2), including a preclusive "voluntary dismissal *with prejudice*," Minutes, Meeting of the Advisory Committee on Civil Rules 25 (Apr. 23-24, 2001) (emphasis added). If dismissal of the class's claims with no relief can be "fair, reasonable, and adequate," *a fortiori* a settlement that provides prospective relief and a substantial payment to third parties—to be used for the class's benefit to address the legal wrongs prompting the suit—can be as well.

There are limited circumstances where a *cy pres* or injunctive-only remedy will meet Rule 23(e)'s requirements. But petitioners' across-the-board prohibition would be consistent with the Rule's text only if there were *no* such circumstances. That is not the case. Petitioners nowhere dispute that adverse legal and factual

developments during litigation may reduce the case's value to a point where any reasonable settlement amount is outstripped by the costs of distributing the proceeds to individual class members. In that situation, any rational class member would prefer an indirect benefit—from paying settlement proceeds to an organization that will serve their interests—to receiving *no* benefit at all. Petitioners nowhere explain why a settlement that brings class members *some benefit* and requires the defendant to pay *some recompense* is unfair, unreasonable, or inadequate, when the alternative is *nothing*.[4]

That is because petitioners' true goal in seeking a *cy pres* ban is to punish counsel for cases that work out poorly, to "discourage bad" lawsuits. Pet. Br. 43 (urging courts to force attorneys to "slink away and dismiss their cases"). But Rule 23(e) is about protecting "class members who have not participated in shaping the settlement," Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment—not punishing counsel. The goal of deterring weak lawsuits is served by other provisions, including Rule 11, and context-specific fee-shifting statutes, *e.g.*, 15 U.S.C. §1692k(a)(3) (authorizing defense fees for certain Fair Debt Collection Act suits), to the fact that low-quality lawsuits most often result in costly investment for no return.

In non-class litigation, parties can reach voluntary resolutions that involve only forward-looking relief or pay-

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[4] Petitioners hypothesize that counsel could negotiate a *cy pres* settlement but "opt out every single class member so that class members would obtain the settlement benefit while retaining their right to sue." Pet. Br. 53. That is implausible: Defendants typically require a "blow up provision" that scuttles the deal if too many plaintiffs opt out. 4 W. Rubenstein, *Newberg on Class Actions* §13:6 (5th ed.).

ments to third parties for the plaintiff's benefit. See, *e.g.*, *Beastie Boys* v. *Monster Energy Co.*, 983 F. Supp. 2d 369, 373 (S.D.N.Y. 2014) ($1 million payment "to a charitable organization chosen by the Beastie Boys and approved by [defendant]" to settle unauthorized use of band's song). As with other contracts, a promised performance under a settlement "may be given to the promisor *or to some other person*." *Restatement (Second) of Contracts* § 71(4) (1981) (emphasis added). Petitioners would preclude such arrangements for class actions alone, even where that is the best result obtainable for the class. But Rule 23 requires the settlement to be fair, reasonable, and adequate. That standard cannot possibly require courts to impose the less-adequate relief of *nothing* to replace the more-adequate relief of *something*.

2. *Petitioners' Categorical Ban Ignores Rule 23(e)'s Structure and History*

Since its inception, Rule 23(e) has provided a general standard governing settlement approval, not categorical prohibitions. As the Advisory Committee notes to the 2003 amendments observe, "many factors" may "deserve consideration," including those "provided by *In re: Prudential Ins. Co. American Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998)," and "found in the Manual for Complex Litigation." Petitioners' categorical prohibition on *cy pres* settlements is contrary to that approach, which entrusts district courts to exercise discretion in light of the totality of the circumstances.

Although *cy pres* settlements are rare, they date from shortly after Rule 23's modernization in 1966. See p. 8, *supra*. In the half-century since, Congress has repeatedly revisited class actions, implementing myriad changes. It considered *cy pres* settlements but never proscribed

them. For example, in 2005, Congress implemented extensive changes through the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4. See pp. 6-7, *supra*. Congress specifically considered *cy pres* settlements. See, *e.g.*, *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary*, 108th Cong. 111-112 (2003); 151 Cong. Rec. S1,007-S1,008 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch); S. Rep. No. 109-14, at 17, 19 (2005). But it did not preclude *cy pres*, even though it addressed other claimed abuses, such as "coupon settlements." See 28 U.S.C. § 1712(a). Quite the opposite. Congress empowered courts to "require" *cy pres* distributions in connection with coupon settlements: Under § 1712(e), district courts may "require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations" agreed upon by the parties. Congress treated *cy pres* as a useful tool—not an evil to be extirpated.

Congress has revisited the issue of *cy pres* settlements since. See *Class Actions Seven Years After the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 2, 40, 96 (2012); *State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the H. Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 10 (2015). Petitioners themselves have testified before Congress on *cy pres*. See *Examination of Litigation Abuses: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 113th Cong. 21-33 (2013); *Consumers Shortchanged? Oversight of the Justice Department's Mortgage Lending Settlements: Hearing Before the Subcomm. on Regulatory Reform*,

Commercial & Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 69-84 (2015). Congress's "silence on [that] issue, coupled with its certain awareness of" it, "is powerful evidence" of Congress's intent. *Wyeth* v. *Levine*, 555 U.S. 555, 575 (2009).

The House has passed a bill that would limit attorney's fees from *cy pres* settlements in class actions. See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 1718. That proposal would make no sense if Rule 23(e) contained the absolute prohibition petitioners propose. This Court should not "adopt[ ] an atextual requirement * * * that Congress, despite its extensive involvement in the * * * field, has not sanctioned." *Amgen*, 568 U.S. at 478.

Nor does petitioners' prohibition find support elsewhere. Under CAFA, the Attorney General has been notified of any class-action settlement and been given the opportunity to interpose his views. 28 U.S.C. § 1715(a), (b), (d). The United States has often filed statements of interest. But it has never suggested that *cy pres* settlements are forbidden. U.S. Br. 1-2. The Rules Advisory Committee has considered *cy pres* settlements. A "[s]ubcommittee developed a fairly lengthy sketch of both a possible rule amendment and a possible Committee Note" to govern such settlements. *Report by the Committee on Rules of Practice and Procedure* 213 (2016). The subcommittee recommended against amending Rule 23 because, among other things, the circuits were converging around standards articulated by the American Law Institute. *Id.* at 213-214. The Advisory Committee thus did not understand Rule 23 to prohibit *cy pres* settlements—because it does not.

B. Federal Courts Have Identified the Limited Contexts Where *Cy Pres* Settlements Might Satisfy Rule 23(e)

Federal courts and commentators have, over the years, identified the narrow category of cases where a *cy pres* settlement may satisfy Rule 23(e)'s requirements. *First*, settlement funds must be so limited, and the cost of distributing the funds to class members so comparatively costly, that "distribution to the class members is infeasible" and would "provide no meaningful relief." *Hughes* v. *Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013); see *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009); *Klier* v. *Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007). *Second*, *cy pres* recipients must truly serve the class-member interests pursued in the lawsuit. See, *e.g.*, *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012); *Six (6) Mexican Workers* v. *Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990). That requirement ensures that *cy pres* distributions actually, if indirectly, benefit the class. *Third*, courts must carefully review recipients to prevent conflicts of interests. See *Baby Prods.*, 708 F.3d at 173.

1. The "very best use" of settlement funds ordinarily is to pay them to "the class members directly." *Klier*, 658 F.3d at 475; see 4 *Newberg*, *supra*, § 12:26. Consistent with that, courts preclude *cy pres* distributions unless direct distribution to class members would be "infeasible." ALI Principles § 3.07 cmt. b. "Infeasible" means that "distributions are [not] sufficiently large to

make individual distributions economically viable." *Id.* §3.07(a).

Direct distribution to class members is rarely infeasible. But sometimes unclaimed funds may be too limited to warrant distribution. See 4 *Newberg*, *supra*, §12:32. Or it may become apparent during litigation that the risk-discounted value of a case—and the maximum the defendant will pay in settlement—has become "too small" to support the expense of the claims-administration system necessary to send a "recovery to individuals." *Pharm. Indus.*, 588 F.3d at 34. The costs of claims processing—providing notice, distributing and receiving claims forms, verifying claims, and distributing proceeds—can be prohibitive. Consequently, where the settlement value of the case is small and the class is very large, especially where class members are not readily identifiable, the costs of distributing settlement funds could dwarf any recovery. *Holtzman* v. *Turza*, 728 F.3d 682, 689 (7th Cir. 2013); *New York* v. *Reebok Int'l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996).

In those limited circumstances, *cy pres* distribution to an organization that will serve class-member interests can be "the best solution." *Hughes*, 731 F.3d at 675. The "indirect benefit to the class" that results from *cy pres* distribution, *Klier*, 658 F.3d at 475, may satisfy Rule 23(e) as a "fair, reasonable, and adequate" resolution, see *Hughes*, 731 F.3d at 675; *Baby Prods.*, 708 F.3d at 173-174; *Klier*, 658 F.3d at 475; *Pharm. Indus.*, 588 F.3d at 34; *Powell* v. *Ga.-Pac. Corp.*, 119 F.3d 703, 706-707 (8th Cir. 1997); *Reebok*, 96 F.3d at 49. "A foundation that receives $10,000 can use the money to do something to minimize violations" of the law at issue. *Hughes*, 731 F.3d at 676. But class members who receive checks for a dollar cannot. *Ibid.*; see *In re MGM Mirage Sec. Litig.*, 708 F.

App'x 894, 897 (9th Cir. 2017) (citing "evidence showing that smaller checks, such as those under $10, in many instances are never cashed").

A *cy pres* settlement serves class members' interests in deterring misconduct. It "'[p]revents the defendant from walking away from the litigation' without paying a full recovery" simply because there are "practical obstacles to individual distribution." *Pharm. Indus.*, 588 F.3d at 33-34. Deterring future misconduct, and ensuring the defendant provides *some* remedy, is particularly salient where the violations concern privacy or other non-pecuniary harms. In those instances, the indirect benefits of *cy pres* may better redress the injury than would a tiny check.

2. Courts also require that *cy pres* payments fund activities that serve the class-member interests pursued in the suit. ALI Principles §3.07(c). The proposed recipient must seek to rectify a problem "tethered to the nature of the lawsuit," so as to advance "the interests of the silent class members." *Nachshin* v. *AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011); see *Lupron*, 677 F.3d at 33; *Baby Prods.*, 708 F.3d at 180 n.16. That requirement ensures that the *cy pres* distribution "provid[es] an indirect benefit to the class." *Klier*, 658 F.3d at 475; *Mexican Workers*, 904 F.2d at 1308.

3. Finally, the resolution must avoid appearances of impropriety or self-dealing. *Cy pres* is inappropriate "if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." ALI Principles §3.07 cmt. b. That standard ensures fairness—actual and perceived—to absent class members. See Pet. App. 14.

4. Far from disputing those principles, petitioners endorse many. Petitioners support an infeasibility standard (at 49), declaring that *cy pres* is "inappropriate * * * if it is feasible to distribute cash." They endorse the ALI's standards governing affiliations between a party and *cy pres* recipients. Pet. Br. 55-56 (citing ALI Principles §3.07 cmt. b.). There is good reason for that agreement: Proper application of those principles precludes the putative abuses on which petitioners rest their case. See pp. 43-46, *infra*. Courts reviewing settlements under Rule 23(e)'s "fair, reasonable, and adequate" standard already apply those principles rigorously to limit *cy pres* settlements to the unusual circumstances where it is the best way to serve class-member interests.

Petitioners propose modifying those principles. They contend that, even if it is "prohibitively expensive to distribute money to every claimant" in the class, distribution is not infeasible where the district court could conduct "random lottery distribution to" some "percentage of claiming class members." Pet. Br. 44, 51. But the lottery reduces claims-processing costs very little: The class still must be given notice of the lottery and means of entering; claims must be verified; and some number of winners must be sent their winnings. The lottery system addresses only one cost (final mailing of checks) of myriad administrative costs that might dwarf any recovery.

A lottery, moreover, intentionally denies some class members any benefit to increase the return for others. But Rule 23(e)'s "fairness" standard involves "a comparative analysis of the treatment of class members vis-à-vis each other." Fed. Jud. Ctr., *Manual for Complex Litigation* (4th) §21.62 (2004) (cited in Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment). A lottery treats them differently based on a mechanism that is con-

cededly "arbitrary." Pet. Br. 44. A judicially backed mega-millions lottery might increase public participation, but it is unseemly to benefit some by denying any benefit to others. And petitioners nowhere explain why a lottery "would necessarily result in greater relief to the class as a whole than a properly tailored *cy pres* award." U.S. Br. 27 n.2.

The ultimate question is not whether a lottery might be permissible. It is whether a district court abuses its discretion by not mandating one. If direct compensation of class members is not feasible, nothing in Rule 23(e) requires a court to select a lottery "next best" proposal for distributing funds over the long-recognized *cy pres* alternative.

C. Rule 23(b)(3)'s "Superiority" Requirement Does Not Preclude *Cy Pres* Resolution

Finding nothing in Rule 23(e) to support their categorical ban, petitioners turn to Rule 23(b)(3). If class members cannot receive direct monetary compensation, they urge, the proposed class cannot satisfy Rule 23(b)(3)'s "superiority" requirement. Pet. Br. 52-54; see Ariz. Br. 9-10. In such cases, they assert, "retaining [an individual] right to sue" is superior. Pet. Br. 53.

1. Rule 23(b)(3) requires that class treatment be "superior *to other* available methods *for fairly and efficiently adjudicating the controversy*." Fed. R. Civ. P. 23(b)(3) (emphasis added). Where individual claims have little value—as is true in any case eligible for *cy pres* resolution—the class members "would have no realistic day in court if a class action were not available." *Phillips Petrol. Corp.* v. *Shutts*, 472 U.S. 797, 809 (1985). "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic

or a fanatic sues for $30"—or $1. *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Petitioners thus seek to foreclose class actions precisely where the Rules promote them. "'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Amchem*, 521 U.S. at 617.

2. The government urges that, "[e]ven if the alternative to a class action is that the plaintiff would not bring a lawsuit at all, a class action that yields no relief is still not 'superior' to that alternative." U.S. Br. 26. That is mistaken. *First*, the Rule's *text* directs courts to ask whether class treatment is superior to "alternative means of adjudicating"—not to compare class adjudication with no adjudication.

Second, the government incorrectly assumes that *cy pres* settlements "yield no relief." Here, there was direct, prospective relief for the class—disclosures to avoid unconsented sharing of stored communications—to forestall future violations. And any *cy pres* settlement that meets Rule 23(e)'s "fair, reasonable, and adequate" standard yields relief, even if benefits are indirect. *Cy pres* recipients must "'serve the objectives of compensation for the class,'" and the payment "'deter[s] * * * illegal behavior,'" preventing the defendant from "'walking away from the litigation'" with no reckoning. *Pharm. Indus.*, 588 F.3d at 33. Class members surely would prefer those benefits to the government's proffer of *nothing*.

Third, the notion that "superiority" disappears whenever the case yields insufficient relief is fundamentally misconceived. Under that view, classes would have to be decertified whenever plaintiffs *lose*—in such cases, class

members get "no relief." But the merits of the case and the ultimate outcome are irrelevant to superiority. See *Eisen* v. *Carlisle*, 417 U.S. 156, 177 (1974).

D. Petitioners' and Their *Amici*'s Remaining Arguments Fail

1. *Petitioners' First Amendment Argument Is Waived and Meritless*

In one paragraph, petitioners suggest that *cy pres* settlements "raise[ ] serious First Amendment concerns," because recipients might "have political valence[s] * * * offensive to * * * class members." Pet. Br. 36-37. Petitioners never mentioned the First Amendment in the court of appeals, and the court never addressed it. This Court will not address issues "neither raised in nor passed upon by the Court of Appeals." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). The First Amendment is not within the question presented (which concerns Rule 23 standards). And it appears nowhere in the petition for certiorari. That forecloses its consideration here. See *Bay Area Laundry & Dry Cleaning Pension Tr. Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 206-207 (1997); *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

The argument fails in any event. Petitioners fail to address the state-action requirement, a pre-requisite to any First Amendment claim. *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1113-1114 (10th Cir. 2017) (holding that judicial approval does not convert private settlement agreements into state action). Besides, the short answer for anyone with genuine objections to a *cy pres* recipient—or to the lawsuit—is to opt out. That opportunity protects due process rights, *Phillips*, 472 U.S. at 810-814, and First Amendment interests, cf. *Christian Legal Soc'y Chapter of Univ. of*

Cal. v. *Martinez*, 561 U.S. 661, 682 (2010) (distinguishing "regulations that *compelled* a group to include unwanted members, with no choice to opt out," from a policy with opt-out mechanism).

2. Cy Pres *Raises Neither Redressability Nor Rules Enabling Act Concerns*

The government urges that *cy pres* settlements raise Article III issues because they might not "redress" the plaintiffs' injuries. U.S. Br. 22-25. The argument has no application in this case: The settlement here provides for *prospective relief* that alters the defendant's behavior to redress the injury alleged. The wrong asserted by the complaint was use of private information without consent. See p. 11, *supra*. The settlement requires Google to make permanent changes to its disclosures so that users know of, and consent to, such uses. See pp. 48-49, *infra*. That relief precisely addresses, and remedies, the wrong alleged. The government does not suggest otherwise.

The government raises the hypothetical concern that, where the only relief is a *cy pres* payment, that might not "redress[ ] plaintiffs' injuries." U.S. Br. 22. But "redressability," as an element of standing, depends on the relief sought, not the ultimate settlement terms chosen. No authority supports the government's contrary position. *Motor Fuel*, 872 F.3d at 1114.[5] Monetary payments,

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[5] The government cites no case suggesting that settlement terms might retroactively render an injury non-redressable. See *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1537-1538 (2018) (reviewing mootness); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 559 (1992) (reviewing grant of motion to dismiss); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 88 (1998) (same); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 173 (2000) (litigated judgment on the merits); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 98-99 (1983) (same); *Gill* v. *Whitford*, 138 S. Ct. 1916, 1924-

moreover, are given "to *substitute* for a suffered loss," not to repair the injury itself. *Bowen* v. *Massachusetts*, 487 U.S. 879, 895 (1988). Outside the class-action context, parties can voluntarily redirect that substitute to third parties. See pp. 27-28, *supra*. The government nowhere explains why Article III operates differently for class actions. Besides, under the ALI standards applied here, third-party recipients must apply the funds to benefit class members and address the specific injuries that prompted suit. See pp. 31-33, *supra*. That is redress.

Nor do *cy pres* settlements violate the Rules Enabling Act or expand substantive remedies. Pet. Br. 33, 38; Ariz. Br. 10-11. Settlement agreements are contracts. A district court's approval "simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication" of the merits. *Sullivan* v. *DB Invs., Inc.*, 667 F.3d 273, 312 (3d Cir. 2011). Because it makes no "finding that plaintiffs are actually entitled to relief under substantive * * * law, * * * a court does not 'abridge, enlarge, or modify any substantive right' by approving a voluntarily-entered class settlement agreement." *Id.* at 313 (quoting 28 U.S.C. §2072(b)); accord *Marshall* v. *Nat'l Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015); *Baby Prods.*, 708 F.3d at 173 n.8; *Mexican Workers*, 904 F.2d at 1307.

If anything, petitioners' contrary view raises Rules Enabling Act concerns. No law precludes non-class suits from being settled on terms that include third-party payments. Yet petitioners read the Federal Rules to impose that substantive prohibition on class actions.

1925 (2018) (same); *Califano* v. *Yamasaki*, 442 U.S. 682, 688-690 (1979) (same).

II. Petitioners' Proposed Attorney's Fees Rules Are Misplaced And Unfounded

Petitioners devote much of their brief to proposals regarding attorney's-fee calculations. See Pet. Br. 20-49, 56-57. Those proposals are not properly before the Court. None is supported by Rule 23.

A. Petitioners' Attorney's Fees Proposals Are Not Properly Before the Court

Petitioners "ask this Court to hold" that attorney's fees, for "*all* Rule 23 settlements," may reflect only the "actual and direct benefit to the class." Pet. Br. 15, 48 (emphasis added). But the question presented does not encompass that request. Petitioners limited the question presented to "*a cy pres award* of class action proceeds." Pet. i (emphasis added). It does not address class actions generally.

The question presented, moreover, asks whether a *cy pres* settlement that affords no direct monetary relief to class members "comports with" Rule 23(*e*)'s "requirement that a settlement binding class members must be '*fair, reasonable, and adequate*,'" or "supports *class certification*" under Rule 23(*b*). Pet. i (emphasis added). That does not encompass fee awards, which are governed by 23(*h*)'s requirement that fees be "reasonable."

Petitioners' fee arguments, moreover, were waived below. In district court, petitioners never argued that fee-award calculations must exclude *cy pres* distributions. Petitioners urged the district court to limit fees to "no more than 10%" of the fund. Pet. App. 139. The court of appeals did not pass on petitioners' argument for excluding *cy pres* payments, presumably because of that waiver. This Court should not entertain arguments not preserved or passed upon below. *Taylor* v. *Freeland &*

Kronz, 503 U.S. 638, 645-646 (1992). Applying a new rule "without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion." *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990).

B. Petitioners' Fee Rules Defy Text and History

Rule 23(h) permits "reasonable" attorney's fees, a standard that affords district courts considerable discretion. See 7B C. Wright & A. Miller, *Federal Practice and Procedure* § 1803.1 (3d ed.). One important consideration is the degree of success. Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment. Consequently, to the extent indirect benefits from a *cy pres* settlement bring less value, courts already have ample "case by case" discretion "to decrease attorneys' fees where a portion of a fund will be distributed *cy pres*." *Baby Prods.*, 708 F.3d at 179. Conversely, "[c]lass counsel should not be penalized for * * * reasons unrelated to the quality of representation," and district courts have discretion not to impose such discounts. *Id.* at 178.

Dissatisfied by Rule 23(h)'s flexible "reasonable[ness]" standard, petitioners insist on a categorical rule: Courts must "*exclude[]* * * * *cy pres* awards from the calculation," counting only the "direct benefit to the class." Pet. Br. 15, 40 (emphasis added). Rule 23 contains no such command. In *Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980), this Court refused to blue-pencil a similar prohibition into the Rule, declining to hold that courts cannot base fees on "the unclaimed portion" of a recovery. *Id.* at 477-478. The plaintiffs' attorneys had "recovered a determinate fund for the benefit of every member of the class whom they represent," which merited consideration even though some portion remained unclaimed. *Id.* at 479-482. Because *Boeing* "confronted

essentially the same issue" petitioners raise here, it all but forecloses "requiring district courts to discount attorneys' fees when a portion of an award will be distributed *cy pres*." *Baby Prods.*, 708 F.3d at 177-178; see *Mexican Workers*, 904 F.2d at 1311.

Moreover, Congress has twice enacted legislation tying attorney's fees to "direct benefits" in other contexts. CAFA limits fees for *coupon settlements* to "the value to class members of the coupons that are redeemed." 28 U.S.C. § 1712(a). The PSLRA limits fees *in securities cases* to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. § 77z-1(a)(6). But Congress has not imposed that rule for class actions generally or *cy pres* specifically—despite considering *cy pres* extensively. See pp. 9-11, *supra*. Congress's decision to limit or exclude recoveries from fee calculations only in specific contexts forecloses the broader rule that petitioners demand here.[6]

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[6] Petitioners' effort to insert an extra-textual exclusion into attorney's-fee calculations is particularly misplaced given changes proposed by the Rules Advisory Committee. As that Committee recently confirmed, "any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. The Committee approved amendments to Rule 23(e) requiring courts to consider "the terms of any proposed award of attorney's fees" in connection with whether the "relief provided for the class [in the settlement] is adequate." Fed. R. Civ. P. 23(e)(2)(C)(iii) (effective Dec. 1, 2018, absent congressional action). That general directive is inconsistent with the categorical exclusion petitioners seek. And the fact that new Rules become effective December 1, 2018, makes consideration of fee issues resolved under the current but soon-to-be-superseded Rules rather pointless.

III. Petitioners' Policy Arguments Fail

Petitioners' arguments are based not on text, structure, or history, but policy. Petitioners accuse the bar of unethical conduct and the courts of dereliction of duty. According to petitioners, plaintiffs' counsel "enrich[ ]" themselves "at the expense of their clients," "sell their putative clients down the river," and engage in "self-deal[ing]," "gimmicks," "subterfuge," and "gamesmanship." Pet. Br. 16, 20-21, 22, 29, 40, 48.[7] Defendants are accused of "conniv[ing]" with plaintiffs. Pet. Br. 30-33, 40. Petitioners' dim view extends to the judiciary as well. District courts, we are told, "ignor[e] and resist[ ] circuit court" guidance, or seek to benefit favored charities. Pet. Br. 37, 49. Those accusations are unfounded. And existing rules amply proscribe the conduct that petitioners impute to their brethren.

A. Existing Standards Address Petitioners' Concerns

Attorneys have "solemn dut[ies]" to "advance the interests of [their] client[s]." *Nix* v. *Whiteside*, 475 U.S. 157, 168 (1986). They "are personally subject to an ethical regime designed to reinforce the profession's standards." *Connick* v. *Thompson*, 563 U.S. 51, 65 (2011). Petitioners presume misconduct where this Court should not. The Court will not rewrite the Federal Rules "premised on the assumption that in the pursuit of fees, attorneys will choose to bring claims lacking good faith or a reasonable basis in derogation of their ethical duties." *Sebelius* v. *Cloer*, 569 U.S. 369, 382 (2013).

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[7] See Pet. Br. 1 ("minimize payoff by the defendant, maximize benefit to class counsel, and leave injured class members out in the cold"), 19 ("illusory settlement at class members' expense"), 22 ("obscuring * * * allocative decisions" to "trade benefits to defendants for bigger fees").

Rule 23's proper application precludes the misconduct on which petitioners base their arguments. Under Rule 23(e), courts must reject any settlement that is not "fair, reasonable, and adequate." District courts rigorously enforce the rule; appellate courts step in where district courts misapply the law. See, *e.g.*, *In re Dry Max Pamper. Litig.*, 724 F.3d 713, 718-719 (6th Cir. 2013); *Koby* v. *ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080 (9th Cir. 2017); *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 625-626 (8th Cir. 2001).

Rule 23(e) is regularly invoked to reject ordinary settlements that courts deem inadequate. See, *e.g.*, *In re Subway Footlong Mktg. Litig.*, 869 F.3d 551, 556-667 (7th Cir. 2017); *Koby*, 846 F.3d at 1079; *Polar Int'l Brokerage Corp.* v. *Reeve*, 187 F.R.D. 108, 112 (S.D.N.Y. 1999). The *cy pres* context is no different: Petitioners' own brief cites at least five cases where courts rejected a proposed *cy pres* settlement as inadequate, requiring counsel to obtain more money that could be distributed to the class. See Pet. Br. 42-43 (citing *Baby Prods.*, 708 F.3d at 178; *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 2d 939, 939 (N.D. Cal. 2013); *In re Bayer Corp. Litig.*, No. 09-md-2023, 2013 WL 12353998, at *3 (E.D.N.Y. Nov. 8, 2013); *Pecover* v. *Elec. Arts Inc.*, No. 08-cv-02820, 2013 WL 12121865 (N.D. Cal. May 30, 2013); *Pearson* v. *NBTY, Inc.*, No. 11-cv-07972, Dkt. 213-1 (N.D. Ill. May 14, 2105)). Contrary to petitioners' suggestion, "experience" has "borne out," Pet. Br. 42, that *cy pres* settlements are "rejected when the proposed distribution fails" to satisfy Rule 23's standards, *Mexican Workers*, 904 F.2d at 1308.

Petitioners' accusation that defendants use *cy pres* to "benefit themselves," Pet. Br. 30-33, founders. Petitioners invoke *In re Microsoft Corp. Antitrust Litigation*, 185 F. Supp. 2d 519 (D. Md. 2002), to accuse Microsoft of

having "attempted to resolve an antitrust class action by directing a *cy pres* donation of computers and software to schools" to give itself a business advantage. Pet. Br. 31. Petitioners omit that the district court *rejected* the proposed settlement for that very reason. See *Microsoft*, 185 F. Supp. 2d at 528-530.

While the government invokes the "'risk of collusion' between the parties at the expense of absent class members," U.S. Br. 19, absentees' interests are protected by existing rules. Courts demand "rigorous adherence to those provisions of [Rule 23] 'designed to protect absentees,'" *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 849 (1999) (quoting *Amchem*, 521 U.S. at 620)—including Rule 23(e)'s fair, reasonable, and adequate standard, see Fed. R. Civ. P. 23 advisory committee's note to 2003 amendment. Class counsel also have fiduciary obligations. Rule 23(a)(4) requires them to fairly and adequately represent the interests of the class in all cases, whether they involve *cy pres* or not. See *Ortiz*, 527 U.S. at 856-857; *Gallego* v. *Northland Grp. Inc.*, 814 F.3d 123, 129 (2d Cir. 2016). And for settlement-only classes, courts apply even greater scrutiny to guard against collusion. *Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

Unwilling to address the actual rules, petitioners attack the courts. Petitioners urge that district courts face "conflicts of interest" in *cy pres* settlements, and "resist[]" precedent confining their authority. Pet. Br. 37, 49. Not so: Courts typically avoid injecting their interests into *cy pres* recipient selection by leaving it to the parties. See ALI Principles §3.07(c). Courts of appeals "greet[] with * * * skepticism *cy pres* distributions imposed by trial courts." *Baby Prods.*, 708 F.3d at 172 n.7. Widely accepted standards prevent the appearance

of impropriety in selecting recipients, ALI Principles §3.07 cmt. b., and "there are objective standards that require recusal" in appropriate circumstances, *Caperton* v. *A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009). This Court should not legislate new rules where proper application of existing ones amply addresses petitioners' accusations.

Finally, petitioners urge that the potential for a *cy pres* settlement encourages "strike" suits. Pet. Br. 36. They offer no economic analysis to support that claim. "[T]he existence of a cy pres component, by itself, should not adversely affect the total settlement. Since the attorney's fee depends on the total amount, the class attorney has an incentive to maximize the total." R. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. Kan. L. Rev. 913, 945-946 (2017). And "the class attorney does not benefit in any obvious way by directing proceeds to a cy pres beneficiary rather than to the class; her fee is the same in either case." *Ibid.* The fact that *cy pres* settlements are rare belies petitioners' supposition that they encourage unfounded suits. See p. 9, *supra*. Strike suits should be deterred by rigorous application of legal provisions designed to prevent them—not by judicial imposition of categorical rules to preclude the occasional *cy pres* settlement.[8]

B. Petitioners' Accusations Are Unfounded

Petitioners' argument rests on a parade of horribles that presumes defiance of settled norms. Pet. Br. 33-35

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[8] Petitioners' arguments (at 35) about *cy pres* permitting class treatment of otherwise unmanageable cases fails for the same reason. This Court has rejected the notion that a settlement class must be manageable through trial. See *Amchem*, 521 U.S. at 620.

& n.3, 37-38; U.S. Br. 25; Cato Br. 15. But the parade reduces to a procession of worn-out floats. Petitioners invoke *Nachshin*, 663 F.3d 1034, as a case where the judge "select[ed] [the] judge's spouse's charity as [a] *cy pres* recipient." Pet. Br. 38. But *Nachshin* reversed the approval. 663 F.3d at 1040. The accusation, moreover, is unfair: The charity was suggested by a *mediator*, and the judge's sole connection was that her spouse sat on its *50-person* board. *Id.* at 1041-1042. That tenuous connection provided no ground for recusal under the governing statute. *Ibid.* (applying 28 U.S.C. § 455).

Petitioners invoke cases in which they and others challenged the settlement, but then dismissed their appeals. Pet. Br. 31, 34, 37.[9] Petitioners thus ask this Court to pronounce on those settlements without prior consideration in a court of appeals. And petitioners scrape the bottom of the barrel when they invoke an aged press release about a *state-court* settlement to support a judicial rewrite of the Federal Rules. Pet. Br. 34 (discussing state-court Rezulin suit).

There are undoubtedly cases where Rule 23's standards were not applied with appropriate rigor. But the same can be said of *any* Federal Rule (or substantive law). That occasional result hardly justifies judicial insertion of new prohibitions that Congress has declined to impose.

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[9] Petitioner dismissed his appeal in *Citigroup*, see *ATD Grp.* v. *Frank*, No. 16-2850, 2017 WL 4014951 (2d Cir. Mar. 29, 2017) (cited Pet. Br. 34), as did the objector in *In re Google Buzz Privacy Litig.*, No. 11-16587 (9th Cir. Nov. 21, 2011), ECF No. 14 (cited Pet. Br. 31, 34, 37).

IV. This Settlement Complies With Rule 23

After extensive hearings and carefully considering petitioners' objections, the district court found the settlement "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); see Pet. App. 39-52; pp. 16-18, *supra*. Notwithstanding petitioners' fact-bound contentions, the court committed no abuse of discretion.

A. The Settlement Provides Valuable Prospective Relief To Prevent Violations

The settlement includes prospective relief requiring new, permanent changes to Google's disclosures—changes that would apprise users of, and allow them to make informed choices regarding, Google's use of referrer headers. Pet. App. 49-50. Those disclosures make clear that user "search queries [are] sent to websites when [users] click on Google Search results." Pet. App. 109-111. That redresses the legal violation at the center of the suit, which was Google's use of information without informed consent. See J.A. 35-36; 18 U.S.C. §2702(b)(3) (permitting disclosure of electronic communications only with "lawful consent"). In its final approval order, the district court noted the value of that "injunctive relief." Pet. App. 50. Google was now "obligated to make * * * changes to * * * better inform users how their search terms could be disclosed to third parties." J.A. 94.

While petitioners refer to the settlement as "*cy pres* only," that is incorrect: The class received the direct benefit of prospective relief to stop the violations that prompted the suit. As the district court held, "contrary to what the objectors argue, future users of Google's website will receive something from the injunctive relief: the capability to better understand Google's disclosure practices before conducting a search." Pet. App. 50. Petitioners' suggestion that Google merely agreed to

"continue to include" disclosures already being made, Pet. Br. 9, is false. The settlement required "additional disclosures." Pet. App. 73. Petitioners admitted as much in their certiorari petition, representing that Google was obligated to "*revise* its 'Frequently Asked Questions' webpages." Pet. 9 (emphasis added). The record on that point is undisputed. J.A. 38 (class counsel explaining that Google was "going to make their disclosures more robust and more prominent"). The settlement imposed "permanent prospective relief requiring disclosures from Google," a "change" from prior practice. J.A. 145-147.

B. The District Court Properly Found the Cash Component Adequate and Non-Distributable

The settlement included a payment of $8.5 million. The district court found that payment adequate given the "significant and potentially case-ending" legal developments after the suit was filed. Pet. App. 58-59. Petitioners do not dispute the payment's adequacy. Despite claiming that plaintiffs' counsel sell their clients out, petitioners never claimed that happened here. To the contrary, they opined that perhaps "Google is overpaying." J.A. 118.

The district court recognized that even limited funds must be distributed to class members unless distribution would be infeasible. See Pet. App. 45-47. The court found it infeasible to distribute the fund here given that the class size "exceeds one hundred million individuals." Pet. App. 47; J.A. 33.[10] Even before deducting *any* administration costs or attorney's fees, the $8.5 million fund amounted to only 6.5 cents per class member. Experi-

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[10] According to comScore, which provides website analytics, 129.9 million people visited Google's search website in the six months preceding the motion for preliminary settlement approval. J.A. 87 n.2.

enced in handling class actions, the district court understood that the costs of notice, claim processing, claim verification, and distribution would make "actual remuneration * * * to an individual class member * * * virtually impossible." J.A. 33. "[R]equiring proofs of claim" from such a class "would impose a significant burden to distribute, review and then verify." J.A. 95-96. "[T]he cost of sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class." Pet. App. 47; see J.A. 95-96 (same). The class "potentially covers all internet users in the United States," so "direct notice to class members * * * is impractical." J.A. 98. Notice of the settlement alone cost about $855,000—over 10% of the settlement fund. C.A. S.E.R. 152-161, 232-233.[11]

This Court does "not inspect and set aside for insufficient evidence District Court findings of fact," *Amchem*, 521 U.S. at 622 n.17, especially findings "accepted by two lower courts," *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2544 (2015). Petitioners therefore recharacterize the decisions below as announcing a legal rule: that *cy pres* is permissible any time the fund, divided by the class size, yields a small quotient. Pet. Br. 49-52; cf. U.S. Br. 27-28. But the courts below never held that *cy pres* is permitted whenever a settlement fund cannot "be distributed to *every*

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[11] This is not a case where class members could be identified and money distributed based on existing relationships. Contrast *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 940 (9th Cir. 2015) (subscriber list); *McDonough* v. *Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 636 (E.D. Pa. 2015) (purchase records). Here, "it would not be possible for Google to direct payment to any significant proportion of class members" without a claims process. Google Br. 36, *In re Google Referrer Header Privacy Litig.*, No. 15-15858 (9th Cir. Dec. 4, 2015), ECF No. 26.

potential class member." Pet. Br. 15, 18. The Ninth Circuit affirmed what the district court "found": "that the cost of verifying and 'sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class.'" Pet. App. 9. That finding rests not on a mathematical rule, but on an experienced district judge's case-specific evaluation. Even if there were just a 2% claims rate, notice to the class, claims processing, verification, and distribution would at most leave dimes for each claimant, not dollars. Pet. App. 5.[12]

Petitioners insist that the district court was *required* to reject the settlement based on speculation that fewer class members might file claims. Pet. Br. 44-45; see pp. 34-35, *supra* (addressing lottery). But class actions with big-name defendants, coupled with effective notice mechanisms, yield higher claims rates. Underestimating the claims rate would mean dissipating the fund on processing. District courts have discretion in applying Rule 23, and "[d]iscretion means a choice" among permissible options. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 179 (1948); *Gallego*, 814 F.3d at 128-129. In some cases, *pro rata* distribution to claimants might make sense. But it makes no sense to *require* it where notice, claims processing, verification, and payment costs would exceed any benefit to the class.

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[12] Even at just 2% participation (2.59 million claimants), and claims-administration costs of only $1.50 per claimant (an unrealistically low estimate given the difficulty of identifying class members and the need to mail checks), administration costs would absorb at least $3.89 million of the $5.3 million available. See *In re Wells Fargo Secs. Litig.*, 991 F. Supp. 1193, 1196 & n.1 (N.D. Cal. 1998) (costs of $1.50 to $5.50 per claimant). That would leave only 54 cents per claimant—more likely less, potentially zero.

C. The District Court Did Not Abuse Its Discretion in Approving Recipients

Under ALI principles followed below, *cy pres* recipients must use the funds to address the types of injury that class members suffered. ALI Principles §3.07(c); see, *e.g.*, *Lupron*, 776 F.3d at 33; *Baby Prods.*, 708 F.3d at 180; see pp. 31-33, *supra*. Petitioners never argue that the recipients here fail that test. See Pet. App. 12 ("Objectors do not dispute that the nexus requirement is satisfied here."). Nor could they: The *cy pres* recipients provided detailed proposals specifying their use of funds. App., *infra*, 9a-223a.

Petitioners urge that recipient selection was affected by counsel's allegiances. Pet. Br. 54-56. There is no dispute, however, over the relevant standard. Counsel should not "'have any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits.'" Pet. Br. 55-56 (quoting ALI Principles §3.07 cmt. b). The court of appeals applied that standard to reject petitioners' arguments. Pet. App. 14 (quoting ALI Principles §3.07 cmt. b).

This Court need not reconsider petitioners' fact-bound complaint that, of the six *cy pres* recipients, three were housed at schools attended by class counsel (Harvard, Stanford, and Chicago-Kent). Pet. Br. 54-55. Counsel made clear they had no connection to those schools beyond having attended them: As one explained, "I simply got my law degree [at Harvard], and that's simply the end of it." Pet. App. 19 (quoting J.A. 136). That belies petitioners' assertion (at 11) that counsel failed to "deny that the *alma mater* status played a part in their selection." The district court found "*no indication* that counsel's allegiance to a particular alma mater" even

"factored into the selection process." Pet. App. 59 (emphasis added). The court of appeals agreed. Those schools "graduate[] thousands of students each year"; relatively few institutions had the required track records in this area; and it made no sense to disqualify some based on nothing more than where counsel got their degrees. Pet. App. 19.

Petitioners do no better in complaining that, because Google had donated money to other *cy pres* recipients, the payments were "changes to accounting entries" that "simply redirect[ed] money that the defendant would have given" anyway. Pet. Br. 32-33. Petitioners conceded below that the *cy pres* recipients would use the awards to fund new programs, not existing ones. See J.A. 164. Recipients "explained how the *cy pres* funds were distinct from Google's general donations." Pet. App. 16-17. Several recipients had challenged Google's practices, prompting lawsuits and government investigations. Pet. App. 16 n.7. Google, moreover, had previously "donated to hundreds of third-party organizations whose work implicates technology and Internet policy issues"; disqualifying them would have prioritized "less relevant or less qualified" organizations over "the interests of the class." Pet. App. 16, 18.

This Court "does not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). The courts below both carefully considered petitioners' contentions. Both applied the proper standard. And both properly found petitioners' contentions wanting.[13]

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[13] Any challenge to attorney's fees—governed by Rule 23(h)'s reasonableness standard—is not properly before the Court. See pp. 40-41, *supra*. Nor was there an abuse of discretion. The district court

V. The Government's Jurisdictional Argument Counsels Dismissing The Petition As Improvidently Granted

The government argues that there is a "substantial" and "logically antecedent" question about whether any class members have suffered injury in fact so as to establish standing under *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016). U.S. Br. 13-15. Neither court below addressed that contention. Nor did petitioners' opening brief. Ordinarily, "'this is a court of final review and not first view.'" *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam). The existence of a previously unaddressed jurisdictional issue counsels dismissing the writ as improvidently granted. See, *e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 28 (1993) (per curiam); *Adarand*, 534 U.S. at 105.

That result is particularly appropriate here. This case is plagued with vehicle issues. Petitioners' primary arguments often lack relevance to this case. There was no "selling out" the class, as the settlement amounts are concededly adequate. See p. 16, *supra*. The question presented asks whether a settlement that "provides no

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found the award appropriate, as the settlement was not "easily secured," coming only after class counsel defended against "three motions to dismiss" and "extensive in-person negotiations." Pet. App. 54-58. The court had ample discretion to adjust the award based on the circumstances. See *Fischel* v. *Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1006-1007 (9th Cir. 2002). The outcome was in line with similar cases, 10 Wright & Miller, *supra*, § 2675.3 (awards typically 20-30%), and supported by class counsel's hours and rates, Pet. App. 55-57. There are few "sphere[s] of judicial decisionmaking in which appellate micromanagement has less to recommend it" than attorney's fees. *Fox* v. *Vice*, 563 U.S. 826, 838 (2011).

direct relief to class members" can satisfy Rule 23, Pet. i, but the settlement here does provide direct, prospective relief that addresses class members' injuries, see p. 13, *supra*. Many arguments (*e.g.*, the First Amendment and attorney's fees) are waived. See pp. 37, 40, *supra*. And Congress is currently considering legislation that addresses many of petitioners' purported concerns. See p. 10, *supra*. Not even the government suggests this Court address *Spokeo*'s application in the first instance here. The interests of decisional integrity compel dismissal.[14]

Under *Spokeo*, the "bare procedural violation" of a statutory right is not sufficient to confer Article III standing; instead, a "concrete injury" is required. 136 S. Ct. at 1549-1550. But a wide range of "intangible" harms may be sufficiently concrete given (a) their "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" and (b) Congress's judgment that the harm should be remedied. *Id.* at 1549; see *id.* at 1551 (Thomas, J., concurring) (noting that standing requirements are more lenient for private-party disputes).

Those considerations establish standing here. In a "great many of the cases" traditionally heard in Anglo-American courts—libel, false light, or privacy invasion—"the only harm is * * * to the plaintiff's dignity." 2 D.

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[14] The government's proposal of remand (Br. 15) is unwarranted. The government regularly advises that certiorari should be denied where it has doubts about the plaintiffs' standing. See, *e.g.*, Gov't Br. in Opp. 9, *Flock* v. *Dep't of Transp.*, 137 S. Ct. 2268 (2017) (No. 16-1151); Gov't Br. in Opp. 16, *Stop Reckless Instability Caused by Democrats* v. *FEC*, 137 S. Ct. 374 (2016) (No. 16-109); Gov't Br. in Opp. 8, *Kent Recycling Servs., LLC* v. *U.S. Army Corps of Eng'rs*, 136 S. Ct. 2427 (2016) (No. 14-493). The equivalent is warranted here.

Dobbs, *Law of Remedies* §7.1(1), at 259 (2d ed. 1993); see also W. Page Keeton et al., *Prosser and Keeton on Torts* §117, at 851 (5th ed. 1984) ("the rights to privacy are recognized in virtually all jurisdictions"). Such "privacy" cases are actionable in federal court. *Time, Inc.* v. *Hill*, 385 U.S. 374, 384 & n.9 (1967). The Court's Fourth Amendment cases recognize that privacy is a cognizable interest capable of legal protection, even if its invasion may cause no pecuniary losses. See, *e.g.*, *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018); *Arizona* v. *Hicks*, 480 U.S. 321, 326 (1987) (Fourth Amendment violated by officer lifting receiver to see serial number). There is no principled basis for rejecting Congress's determination that improper invasion of citizens' stored electronic information—unconsented circulation of their searches—should be actionable as well. See 18 U.S.C. §2702(a)(1)-(2). To the extent the Court chooses to address this previously unaddressed issue, standing should be upheld.

CONCLUSION

The decision below should be affirmed. Alternatively, the Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

Federal Rule of Civil Procedure 23 (effective Dec. 1, 2009) provides as follows:

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues,

or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e);

the objection may be withdrawn only with the court's approval.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certifycation under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

APPENDIX B

Protecting Online Privacy: A National Initiative

A Proposal from AARP Foundation

As internet use continues to soar and as more and more daily transactions and interactions for both business and personal reasons are migrated online—it is a national imperative that people of all ages fully understand how to protect their privacy online. Just as reading, writing and arithmetic are critical requirements in life—so too now are the knowledge, skills and abilities to safely and effectively maintain an online presence. For these reasons, AARP Foundation proposes to develop a national initiative to educate and inform one million individuals over a three year period on how to protect their online privacy and proactively avoid the harmful impact of internet fraud and identify theft.

As the charitable arm of AARP, AARP Foundation is dedicated to creating solutions that help vulnerable Americans secure the essentials and maintain their independence. AARP is the leading, national expert on people 50+, with access to data and research regarding each socio-economic segment of the population. AARP Foundation works closely with the larger AARP enterprise to understand the needs of vulnerable older adults, their families, and their communities, and works to identify, implement and bring to national scale interventions to meet those needs. With a presence in all 50 states and multiple channels for delivering timely, relevant and actionable information, we are well-positioned to reach individuals of all ages and deliver important content on online privacy protection.

AARP Foundation is uniquely qualified to administer this program and develop, implement, scale and sustain

consumer facing tools and services designed to help individuals protect their online privacy and manage their flow of data. While AARP and AARP Foundation's overall focus is on older adults—we are a trusted brand to people of all ages. AARP Foundation has an exemplary record of providing service and consumer education on a wide variety of topics and has the requisite communication channels, national and local partnerships, research capability, infrastructure, human capital, and transparent reporting mechanisms to transform how consumer facing education and information on online privacy is delivered and measured. Last year alone, AARP Foundation served over 3.2 million individuals across its programmatic efforts.

AARP Foundation's consumer protection programs have arguably been subjected to more scientific scrutiny than any consumer protection program in the country. No fewer than four major studies have been done to measure the behavior change effects of our peer counseling model. In each case, the program has shown that recipients of the services retain the information they receive, resist subsequent malicious attempts that occur after receiving counseling, retain the information over a prolonged period of time, and are more knowledgeable in general about how to protect themselves.

After a careful internal review, we have determined that accepting cy pres funding for this effort would not pose a conflict of interest for either AARP or AARP Foundation as neither entity receives funding from nor is in partnership with Google. Both organizations are free and independent from any relationship with Google or its employees.

Initiative Goals and Objectives

To implement this wide-scale, national effort, we will employ a number of different strategies to ensure we are reaching a diverse range of consumers with relevant, timely, actionable, and credible information, tools and resources to develop the skills and knowledge to protect their online privacy. These different methods will be designed specifically to meet the intent of the settlement and will include:

1. **Expanding AARP Foundation's existing and multi-tiered regional consumer protection call center operations.**

AARP Foundation currently operates three regional call centers that employ highly trained volunteers to respond to in-bound calls from consumers and conduct proactive outbound calling to educate those at risk on issues related to fraud and how to protect their privacy. Research conducted by AARP Foundation and the Department of Justice showed the high correlation between peer assistance and individuals taking the necessary steps to protect themselves from fraud. Our volunteers go through intensive training from the initial 25 hours of curriculum and on-the-job training provided by staff through to ongoing education on at least a quarterly basis conducted by experts from the SEC, Attorney Generals' Offices, the FBI, Legal Aid services and many more. For this effort, we would develop specific training for volunteers on the latest information and best practices for online privacy protection.

2. **Develop a communications campaign including enhancing current website with online privacy focused content**

To reach even more people with information and resources, AARP Foundation will develop a communica-

tions campaign and enhance its website with focused content on online privacy protection and will develop a unique and engaging consumer-facing tool for individuals to assess their current practices related to sharing private information and specific actions to take to increase their protection and better manage their flow of data for all aspects of online interactions and transactions including social media, banking, website navigation, etc. This enhanced website will be an unparalleled national and open-source resource for individuals wanting the latest information on privacy protection and will be a repository for content, tools and resources available to consumers and intermediaries.

3. Build local consumer protection programs, events and sustained capacity

AARP Foundation will utilize a portion of the funding to build the capacity of national, state and local organizations and AARP state offices to provide consumer education programs related to online privacy protection. This capacity building effort will include developing curriculum and "train-the-trainer" toolkits and materials for local education activities and providing capacity building and planning grants to key organizations to sustain the program past the period of the funding. Specific consumer education and training materials will be developed and disseminated through workshops and events coordinated with the AARP state offices and national, state and local partners to consumers and staff and volunteers of key organizations supporting this effort.

4. Build unprecedented research and data on online privacy protection

A critical component of this effort will be adapting AARP Foundation's existing database management system to create an "early warning system" that tracks

trends and threats to online privacy. This data can then be shared with staff, volunteers, law enforcement, policy makers, and consumers to enable them to take action to increase privacy protection efforts. This database will be one of the largest collections of threats to privacy and consumer fraud trends in the country and will give AARP Foundation and its partners the ability to know how to target education and outreach efforts on a real-time basis.

Transparency in Publishing Results and Outcomes

AARP Foundation has implemented an organization-wide process for evaluating all projects, grants and programs. We also promote transparency by publishing the results of our programs, grants and initiatives on our website and via our annual reports. At any given time, consumers, funders and other stakeholders can see the results and impact of our efforts. This process includes developing a Logic Model that evaluates and measures the social change that occurs as a result of our efforts. As part of the development of the logic model for this project, we have initially identified the following social impact outcomes and the related metrics we will track to ensure we are meeting these outcomes:

There is increased awareness of online privacy protection efforts	• At least 1 million people served over the three year funding period. (Quantitative)
Increase in the number of individuals who take steps to protect their private information and manage their flow of data	• Number of people contacted or attending events who take action to protect online privacy. Baseline to be es-

	tablished in Year 1 of funding and increase measured in Years 2 and 3 (Quantitative) • Feedback and stories from consumers. (Qualitative)
There is increased capacity of local communities and organizations to support online privacy protection efforts.	• Number of partners engaged. (Quantitative) • Number of community education and "train the trainer" events held. (Quantitative)

Infrastructure and Partners

To minimize infrastructure costs and maximize funding for programmatic work, call center operations will be operated out of existing AARP Foundation regional call centers in Seattle, Washington and Denver, Colorado, and Charleston, West Virginia. These call centers have a successful track record for reaching consumers, and have expert staff and trained volunteers ready to conduct outreach minimizing ramp up time for the program.

In addition, AARP Foundation will leverage AARP State Offices located in every state to implement state and community-based outreach efforts, events and workshops that help build capacity to respond to specific issues related to online privacy protection and online fraud.

As part of this effort, AARP Foundation will continue to work closely with the Federal Trade Commission, state attorneys general, the FBI, the Financial Industry Regulating Authority (FINRA), the State Dept. of Financial Institutions, the Centers for Medicare and Medicaid Services (regarding Medicare fraud), and local law

enforcement agencies to build expertise on online privacy protection.

Organizational Capacity

AARP Foundation works across the country with existing and results-driven organizations at the local and state level, coordinating responses to address issues facing low-income older adults to most effectively reach people in ways relevant to their needs and their community. This approach maximizes the impact of our resources, reinforces and builds solutions from the ground up, avoids duplication of effort, and creates a powerful multiplier effect for change.

AARP Foundation has proven capacity and capability to manage a project the size and scope of this project as evidenced by our highly effective Tax-Aide and long history of operating consumer fraud prevention programs. In 2013, Tax-Aide deployed 35,000 volunteers in 6,000 locations across the country to provide free tax preparation services for 2.6 million people.

Consumer protection has been core to AARP Foundation's work for many years. In 2005, a settlement between a multi-state group of attorneys general and Western Union resulted in a multi-million dollar charitable contribution to the AARP Foundation to fight fraud. A second settlement between the states and Moneygram in 2008 resulted in an additional $1.1 million contribution to the AARP Foundation. Most of the funding from these settlements went to the creation and operation of eight regional Fraud Fighter Call Centers and community-based programs that used evidenced-based techniques to fight elder financial abuse.

Currently, AARP Foundation operates ElderWatch and Fraud Prevention programs around the country.

These programs work in communities to provide education about scams and frauds through public outreach events, media, website exposure, mailings, etc. Central to the fraud fighting efforts, however, are inbound and outbound call centers staffed by trained volunteers. The inbound call centers offer assistance in filing complaints with the state's Attorney General, mediation services, client/company intervention, referrals, education and assistance. Based on research conducted between AARP Foundation and the Department of Justice showing the high correlation between peer assistance and behavior change related to avoiding fraud, the outbound call centers provide peer-to-peer education to consumers all across the country, informing them about current frauds and scams and providing assistance with navigating the complaint process, as applicable. In 2012 alone through these call center operations, AARP Foundation had direct contact with over 200,000 consumers.

For its consumer protection work, AARP Foundation has a strong track record that has attracted multiple funders. In addition to the Colorado, Washington state, and West Virginia Attorney General's offices, additional funders of our work include FINRA Foundation, the Washington State Insurance Commissioner, the Administration on Aging (AoA) and the Charles Schwab Foundation.

Project Management and Staffing

AARP Foundation's experienced management team is committed to the success of this project.

Emily Allen is the Vice President, Income Impact with AARP Foundation and will serve as the lead for the program and provide strategic direction and oversight. Throughout her career, Ms. Allen's primary passion has been on serving the needs of those most at

risk in our communities. She has served in a number of capacities in the non-profit, education and asset building arenas and has worked across the generations to ensure vulnerable and at risk individuals have access to the resources and services they need to thrive. Currently, Ms. Allen is responsible for the development of strategies and interventions to ensure that low income older adults increase their economic stability obtaining quality jobs in their communities and by increasing their access to appropriate and affordable financial products and services. Ms. Allen holds a Bachelor's Degree in Psychology from Westminster College and a Master's Degree in Human and Organizational Learning from The George Washington University.

Amy Nofziger, Director – Regional Operations, AARP Foundation. Amy has worked at AARP Foundation's ElderWatch program since its inception in 2001, first as the Program Coordinator and then as the Program Leader. More recently Amy took on the responsibility as the Director of Regional Operations for the AARP Foundation Income Impact area. She is responsible for regional program management and operations for the Income program areas.

Amy serves on the Colorado Nonprofit Association Leadership Advisory Committee. She was appointed to the State of Colorado's Elder Abuse Task Force and sits on the Public Guardian Advisory Committee. Previously, Amy was the chairwoman of the advisory board for the Colorado Coalition for Elder Rights and Abuse Prevention (CCERAP). She has presented to over 75,000 seniors and professionals on consumer fraud, workforce initiatives and other social issues facing older adults. Amy has a degree in criminology/sociology from Ohio Univer-

sity, a certificate in gerontology from the University of Denver, and is a trained mediator.

Doug Shadel, PhD, AARP Washington State Director – Project Advisor. Shadel is one of the leading experts in the United States on financial exploitation of older persons. He is a former fraud investigator who has co-authored numerous books on the topic including *Schemes & Scams*, *Weapons of Fraud* and *Outsmarting the Scam Artists*. He has also co-authored numerous studies on fraud and has been invited to present at the National Academy of Sciences, the U.S. Securities and Exchange Commission, the Federal Trade Commission and to the U.K.'s Fair Trading Bureau in London. Shadel recently presented research findings to an internet fraud summit in Germany cosponsored by Microsoft and a number of European authorities. Shadel holds a bachelor's degree in political science, a master's in public administration and a PhD in social science.

Budget

Personnel	.5 FTE Salary and Benefits - 50K/year for 3 years	$150,000
Web and Technology	Upgrades and customization for existing Foundation Website and Impact System - 50K fixed cost, 25K/year for 2 years	$100,000

Regional Call Center Operations	Volunteer expenses, operational costs - 100K/year for 3 years	$300,000
Contracts	Curriculum development (25K fixed cost); evaluation (50K fixed cost)	$75,000
Grants	Capacity building grants for program sustainability to 4 regional organizations 50K/organization in year 3.	$200,000
Total Direct Costs		$825,000
Indirect Costs	10% Indirect Cost Rate (ICR)	$82,500

APPENDIX C

[Berkman Center for Internet & Society at Harvard University logo omitted on each page of Appendix C]

Search for Privacy:

Blueprint for Better Protection of Search Engine Users and Their Data

Executive Summary

The Berkman Center for Internet & Society at Harvard University is a university-wide, interdisciplinary program founded to explore cyberspace, share in its study, and help pioneer its development. Since its inception in 1997, the Center has engaged in extensive research, educational, and other relevant activities on cutting edge issues related to the Internet. Research, teaching, and engagement around risks to privacy and reputation in the digital age—as well as new approaches to protect it—are integral to the Berkman Center's mission.

Among the most frequently used services on the Internet are search engines, which have developed over the years from relatively simple tools to locate information to highly sophisticated and commercially immensely profitable services that are an important part of today's Internet economy. Search engines are not only indispensable navigation aids in the digital age. They also pose a significant risk to consumer privacy by accumulating an unprecedented amount of data about almost everything we search for and click on the Internet. A series of recent privacy cases and incidents where users search data has been shared with third parties without their knowledge or consent illustrates the problem where adequate privacy safeguards fail or do not exist.

To work towards a solution, the Berkman Center proposes an initiative to develop concrete proposals for safe-

guarding Internet privacy more effectively via legal and policy reform, company action, technological innovation, targeted education and user outreach. Bringing together like-minded individuals and organizations that share our mission to strengthen user privacy, we will develop a blueprint that demonstrates how users of search engines can be better protected in the future. Based on a thorough, independent analysis of search-relevant privacy cases and incidents, we will evaluate to what extent existing legal and regulatory frameworks succeed or fail in protecting consumer privacy, and how we can close gaps by adding new privacy safeguards. Outputs of the proposed initiative include specific recommendations targeted at lawmakers and relevant companies, as well as materials, resources, and tools that enable users to make informed choices about their data—and better control it—when searching the Internet.

The initiative will draw together a community of users, practitioners, company representatives, advocates, and technologists who want to take action on Internet privacy by influencing company behavior, strategically educating policymakers, and empowering users.

Proposed Initiative

Problem Statement and Objectives

The litigation and settlement in re Google Referrer Header Privacy Litigation exemplifies a growing number of instances where business practices by Internet companies threaten the privacy of their users. This case and similar incidents demonstrates a lack of adequate safeguards to protect privacy online and mitigate the associated risks for consumers. While business and revenue models, rapid technological innovation, and the behavior of users are important factors that shape privacy risks online, the litigation also suggests that existing legal and

policy frameworks aimed at protecting privacy have not adequately kept up with changing data collection, processing, and sharing practices. Especially in the highly interconnected "big data" environment that defines cyberspace today, these systems are not adequately protecting everyday users.

With a focus on the changing landscape of online search, and leveraging many years of privacy research, teaching, and policy work, the Berkman Center proposes a research-based multi-stakeholder law and policy initiative aimed at formulating concrete proposals for how Internet privacy can be safeguarded more effectively, via legal and policy reform, company action, technological innovation, targeted education and outreach. Analyzing recent privacy cases and incidents—starting with the litigation at hand—and considering emerging and soon-to-be emerging technological developments (e.g. Google Glass, sensor networks, the Internet of Things), as well as advancements in the data analysis capabilities that underlie online searching, the proposed initiative will:

1. Catalog and analyze current and future privacy threats resulting from search technology and corresponding business practices, beginning with in-depth comparative analysis of relevant cases and examples;
2. Examine and investigate existing legal and regulatory frameworks and critically evaluate to what extent current legal instruments and doctrines are suitable or fail to effectively and efficiently protect consumer privacy in the evolving online search ecosystem;
3. Develop, in partnership with relevant stakeholders, a set of scenarios, at the intersection of law, technology, and business practices that outline concrete ways to improve user privacy online, with a focus on search; and,

4. Share these findings in creative formats with relevant stakeholders and target audiences, with the goal of raising awareness regarding privacy risks and potential alternatives or remedies.

   →The ultimate ambition of the proposed initiative is to develop a blueprint that demonstrates how users who are engaged in online search can be better protected in the future; based on the blueprint, we will generate a set of specific recommendations targeted at lawmakers and regulators, as well as relevant companies.

While these specific outcomes are central to the initiative, arguably just as important is the process of building a collaborative network, where essential knowledge can be transferred between relevant actors, and findings can be transformed into concrete actions. As the Berkman Center takes the lead in developing the blueprint and is responsible for recommendations and other key outcomes, the initiative will simultaneously engage a diverse set of stakeholders who play a role in the evolving online search ecosystem, including search technology users, consumer watchdogs and privacy organizations, search technology developers, search providers, advertisers, and regulators. Such multi-stakeholder processes have informed previous policy-oriented initiatives by the Berkman Center and increased the impact of their outcomes. For instance, our work on digital media and copyright, interoperability, freedom of speech, cloud computing regulation, and many other topics have been shaped by extensive consultation and collaboration with a broad set of stakeholders.

This type of initiative is central to the Berkman Center's mission: to investigate the real and possible boundaries in cyberspace between open and closed systems of code, of commerce, of governance, and of education, and

the relationship of law to each. We do this through active rather than passive research, believing that the best way to understand cyberspace is to actually build out into it. Our research and allied work all shares a commitment to advancing the public interest, and holding legal and policy frameworks accountable to that same standard.

The proposed initiative—to explore ways to preserve consumer privacy in a rapidly expanding online ecosystem in which search plays such an important role—will build directly upon previous Berkman research activities and advocacy work on online privacy, as further described below. The initiative will also benefit from important connection points with a series of ongoing projects, including our continuing work on information and communications technology (ICT) interoperability. Important insights regarding the interplay of legal instruments and privacy-protecting mechanisms in computer science, such as differential privacy, can be transferred from our National Science Foundation project on Privacy Tools for Sharing Research Data. Our series of influential youth privacy reports will provide a foundational understanding of how youth behave and seek information online, with a special focus on deepening our understanding of how youth understand privacy risks. In addition to our rich community of faculty, fellows and staff, we will also engage experts from our growing network of collaborators via our global network of interdisciplinary Internet & Society research centers, where comparative perspectives on privacy issues are also center stage.

Workplan, Timeline, and Methodology

Activities under the proposed initiative can be divided into five analytically distinct, but interrelated phases with different methodologies at work.

Phase 1	Information gathering: Understanding the online search ecosystem and related privacy risks

Activity: During the initial phase, we will carry out a comprehensive review and synthesis of the online search ecosystem and its key constituencies, including applicable privacy policies and practices, developments in search technology, evolving business practices, and relevant trends in user behavior, all with the goal of identifying current and future privacy threats as well as opportunities for possible interventions. As part of this process, we will aim to understand how one group of consumers, youth, conceives of and responds to issues of data privacy.

Methods: We will employ various methodologies, including development of use cases and case studies, a review of search-related privacy incidents, a literature review, expert and selected focus group interviews with users, and the formation of a multi-stakeholder working group which will convene for a series of meetings.

Timeline: 6 months.

Milestones: Multi-stakeholder working group launch meeting, project website.

Phase 2	Analysis and evaluation: Mapping the relevant legal and policy landscape

Activity: Based on findings from phase 1, the Berkman team will create a typology and corresponding "heatmap" of search-related privacy challenges and issues for consideration. This will serve as the basis for an in-depth analysis of the relevant legal and regulatory frameworks, broadly defined, with the goal of evaluating the current "state of play" with respect to the levels of privacy protection of users of online search technology. The evaluation will be based on a "scorecard" system, *i.e.* a set of criteria, developed in collaboration with stakeholders, which will enable continued assessment of legal and regulatory frameworks over time and measure success. This mapping will also explore gaps in knowledge or understanding, with the goal of identifying specific areas for education or intervention.

Methods: The team will engage in qualitative research, including traditional legal research and doctrinal analysis as well as economic analysis; it will also apply techniques borrowed from emerging regulatory issues analysis and horizon scanning.

Timeline: 6 months.

Milestones: Interactive heatmap, "scorecard," interim report.

Phase 3	Consultation: Engaging and consulting relevant stakeholders and soliciting feedback on anticipated outputs and work to date

Activity: The insights and findings from these initial activities will be shared through a series of multi-stakeholder working meetings. These gatherings will also provide an opportunity to develop a collective understanding of both the problem and the potential solution space for privacy challenges related to online search. A particular emphasis will be on the identification of scenarios and targeted interventions that could improve the status quo and increase the levels of privacy protection for users of online search technology. A focus will be on legal and regulatory interventions, including enforcement issues, in addition to areas for user education and enhanced understanding of privacy risks (and possible alternatives).

Methods: Multi-stakeholder working meetings, expert interviews, and—possibly—a small number of commissioned papers, including a comparative law analysis.

Timeline: 3 months.

Milestones: Working meetings, potential analytical pieces based on takeaways from working meetings.

Phase 4	Synthesis

Activity: In the fourth phase, the Berkman team will synthesize the work from the previous activities and work towards a blueprint that outlines how the privacy of users who are engaged in online search can be better protected in the future. Based on the blueprint, the team will generate a set of specific recommendations targeted at lawmakers and regulators, in addition to relevant ICT

companies. It will also seek to explore or envision opportunities to enhance user understanding of risk, with the goal of developing tools or other educational materials that can be used by users (and perhaps forward-leaning companies). The draft blueprint and the recommendations will be shared with the multi-stakeholder group and outside experts, including privacy advocacy groups.

Methods: Qualitative analysis.

Timeline: 6 months.

Milestones: Blueprint and recommendations.

Phase 5	Outreach and public communications of findings

Activity: While outreach will occur in parallel to the four phases outlined above, the proposed initiative would conclude with a strategic effort to engage in knowledge transfer and the targeted sharing of the blueprint and recommendations with lawmakers and regulators and the public at large.

Methods: Outreach event in Washington D.C.; policy briefings with decision-makers; media calls, as appropriate.

Timeline: 3 months.

Milestone: D.C. event.

Target Group and Value Added

The target group of the initiative closely aligns with the Members of the Class, which according to the complaint are "all persons in the United States who submit-

ted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification." A more specific approximation of the demographics of the Class can be inferred from a 2012 report by the Pew Research Center, according to which 83% of searchers used Google as a search engine. The report found that search is particularly popular among young adult Internet users, users who have been to college, and those with the highest household incomes.

The targeted group of the proposed initiative aligns closely with the Class at three levels and across the different phases of the project, as outlined in the previous section:

- *Multi-stakeholder working group:* A select number of search engine users will be invited to participate in the multi-stakeholder working group and in the respective meetings. A focus will be on young adult users.
- *Consultation process:* The draft documents resulting from the proposed initiative will be shared over the project website with all class members, who are invited to provide feedback.
- *Blueprint and recommendations:* The proposed initiative is aimed at improving the level of privacy protection of users who use search technology online through changes in the legal and regulatory framework. By definition, this group includes all Class Members.

At the core of the case is the allegedly unlawful disclosure of the contents of search queries of Google users to third parties. The interest of the Class is in being protected against future privacy violations and non-transparent data-sharing by the search engines provider.

The proposed initiative responds to these issues by benefiting the Class directly and in at least three ways:

- *Knowledge base about threats*: The initiative seeks to inform Internet users about current and future privacy threats related to online searching, while offering a critical assessment of gaps and limitations of the current legal and regulatory framework, including enforcement regimes. Importantly, this assessment will include an analysis of user expectations and attitudes, with an eye towards creating educational materials that will better inform consumers and policy makers about the technologies they use (and regulate). This foundational analysis will not only educate the Class members on the privacy risks associated with online search, but also empower them to take deliberate and effective preventive measures as desired.
- *Policy blueprint and recommendations*: The initiative will result in a blueprint and associated recommendations for lawmakers and regulators aimed at increasing the future level of privacy protection for the users of online search technologies—including the class members. As such, it seeks to protect the Class from future wrongful conduct of which the plaintiffs complain.
- *Educational materials*: Finally, the Class will benefit from creative educational materials designed to respond to gaps in knowledge regarding privacy risks, and that are based on findings emerging from a collaborative, networked process with key actors in the field. These outputs will ideally complement ongoing efforts to raise awareness and help users and policymakers understand the more complex elements of search technologies, and therefore make informed choices about the products they use.

Deliverables, Reporting, and Evaluation

The objectives and deliverables have been described in the action plan and are both measurable and subject to evaluation.

Key deliverables include:

- Heatmap identifying and prioritizing search-related privacy risks
- Research outputs, including a series of papers and briefing materials
- Blueprint and recommendations addressed to lawmakers and regulators
- Creative educational and outreach materials, grounded in data on user concerns regarding search-related privacy risks

Each draft deliverable will be subject to a peer review, shared among the members of the multi-stakeholder working group, which includes search engine users, and will be part of an open consultation process, in which the Class can participate and provide feedback. All findings and outcomes will be made accessible over a project website on the Berkman Center's homepage.

The outcomes and effectiveness of the proposed initiative will be reported in one midterm and one final report, available to the Class and the public at large through a project website on the Berkman Center's homepage. The reports will be structured in a manner similar to the narrative portion of a grant report. Moreover, all findings and materials resulting from the initiative—including, for instance, the summaries of the multi-stakeholder working meetings as well as the typology of search-related privacy threats and challenges, in addition to educational materials—will be shared online and pre-

sented in a manner that is accessible to a broader audience, including the Class, policymakers and companies.

Team

The initiative will be staffed as follows: Professor Urs Gasser will serve as the Principal Investigator of the initiative, in close collaboration with the Berkman Center's incoming Faculty Chair and Co-Founder Professor Jonathan Zittrain. They will be supported by a part-time project manager as well as three research fellows and two research assistants. The Cyberlaw Clinic at the Berkman Center, led by managing director Chris Bavitz, will provide additional capacity and facilitate student participation in the project. The Berkman core team will provide support in areas such as financial administration, event management, and outreach/communications.

Urs Gasser

[photograph omitted]

Urs Gasser is the Executive Director of the Berkman Center for Internet & Society at Harvard University and a Professor of Practice at Harvard Law School. He is a visiting professor at the University of St. Gallen (Switzerland) and at KEIO University (Japan), and he teaches at Fudan University School of Management (China). Urs Gasser serves as a trustee on the board of the NEXA Center for Internet & Society at the University of Torino and on the board of the Research Center for Information Law at the University of St. Gallen, and is a member of the International Advisory Board of the Alexander von Humboldt Institute for Internet and Society in Berlin. He is a Fellow at the Gruter Institute for Law and Behavioral Research. Dr. Gasser has written and edited several books, and published over 100 articles in professional journals.

Jonathan Zittrain

[photograph omitted]

Jonathan Zittrain is Professor of Law at Harvard Law School and the Harvard Kennedy School of Government, Professor of Computer Science at the Harvard School of Engineering and Applied Sciences, and co-founder of the Berkman Center for Internet & Society. His research interests include battles for control of digital property and content, cryptography, electronic privacy, the roles of intermediaries within Internet architecture, human computing, and the useful and unobtrusive deployment of technology in education. He performed the first large-scale tests of Internet filtering in China and Saudi Arabia, and as part of the OpenNet Initiative co-edited a series of studies of Internet filtering by national governments, including Access Denied: The Practice and Policy of Global Internet Filtering, and Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace. He is a member of the Board of Trustees of the Internet Society, the Board of Directors of the Electronic Frontier Foundation, and the Board of Advisors for Scientific American. He has served as a Forum Fellow of the World Economic Forum, which named him a Young Global Leader, and Distinguished Scholar-in-Residence at the Federal Communications Commission. His book The Future of the Internet—And How to Stop It is available from Yale University Press and Penguin UK—and under a Creative Commons license. Papers may be found at http://www.jz.org.

Christopher Bavitz

[photograph omitted]

Christopher T. Bavitz is Managing Director of Harvard Law School's Cyberlaw Clinic, based at the Berk-

man Center for Internet & Society. He is also a Clinical Professor of Law at Harvard Law School, where he co-teaches the Practical Lawyering in Cyberspace seminar and teaches the seminar, Music & Digital Media. Chris concentrates his practice on intellectual property and media law, particularly in the areas of music, entertainment, and technology. He oversees many of the Clinic's projects relating to copyright, speech, and advising of startups, and he serves as the HLS liaison to Harvard's Innovation Lab. Prior to joining the Clinic, Chris served as Senior Director of Legal Affairs for EMI Music North America. From 1998-2002, Chris was a litigation associate at Sonnenschein Nath & Rosenthal and RubinBaum LLP/Rubin Baum Levin Constant & Friedman, where he focused on copyright and trademark matters. Chris received his B.A., cum laude, from Tufts University in 1995 and his J.D. from University of Michigan Law School in 1998.

Sandra Cortesi

[photograph omitted]

Sandra Cortesi is a Fellow at the Berkman Center and the Director of the Youth and Media project. She is responsible for coordinating the Youth and Media's policy, research, and educational initiatives. At the new Youth and Media Lab Sandra works closely with talented young people and lead researchers in the field as they look into innovative ways to approach social challenges in the digital world, including the production and exchange of digital media, youth development in social networking, and digital citizenship. Together with Urs Gasser and the YaM team, she focuses on the topics of "information quality" and privacy, about which she has coauthored several publications. Sandra also examines a broad range of youth communication and information technology prac-

tices for insights into youth online behavior and emergent policy questions, where she applies her training as a cognitive scientist. Sandra continues to also be engaged in international projects. Sandra has a Masters in Psychology, with a specialization in Neuro-Psychology and Human-Computer Interaction, from the University of Basel.

Paulina Haduong

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Paulina Haduong is a Master's Candidate in Technology, Innovation, and Education at the Harvard Graduate School of Education. She is interested in the intersection of education, technology, and art. She is a Co-Founder of the Sexual Literacy Forum at Yale and holds a BA in Linguistics from Yale University, where she was a member of Berkeley College.

Budget

The Berkman Center respectfully requests $935,000 in funding from this cy pres award. Budget for two years of activity is as follows:

Salary and Fellowship:	**$593,800**
Principal Investigator	$74,000
Co-Principal Investigator	$22,000
Clinical Instructor	$75,000
Research Fellows (2/year @ $48,000)	$192,000
Project Management, Outreach	$140,800
Research Assistants, Student Interns	$90,000

Fringe Benefits:	**$198,950**
Travel and Events:	**$75,500**
Working meetings (5, various cities)	$17,500
Focus groups (3, various cities)	$10,500
Policy briefing, DC	$7,500
Staff travel (meetings, conferences)	$20,000
Public outreach	$10,000
Other Project Expenses	**$66,750**
Editorial svcs, graphic design	$3,000
Computing resources	$10,000
Honoraria (5 papers @ $2,000)	$10,000
Subject payments	$2,500
Technical development	$40,000
Supplies, misc project expenses	$1,250
Total:	**$935,000**

Brief History of the Berkman Center

The Berkman Center for Internet & Society at Harvard University is a research program founded to explore cyberspace, share in its study, and help pioneer its development. Since 1997, the Center has been home to an ever-growing community of faculty, fellows, staff, and affiliates working on projects that span the broad range of intersections between cyberspace, technology, and society.

Our global community works collaboratively on cutting edge issues at the intersections of new technology and media including governance, innovation, privacy, intellectual property, cooperation, learning, youth, underserved communities, freedom of expression, and civic engagement.

Relevant Experience and Previous Activities (Selection)

Research, teaching, and engagement around the risks and opportunities related to privacy in a digital age are integral to the Berkman Center's mission and have informed our work in foundational ways. Our underlying approach to studying privacy has been to learn and share across projects and areas of inquiry, as well as with researchers in our extended network, including colleagues outside the U.S.

Research

The Berkman Center has long been home to a number of cross-disciplinary initiatives that investigate privacy and privacy-relevant questions in the digitally networked environment. We offer research, resources, workshops, and other outputs focused on key privacy issues, aiming to pinpoint novel solutions to privacy problems that reconcile technological, legal, political, economic, and behavioral tensions and maximize capacity for innovative and effective uses of data and communications. Our most recent work in the privacy space includes the Student Privacy Initiative, the Youth and Online Privacy Initiative, and the Privacy Tools for Sharing Research Data project. Each of our efforts builds upon engagement with and outreach to diverse stakeholders for whom privacy questions are particularly relevant, including educators, policy makers, industry representatives, advocates, and other scholars. This interdisciplinary, multi-stakeholder

model empowers our team to surface, identify, and analyze critical emerging questions and challenges, to support efforts to promote and preserve privacy rights, and to design and implement practical systems that allow research findings to benefit society.

- Since 2012, the Berkman Center's Youth and Media (YaM) team has been engaged in a Youth and Online Privacy initiative in partnership with the Pew Research Center focused on gaining a more nuanced understanding of youths' conceptions of privacy, how these conceptions may differ from adult perspectives, and how they are reflected in the kinds of activities in which youth engage online. As part of this project, the YaM team conducted focus group interviews with over 200 youth across the country, while Pew administered a nationally representative survey. Together five seminal reports on youth and privacy were co-authored and released, with "Teens, Social Media, and Privacy" as a flagship report. Across these and related efforts, the team has explored the following research questions, among others:
    - What concepts equivalent to "privacy" are embedded in how youth use social media?
    - What kinds of activities do youth engage in when they are online and how do they control the information they post on websites, and more specifically, on social media platforms?
    - Who do youth primarily interact with when they're online? How do youth view relationships with adults and with their peers online?
    - How do youth perceive and respond to Internet restrictions their schools and/or parents might have put in place?

- How do youth perceive and respond to online ads?
- How can we foster a grounded discussion about what technologies—and which associated policies—would be most useful and appropriate, particularly in the educational context?

- Moving forward, the Youth and Media team explores, as part of the Student Privacy Initiative described below, how new online platforms and tools can shape, improve, and expand students learning experiences while protecting their privacy.

Across formal and informal educational settings, increasingly powerful and innovative ICT products and services offer tremendous potential for schools to provide educators and students with new platforms and tools to shape, improve, and expand learning experiences, even in the face of continually shrinking budgets. However, these benefits are also accompanied by critical privacy questions and concerns, especially around the collection and use of student data. Beginning in early 2013, the Berkman Center's Student Privacy Initiative launched a multidisciplinary, multi-stakeholder conversation focused on how these privacy considerations intersect with existing policy regimes as well as with emerging developments in educational theory (e.g., connected learning) and institutional practices (e.g., refining technology policies within an individual school). Since launching, the Initiative has contributed to the student privacy and technology field with a number of timely publications and workshops, including the following: "Privacy and Children's Data: An Overview of the Children's Online Privacy Protection Act and the Family Educational Rights and Privacy Act;" "Student Privacy in the Cloud Computing Ecosystem: State of Play & Po-

tential Paths Forward;" "Youth Perspectives on Tech in Schools: From Mobile Devices to Restrictions and Monitoring;" "Student Privacy & Cloud Computing at the District Level: Next Steps and Key Issues;" and "K-12 Edtech Cloud Service Inventory," which drew from a November 2013 Berkman and Consortium for School Networking (CoSN) co-organized working meeting.

- Information technology, advances in statistical computing, and the deluge of data available through the Internet are transforming social science. However, a major challenge for researchers is maintaining the privacy of human subjects. Led collaboratively by Harvard University's Center for Research on Computation and Society (CRCS) at the School of Engineering and Applied Sciences, Institute for Quantitative Social Science (IQSS), and Berkman Center for Internet & Society, with support from the Secure and Trustworthy Cyberspace (SaTC) program at the National Science Foundation, the Privacy Tools for Sharing Research Data project seeks to develop methods, tools, and policies to bolster the tremendous value that can come from collecting, analyzing, and sharing data while more fully protecting individual privacy.

Education

The Berkman Center has a long-standing track record on educating students and the public at large on privacy issues. Early explorations on the topic during the 1990s and early 2000s include: privacy-focused sections in the first "Internet & Society" courses at Harvard Law School and in the Berkman Center's global iLaw seminars; and a "Privacy in Cyberspace" course offered in 1999-2003 through the "Berkman Online Lectures & Dis-

cussions" program, which also tackled consumer privacy in its E-Commerce offering. In 2006, the Berkman Center convened the Identity Mashup Conference as the culmination of a two-year effort to explore the role of identity systems in strengthening privacy, civil liberties and new forms of civic participation and commerce. More recent activities include the following:

- *Ongoing engagement with privacy-related issues* in courses such as Practical Lawyering in Cyberspace (Harvard Law School), Difficult Problems in Cyberspace (Harvard Law School-Stanford Law School joint course), Online Business and Law Seminar (Harvard Law School), Cyberspace in Court: Law of the Internet (Harvard College Freshman Seminar), Internet & Society: Technologies and Politics of Control (Harvard Extension School), and Comparative Online Privacy, a seminar led by Executive Director Urs Gasser in Spring 2014 (Harvard Law School).
- Privacy within business, non-profit, and research contexts has been a significant area of focus for the Harvard Law School Cyberlaw Clinic at the Berkman Center since its creation a decade ago. The Clinic provides innovative, hands-on training to Harvard Law students who, under careful supervision, offer legal and policy research, guidance and representation to a variety of real-world clients, including start-ups, institutional entities and research projects. Data and information privacy and security are foremost among the concerns, and the Clinic's attorneys and students frequently address novel questions of the practical application of privacy and data security laws, regulations and legal instruments to social science research initiatives.

- In October 2013, the Berkman Center announced participation in an innovative privacy program launched by Fordham Law School's Center for Law and Information Policy (CLIP). As part of the project, CLIP will release a curriculum for privacy education geared toward middle-school students. In coordination with Fordham, Berkman—particularly Youth and Media and the Cyberlaw Clinic—will adapt the curriculum and put the educational effort into practice.

Related Activities

In addition to the research and educational activities highlighted in the previous sections, the Berkman Center has engaged in various efforts aimed at shaping the state of privacy policy, technology, and organizational practice. Examples include:

- *Testimony and policy advice*: Berkman Center researchers have given testimony before policymaking and legislative bodies and international organizations such as the EU, OECD, and APEC (since 2007), particularly based on our Youth and Media work on youth, technology, and privacy as well as reputation issues as well our work on interoperability, which puts forth a nuanced theory of interop that considers the many benefits of increasing interconnectedness while also grappling with its potential negative effects, especially with respect to privacy.
- *Best practice models*: The Berkman Center was among the co-creators of the Global Network Initiative, a multi-stakeholder effort to protect and advance online privacy and freedom of expression, which draws on the international bill of rights to create overarching principles for ICT company decision-making. The GNI combines these principles with dy-

namic implementation guidelines and a supportive framework for learning and accountability to ensure that companies are behaving responsibly, and that their outcomes improve over time.

- *Prototyping new institutional models and research tools:* The Berkman Center's Law Lab (2008-2010) engaged in tool and institution building to deepen our understanding of trust, transparency and human co-operation.

Insights and findings from these and related efforts have been presented at many events in the US and abroad, including, for instance:

- *Hyper-Public: A Symposium on Designing Privacy and Public Space* brought together computer scientists, ethnographers, architects, historians, artists and legal scholars to discuss how design influences privacy and public space; how design shapes and is shaped by human behavior and experience; and how design can cultivate norms such as tolerance and diversity.
- Privacy-related events such as the *Future of Consumer Protection Workshop*, held in St. Gallen, Switzerland; a special speaker series on the Psychology and Economics of Trust and Honesty; and frequent presentations on privacy by guest scholars, including Berkman Fellows, as part of the Center's flagship event series.

Tax Status, Board Members, Key Staff

As a research center within Harvard University, the Berkman Center is recognized as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

The Center is governed by its board of directors, which consists of faculty from across Harvard University. Chaired by Professor William Fisher of the Harvard Law School, the board includes Professor Yochai Benkler (Law School), Visiting Professor Susan Crawford (Law School, Kennedy School of Government), Professor John Deighton (Business School), Dr. Urs Gasser (Law School, Berkman Center Executive Director), Professor Charles Nesson (Law School), Professor Felix Oberholzer-Gee (Business School), Professor John Palfrey (Law School), Professor Jeffrey Schnapp (Faculty of Arts & Sciences, Graduate School of Design), Professor Stuart Shieber (School of Engineering & Applied Sciences), Professor Mark Wu (Law School), Professor Jonathan Zittrain (Law School, Kennedy School of Government, School of Engineering & Applied Sciences; elected Faculty Chair as of July 1, 2014).

The Center includes 30 full-time staff members as well as 61 Fellows and other Affiliates. We engage well over 100 students annually in our research and teaching programs directly, and classes taught by our faculty reach an additional 150 students each year. Key staff members include:

- Executive Director: Urs Gasser
- Research Director: Rob Faris
- Associate Director: Suzanne Kriegsman
- Director of Technology: Sebastian Diaz
- Clinical Program Managing Director: Christopher Bavitz
- Office Manager: Carey Andersen
- General Manager of Special Initiatives: Amar Ashar
- Project Coordinator: Geneve Bergeron

- Web Developer: Justin Clark
- Project Manager: Rebekah Heacock
- Project Manager: Jeff Hermes
- Project Coordinator: Adam Holland
- Digital Media Producer: Dan Jones
- Project Manager: Jennifer Jubinville
- Lead Engineer: David Larochelle
- Project Manager: Nathaniel Levy
- Systems Administrator and Platform Architect: Isaac Meister
- Financial Manager: Jon Murley
- Project Coordinator: David O'Brien
- Web Developer: Anita Patel
- Technical Support Specialist: Ed Popko
- Staff Assistant: Esther Simmons
- Project Manager: Alicia Solow-Niederman
- Financial Assistant: David Ssewankambo
- Manager of Community Programs: Rebecca Tabasky
- Research Associate: Shailin Thomas
- Clinical Instructor: Dalia Topelson
- Clinic Coordinator: Shannon Walker
- Project Coordinator: Dana Walters
- Web Developer: Ryan Westphal

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comply with the University's extensive financial guidelines, including segregation according to fund-based accounting principles, and are subject to annual external audit. As a matter of policy, the Berkman Center is committed to autonomy in our research and transparency in our relationships. These traits are essential to our continued credibility and success as an institution. Our funding model is possible due to the robust, strict, and clear policies that govern our association with donors and preserve the Berkman Center's intellectual independence.

Our research and outreach modes depend substantially on being able to convene and engage parties that span the spectrum of viewpoints, and for our research results to have impact, our work must not only be intellectually rigorous, but also fair and impartial. To that end, we do not accept grants that limit our ability to carry out research in the way we see fit—free of outside influence and consistent with our organizational mission and values. We do not undertake research or accept funds at the request of outside organizations unless it is consistent with our existing research agenda, mission, and overall philosophy. We are transparent about our funding sources, announcing the receipt of funds through our normal communication channels. For specific information, please see our website.

All corporate donors agree to give their funds as unrestricted gifts, for which there is no contractual agreement and no promised products, results, or deliverables. We have experimented with different arrangements at times in the past and have come to believe that this is the most productive approach for both the Center and our donors. These policies complement—and extend, in some respects—the relevant policies of Harvard Law School

and Harvard University. We will continue to review these policies to ensure that we are doing our utmost to maintain the integrity of the Berkman Center, our work, and our community.

Google, the defendant in this case, is among the nearly two dozen sources of current funding. In Fiscal Year 2013 (July 2012-June 2013), the Berkman Center received $307,500 from Google, which was approximately 3.9% of its total budget of $7.9 million for that year. In the current year, we have received $325,000 in contributions from Google as part of a $7.0 million budget, or 4.6% of the whole.

APPENDIX D

Efforts to promote online privacy via research and education at Carnegie Mellon

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This document briefly describes the technical and societal impact of Carnegie Mellon research and educational efforts on online privacy, and proposes additional efforts in this space.

1. Carnegie Mellon University

Carnegie Mellon offers unique, world-class opportunities for security and privacy research. Carnegie Mellon hosts one of the largest academic security and privacy research centers in the world (CyLab), with over 50 faculty and 100 graduate students working on all facets of computer and information security and privacy, ranging from public policy to software design, to network measurements. To achieve high-impact research, inter-disciplinary collaborations between faculty and groups in drastically different fields (*e.g.*, psychology, economics and computer science) are not merely encouraged: they are the norm rather than the exception.

Ongoing privacy-related work in CyLab focuses on a number of different areas including understanding how Internet users make privacy-related decisions and providing tools to support them in making more informed decisions; using empirical data to evaluate the effectiveness and impact of privacy tools, privacy laws, and self-regulatory programs; and developing practical techniques to formalize and enforce privacy policies in various settings.

CyLab researchers have a strong track record in privacy research, outreach, and education. CyLab privacy research has appeared in top peer-reviewed conferences and journals and has been recognized with prestigious awards. Several privacy research papers by CyLab authors have been selected as "privacy papers for policy makers" by the Future of Privacy Forum. Recently, a paper describing empirical research on the effects of privacy information on online purchasing behavior coauthored by Acquisti, Cranor, and their students received the Information Systems Research award for Best Published Paper of 2012. In addition, privacy papers by CyLab faculty and their students are cited frequently in FTC privacy reports and at privacy-related hearings on Capitol Hill. Both Acquisti and Cranor have testified at privacy-related Congressional hearings, as well as at privacy workshops sponsored by the FTC and other Federal agencies. In addition, CyLab privacy researchers are frequently invited to present their research findings at companies—for example, faculty have recently given talks about their privacy research at Google, Facebook, PARC, and Microsoft. CyLab privacy research is mentioned frequently in the popular press, including theWall Street Journal, the Economist, The New York Times, Wired.com, and CNN; researchers have appeared recently on NPR and 60 Minutes, as well as on local television news programs.

CyLab researchers frequently teach privacy-related courses at the undergraduate and graduate level. Carnegie Mellon has recently launched the world's first masters degree program in privacy engineering. We expect that graduates of this is program will be well qualified to work for companies where they can help address privacy issues in products and services. As we developed the

curriculum for this new program, we talked to the privacy teams at a wide range of companies. They told us that it is difficult to hire employees with strong technical skills and a knowledge of privacy. Typically, they end up hiring software engineers or security engineers and providing some on-the-job privacy training. CMU privacy engineering graduates will be uniquely well qualified for privacy engineering jobs in industry. In order to attract top students to the privacy engineering program (rather than a more traditional software engineering or security engineering masters program), we have set up a scholarship fund so that we can provide some scholarship support to outstanding students.

2. Proposed efforts

Carnegie Mellon proposes a comprehensive effort to improve user privacy in an online setting. The research we propose to conduct can be divided into three categories: (1) furthering our understanding of users' privacy behaviors and online threats to users' privacy; (2) improving user-facing interfaces and technologies to increase users' understanding and control of their privacy; and (3) developing computational mechanisms to help ensure that systems and organizations adhere to privacy regulations or policies.

2.1 Understanding users' privacy behaviors and online threats to users' privacy

2.1.1 Evolutionary roots of privacy concerns and behaviors

We propose to explore, using a series of behavioral experiments, the influence that stimuli indicating the presence of other individuals in the physical world, often processed unconsciously, can have over security and privacy behavior in cyberspace. Our proposal is predicated around an evolutionary conjecture: human beings have

evolved to detect and react to threats in their physical environment, and have developed perceptual systems selected to assess these physical stimuli for current, material risks. In cyberspace, those stimuli often are absent, subdued, or deliberately manipulated by attackers. Hence, security and privacy concerns that would normally be activated in the offline world remain muted in cyberspace, and defense behaviors are thus hampered. Our proposal aims at investigating such conjecture and its potential implications, both in positive terms (what are the evolutionary roots of privacy and security behavior?) and in normative terms (how can we use that knowledge to improve privacy and information security in cyberspace?).

Our research question here is straightforward, while also ambitious: are there evolutionary roots for privacy and information security concerns, and can these roots be leveraged to improve privacy and security in cyberspace? While it is impossible to test such evolutionary conjecture directly, we can address the research questions by investigating the impact that external stimuli in the physical world have on security and privacy behavior in cyberspace. We plan to conduct a series of human subjects behavioral experiments aimed at investigating potential evolutionary roots of privacy concerns, and how the usage of physical and even visceral stimuli in the offline world can be used to assist privacy and security behavior in the online world.

Numerous factors determine our different reactions to real world and cyberspace threats. An act that appears inappropriate in one context (watching somebody undressing in their bedroom) is natural in another (on the beach); the physical threat of a stranger following us in the street is more ominous than the worst consequences

of an advertiser knowing what we do online; common sense and social conventions tell us that genuine Rolexes are not sold at street corners—but fake Bank of America websites are found at what seem like the right URLs. There is, however, one crucial parallel that connects the scenarios we just described: our responses to threats in the physical world are sensitive to stimuli which we have evolved to recognize as signals of danger. Those signals are absent, subdued, or deliberately manipulated in cyberspace. The evolutionary conjecture we therefore posit and experimentally investigate is that decision-making regarding privacy and security issues may be inherently more difficult in cyberspace than in the physical world, because (among other reasons) when we are online we lack, or are less exposed to, stimuli which we have evolved to employ in the real world as means of detection of potential threats.

We propose a series of lab experiments to investigate this conjecture indirectly—that is, by measuring the impact that the presence, absence, or changes, to an array of stimuli in the physical world have on security and privacy behavior in cyberspace. Specifically, human beings have evolved sensorial systems selected to detect and recognize threats in their environment via physical, "external" stimuli. These stimuli, or cues, often carry information about the presence of others in one's space or territory. The evolutionary advantages of being able to process and react to such stimuli are clear: by using these signals to assess threats in their physical proximity, humans reduce the chance of being preyed upon [9, 28]. Under this conjecture, the modern, pre-information age notion of privacy may be an evolutionary by-product of the search for physical security. Such evolutionary explanation for privacy concerns may help explain why—

despite the wide and diverse array of privacy and security attitudes and behaviors across time and geography—evidence of a desire for privacy and information security, broadly constructed, can be found across most cultures. Furthermore, since in cyberspace those signals are absent, subdued, or manipulated, generating an evolutionary "deficit," such an evolutionary story may explain why privacy and (information) security concerns that would normally be activated in the offline world are suppressed in cyberspace, and defense behaviors are hampered.

While we cannot directly test such an evolutionary conjecture (that the absence of stimuli that humans have evolved to detect for assessing threats, such as cues to the presence of other humans, contributes to our propensity to fall victim to cyberattacks or cyberspace privacy violations), we can test it indirectly. Namely, we can test—through a series of human subjects' experiments we have carefully designed—how the presence, absence, or modifications in an array of stimuli in the physical world affect security and privacy behavior in cyberspace. The term "stimuli," in the parlance of this proposal, is akin to the term "cues" as used in psychology and cognitive science.

Our experiments focus on three types of such stimuli: (1) sensorial stimuli: auditory, visual, olfactory cues of the physical proximity of other human beings; (2) environmental stimuli: cues that signal to an individual certain characteristics of the physical environment in which the individual is located, such as crowdedness or familiarity; and (3) observability stimuli: cues that signal whether the individual is possibly being surveilled.

The three categories are not meant as mutually exclusive (for instance, it is through our senses that we receive cues about the environment). Our experiments capture

how manipulations of the stimuli in the physical environment of the subject influence her privacy and security behavior in cyberspace. Privacy behavior is operationalized in terms of individuals' propensity to disclose personal or sensitive information, as in previous experiments by the authors. Security behavior is operationalized in a number of different manners, including susceptibility to cyber-attacks (for instance, phishing).

This significance of this research is two-fold. First, it attempts to advance the scientific understanding of what makes security and privacy decision making in cyberspace uniquely different from, and sometimes more difficult than security and privacy in the physical world, by introducing a novel approach to cybersecurity that takes into account the evolutionary roots of defender (and attacker) behavior in cyberspace. Second, by investigating a factor that may significantly disrupt user behavior in cyberspace, the research findings have applied relevance for developers, in that they can inspire how to construct systems that induce more secure behavior. Specifically, our aim is to provide design insights on the differences between perceived and actual security protection in cyberspace, and on how to make features of actual protection or invasion (which then affect choices and behavior in cyberspace) more salient.

Initial research in the above-described directions was funded by the National Science Foundation through a short (18 months) exploratory grant, which has been completed/expired. We ran some initial pilots, which produced promising results; we would use additional funds to design and run actual large-scale experiments based on the lessons learned from the pilots.

The findings of research could be used to examine whether physical stimuli can be used to ameliorate secu-

rity and privacy behavior in cyberspace. Security firms and any companies that develop software that allows its users to make privacy-related decisions could use visceral interventions informed by these results to improve users' ability to make secure and privacy-preserving decisions.

2.1.2 Impact of information leaks

We propose to investigate and quantify through measurement how private information leaks can impact online user experience.

For instance, we have observed through several measurement studies that an increasing number of websites were compromised by attackers who used them to redirect traffic based on the HTTP referrer field information [22, 23]. Somebody landing on one of these compromised websites from a Google search for a specific drug, would be sent to an online pharmacy; while on the other hand, different values in the referrer field would result in being shown the original, uncompromised, website. This mode of illicit advertising has considerably increased and become increasingly sophisticated over the past three years.

We are interested in systematically evaluating how adversaries can abuse information used a priori for user experience personalization (e.g., HTTP referrer), and what are possible countermeasures.

We have gathered evidence that "advertisers" as described above tend to be entities specializing in traffic brokerage. They are not, usually, the same entities as the ones which do sell products, but instead operate externally. For instance, somebody who operates an unlicensed online pharmacy would rely on an advertiser to bring traffic to their online store; that advertiser would

charge the pharmacist as a function of the traffic they manage to redirect to the pharmacy.

Uncovering the business of traffic hijacking In the context of our proposed research, advertisers are particularly interesting, in that they may be working for completely different types of businesses, seeking completely different types of customers. There is anecdotal evidence, for instance, that advertisers—also referred to as "traffic brokers"—charge differently based on the type of traffic desired. For instance, consider a traffic broker sending traffic to websites X and Y. If the operator of website X wants a mix of traffic from USA and Canada seeking pharmaceutical drugs, he probably does not pay the same price as the owner of website Y who is looking for Asian traffic reflecting an interest in adult movies.

We know very little about the specific types of information that is valuable to traffic brokers, and propose to conduct longitudinal, large-scale studies to try to determine how traffic is being monetized as a function of the perceived user interests. To that effect, we plan to build up on the measurement infrastructure we previously devised [22], to deploy it on machines all over the world, using the PlanetLab testbed [1], run queries for different types of traffic (adult, pharmaceutical, software, gambling, ...) and observe differences in a) the pages being fed to search engines as redirection points, and b) the pages on which we eventually land depending on the origin of the traffic.

Devising possible defenses We will then turn to evaluating possible countermeasures. Completely erasing the "HTTP referrer" field seems like a low-hanging fruit. We have, however, gathered anecdotal evidence that miscreants are able to exploit other types of infor-

mation (*e.g.*, cookies being set by landing pages in response to a given query [23]) to redirect traffic "intelligently" even in the absence of HTTP referrers. Informed by the measurements we will have gathered, we will attempt to reverse-engineer the various mechanisms being used, and, ultimately, design effective defenses against traffic hijacking.

The following outcomes of this research could be transitioned to practice:

- Thorough description of the traffic hijacking ecosystem; this could be useful to search engine operators such as Google, but also to law enforcement.
- Guidelines for traffic anonymization in order to avoid traffic hijacking. These could potentially be implemented as browser plugins or web proxies. Such an implementation would in turn be publicly available (open-source).

The research described in Section 2.1.2 would build on work partially funded by the National Science Foundation under award CNS-1223762 (2012-15). Specifically, that research has been to perform measurements evidencing the use of traffic brokers. We have also acquired anecdotal information these brokers perform traffic differentiation based on personal or private information surreptitiously obtained from their visitors; but we have not yet uncovered the types of private information that are valuable to brokers. This would require additional measurement studies as described in this section. These measurements are out of scope for the current NSF grant, and would only be possible with additional funding; similarly, the research on possible defenses and traffic anonymization at the end-host level would also be possible only with additional funding.

2.2 User-facing technologies to improve privacy

2.2.1 User authentication

A key aspect of the online experience is user authentication—in order to make online transactions (*e.g.*, online banking, email) users must first authenticate to a computer system, potentially giving up some privacy in the process.

One very simple solution to the problem of authentication is to use biometric authentication, in which an individual provides unique characteristics (*e.g.*, fingerprints, iris scan, . . .) to allow a different party to confirm their identity, and check that they are authorized to perform a given transaction.

The problem, however, is that this form of authentication binds identification with authorization: You must prove who *you are* to be able to conduct a transaction. While this binding may be desirable in certain contexts—for instance, access to critical physical infrastructure such as nuclear plants—it is actually a drawback for the vast majority of transactions conducted online, where users may desire privacy. For example, an individual purchasing condoms does not need, and probably does not want, their identity to be bound to that purchase for the purchase to be authorized. All that is needed is a proof that the payment instrument used for the purchase is valid and can provide sufficient funds.

Fortunately, ensuring that a certain individual is authorized to perform a transaction does not require to obtain details about the individual's identity; instead this authorization can be demonstrated by the knowledge or possession of an authentication token such as a password. In other words, authentication tokens allow to dissociate one's identity from the authentication mechanism, which

in turn allows for superior privacy guarantees. The challenge then becomes to design authentication mechanisms that are both usable and secure, while while simultaneously ensuring individual privacy is preserved.

Despite years of research trying to prove their obsolescence and replace them with more modern alternatives, authentication passwords remain a very strong candidate for meeting these security, usability, and privacy properties: Strong passwords are hard to break; everybody knows how to use a password; and passwords can be completely decoupled from one's identity. Unfortunately, very little is known about how to properly design guidelines for users to choose strong passwords that remain usable. While we have made advances in determining, for instance, how good a trade-off between usability and security long passwords (*i.e.*, passphrases) provide compared to complex password composition policies [20, 21], we still lack fundamental answers to important questions we propose to study.

Security of long passwords Longer passwords, which contain more characters are harder to crack by brute-force, *i.e.*, when the attacker tries to enumerate all possible passwords, which they can attempt to do in the context of offline attacks. They are also *a priori* more resilient than their shorter counterparts to more educated guessing [20], while being potentially easier to memorize. For instance, it is more straightforward to memorize "Mary had a little lamb," than "n!7#J*."

This comes from the property that the longer the password, the more structured it becomes: "Mary had a little lamb," for instance follows grammatical rules and can be modeled as "noun-verb-article-adjective-noun," which is a relatively common construction. Such constructions provide structure to long passwords, which in

turn makes them much easier to memorize; at the same time, an attacker could use such structures to considerably reduce the amount of guesswork they have to perform to discover a password. For instance, a structure such as "verb-verb-article-article" is probably exceedingly rare, and attackers would not need to try such combinations when attempting to guess a password.

We do not yet know the extent to which these higher-order structures (grammatical, or other mnemonic techniques users rely on) impact password security. For instance, is there a given password length that is short enough that users can shy away from relying on obvious structures, but long enough to provide strong guessing resilience? Are longer passwords always better? Can we gently nudge users into avoiding structural cues? Building up on our expertise in the area, we would rely on a combination of user studies and security analysis to find answer to all of these questions.

Impact of data entry interface Advocating longer passwords as more secure may be correct when data entry is simple; for instance, when a computer keyboard is used. However, the proliferation of mobile devices (cell phones, tablets) indicates that the assumption the data entry interface makes it easy to enter long passwords may be flawed. The increasing amount of private information those devices contain (pictures, contact information, and, increasingly, e-commerce transactions) makes it very pressing to device sound authentication technology for mobile devices.

Here again, we would need to conduct user studies to determine whether a) traditional passwords are a viable authentication mechanism on mobile devices, and if so, b) what are meaningful password composition policies for mobile devices. We would also need to pursue further re-

search in alternative authentication techniques; certain types of so-called "graphical passwords," for instance, could be a potential replacement worth considering [16].

Designing privacy-preserving fail-over mechanisms Another line of research well worth investigating is that of fail-over authentication mechanisms. Fail-over mechanisms take over when the principal means of authentication fails. For instance, a large number of email providers ask to provide answers to "security questions" (e.g., "what is your mother's maiden name?") so that users can bypass the password-based authentication mechanism and recover access to their accounts when they forget their passwords.

Fail-over mechanisms must thus be at least as secure as the authentication mechanism to which they serve as a back-up, lest an attacker would use them to gain unauthorized access. Security questions of the form described above have been shown to be an insecure mechanism, as most answers can be found with relative ease on social networks or other online resources. There has thus been a snift toward using "two-factor" authentication, where the back-up channel may for instance be a one-time password sent to a mobile device the user possesses. Unfortunately, because mobile devices are intrinsically personal, back-up authentication channels relying on them tie back a given user's identity to the authorization mechanism: differently stated, people may not be particularly inclined to divulge their personal cell phone number to an online service for fear of being tracked.

As part of this effort, we would try to design fail-over mechanisms that both provide privacy assurances, while simultaneously achieving a similar—if not higher—level of security as the primary means of authentication (*e.g.*, password-based authentication).

Online single sign-on The difficulty—for both users and service providers—of managing passwords has led to the increasing popularity of single sign-on mechanisms, which allow users to authenticate themselves to an *identity provider* (IdP); the IdP in turn vouches for the user to multiple *service providers* (SPs), absolving service providers of the need to authenticate users themselves. This frees users from remembering many sets of credentials, and frees service providers from the need to develop and maintain their own authentication mechanisms.

When a user logs into a service provider using an identity provider, the latter sends or authorizes the former to access a set of attributes about the user. Entities like Facebook and Google are starting to be widely used as identity providers by service providers such as Flickr and USA Today. Both Facebook and Google have social networking capabilities that make them uniquely qualified to provide rich information about users to service providers. Examples of attributes that may be conveyed from an identity provider to the service provider are age, gender, friend list, email address, current location, photos, and relationship status. The convenience to the user of using identity providers hence comes with a potential cost to privacy: the identity provider may send a service provider data that the service provider otherwise would not have known, and identity providers may learn yet more about users by keeping track of which service providers they access.

To address the former concern, identity providers like Google and Facebook explain to a user what types of information about the user will be sent to a service provider at (first) login. The types of information to be transmitted are typically displayed in a *consent dialog*, which gives the user a chance to abort the process of logging in

to a service provider if she does not want to share the described information with the service provider. A question that naturally arises in this context is to what extent identity providers in fact succeed at conveying to users what personal information they will share with service providers and give users the ability to make an informed choice. Early evidence suggests that users often do not realize how much privacy they are losing while using single sign-on mechanisms (*e.g.*, [3, 5]).

Through an iterative approach of designing new prototype interfaces and empirically evaluating them, we propose to develop interfaces that make the online single sign-on process significantly more transparent to users. Our goal will be to develop interfaces will allow users to make decisions about privacy that are well informed and consistent with their privacy concerns. We will explore the initial login or enrollment phase (*e.g.*, the first time a user clicks the "sign in with Google" button on USAToday.com), which most current interfaces focus on, but we will also develop interfaces to keep users more informed during follow up steps which are now often completely opaque to them (*e.g.*, subsequent logins to a service provider via an identity provider).

This research would potentially produce several artifacts that could be readily transitioned to practice:

- Practical guidelines for password composition policies that could be used by web services providers such as Google; beyond listing policies, we would also be interested in designing password meters that help users select better passwords, based on these guidelines. Such password meters could be open-sourced, and transitioned to anybody who is interested in using them.

- Improved, or novel authentication mechanisms for cellular phones and tablets. Prototypes would be designed to permit field evaluation, and could subsequently serve as a basis for implementation on production phones and tablets.
- New fail-over mechanisms that can be implemented by web service providers such as Google.
- A better understanding of how to communicate to users the privacy risks that accompany online single sign-on, as well as designs for improved and additional interfaces to communicate such privacy information to users.

The proposed research described in Section 2.2.1 on passwords builds on work supported in part by National Science Foundation award CNS-1116776 (2011-14), as part of which we have shown that long passwords can offer security without unduly compromising usability. That award is ending, and does not cover the specific research related to passwords described in this section. The proposed work on single sign-on builds on previous work funded by NIST, as part of which we demonstrated the inadequacy of current single-sign-on consent interfaces, including Google's [5] and developed a first prototype of a potentially more usable interface. Additional funds would allow us to run experiments to evaluate the initial interface, to iteratively refine it, and to explore ways to keep users informed after the first sign-in.

2.2.2 Smartphone privacy

An increasingly popular way for users to interact with the online environment is via smartphones and other mobile devices. We propose to conduct research to improve communication about privacy between smartphone app developers and their users, specifically with regards to

data collection, use, and sharing. Our research will build on our past research on privacy decision making and risk communication. Through a series of interviews with experts and lay users, surveys, and empirical user studies, we will inform the design of interface prototypes. We will iteratively design and evaluate interface prototypes and develop design recommendations for communicating privacy information to smartphone users. In addition, we will develop recommendations for tools for app developers that will improve their awareness of the privacy issues associated with their apps and facilitate better communication about privacy between app developers and their users.

We propose looking beyond users' preferences with location sharing [26, 29] or specific permissions [6, 13]. Furthermore, it is not our goal to identify or fix security holes in the Android system [2, 7, 8, 11, 12, 17, 33]. We will be examining the real harms that users are or should be concerned about with regards to smartphone data sharing. This research takes an approach that tries to determine the possible harms and privacy concerns that could occur to users through expert elicitations. With a holistic idea of the harms possible, we propose designing risk communications that allow users to understand the risks of harms compared to the benefits of data sharing.

As app developers are also important stakeholders, we will examine their choices about data collection when building apps. We will evaluate their resources and needs, and provide recommendations for tools that can assist app developers when making privacy and security decisions and communicating with users.

Consumer interfaces for understanding and control We will begin by interviewing experts on the causes and consequences of data sharing from smart-

phones. We apply methods of risk communication from the field of public policy to design notifications about data sharing on smartphones [25]. By interviewing experts in the field about actual harms and concerns to users, we will identify the most relevant decision points for consumers. The second step includes qualitative and quantitative work on users' understanding of data sharing. This will allow us to uncover the gaps between users' understanding and experts' judgment of risks and concerns.

We will implement and test several interfaces for providing notifications and configuration options related to data sharing from smartphones. This will include testing what information users understand, how to present it on a small screen, and the timing of notifications. Our evaluation methodology will be similar to approaches we have used in the past [18, 19], combining small-scale, qualitative laboratory studies and focus groups with large-scale, quantitative online studies.

Evaluating privacy notifications requires more than an evaluation of understandability. While understandability is a necessary criteria, it may not be sufficient for notifications to be successful. Furthermore, good notifications should assist users in making informed choices, but not necessarily lead them to being more or less permissive about what data is shared. We need to evaluate whether a person who uses the notice to make a decision, for example, about whether to install an app, is able to do so effectively. There are many factors that may determine whether a notice is useful, including whether people notice the notice, whether it is situated in a location such that users are still engaged in a decision process when they encounter it (as opposed to being already committed to installing the app), whether people understand what the notice means, whether the notice addresses the fac-

tors that people want to consider in their decision process, and more.

In one of our previous studies we told Mechanical Turk participants that their friend had recently purchased her first Android phone and wanted assistance in selecting some apps. She requested help selecting apps in six specific categories. We provided participants with a simulated Android store that offered a small selection of apps in each category with varying privacy levels. Participants in different experimental conditions saw different versions of a privacy notice. We were able to measure the extent to which each privacy notice caused participants to select apps with different privacy levels than they would select in the absence of privacy notices [19].

Building on the results of our studies, we will create design guidelines and best practices for smartphone risk communication.

As part of this work we will also identify any particularly vulnerable populations of smartphone users. For example, from preliminary work we have identified teenagers and the elderly as vulnerable populations. We will include investigations of their mental models about smartphone data sharing, and identify if and how risk communication should be designed to address their understanding and needs. As part of this project we expect to work with high school students at the Pittsburgh Science and Technology Academy, a public school focused on science and technology located near the Carnegie Mellon campus.

Tools for app developers While users may be concerned about data leakage, many app developers rely on collecting users' information in order to monetize their app. Currently, the ecosystem may create a conflict be-

tween monetization and privacy-sensitive apps. We will examine the data sharing decisions app developers make through a series of interviews and user studies with app developers. This will lead to a better understanding of the tools needed by app developers in order balance users' privacy concerns with the app developer' desire to innovate and monetize. We will propose tools and guidelines that will assist developers in creating apps that meet consumers' privacy needs.

Our research on communicating about smartphone security and privacy to consumers will result in a set of tested prototype notices and design guidelines. Software developers for mobile platform companies will be able to make use of these prototypes and guidelines to improve the way their platform communicates with users about privacy and security risk. In addition, we plan to develop privacy tools and guidelines for app developers and make them available for free. We will work with app developer forums and associations to make app developers aware of our tools. By increasing awareness about privacy issues among app developers and providing them tools that make it easier for them to build privacy into their apps, we expect to increase the number of apps that respect user privacy.

We have already reached out to representatives from the Application Developers Alliance[1] and Association for Competitive Technology[2], and hope to continue working with these app developer alliances as we propose new tools and interfaces.

We began our smartphone privacy research about a year-and-a-half ago with National Science Foundation

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[1] http://appdevelopersalliance.org/

[2] http://actonline.org/

funds provided for PhD traineeships in Usable Privacy and Security. We are in our last year of funding for the traineeship program so the funding from this case will allow us to move beyond the preliminary phases of this project, complete our research studies, and develop useful design guidelines and tools.

2.3 Infrastructure for enforcing privacy policies

One approach to mitigating privacy concerns in the digital information age has been to enact laws (*e.g.*, HIPAA, GLBA). Another is for organizations to publish and adhere to self-declared privacy policies (*e.g.*, Google and Facebook in the Web services space).

One direction of our work at CMU has focused on investigating the possibility of formalizing and enforcing such practical privacy policies using computational techniques. We have formalized privacy policies that prescribe and proscribe flows (disclosures) of personal information [4, 10] as well as those that place restrictions on the purposes for which a governed entity may use personal information [30]. Recognizing that traditional preventive access control and information flow control mechanisms are inadequate for enforcing such privacy policies, we have developed principled audit and accountability mechanisms that seek to encourage policy-compliant behavior by detecting policy violations, assigning blame, and punishing violators. We have applied these techniques to several U.S. privacy laws and organizational privacy policies, including the first complete formalization of GLBA and the HIPAA Privacy Rule [10, 14]. In addition to developing algorithms and computer systems for privacy protection, we have initiated conversations with industry to transition these technologies. Specifically, we have presented our work to Google's Privacy Engineering team and generated significant inter-

est in joint work. Our methods for auditing disclosure clauses in privacy policies is of significant interest to Symantec; similarly, our work on enforcing purpose restrictions on information use is of significant interest to Microsoft.

We envision that we can conduct effective privacy research along these lines that will be directly relevant to improving compliance of Google's products (in particular, its search engine) with its privacy policies. Specifically, we will explore the possibility of checking that Google uses personal information for purposes that are compliant with their declared privacy policies. A central challenge that we plan to address is to enable this form of checking even when the checker does not have access to Google's software systems. This setting is particularly important because it will enable users, privacy advocacy groups, and government organizations to check that Google's practices respect users' privacy even though they will typically not have access to Google's internal systems. Such a tool will also help Google's internal privacy engineering team to detect potential compliance violations by studying the observed behavior of the system rather than its source code. This can be helpful in settings where third parties produce and maintain some of the software implementations that operate over personal information of Google's users. In taking on this challenge, we will build on our initial work on information flow investigations [31].

Concerns about privacy have led to much interest in determining how third-party associates of first-party websites use information they collect about the visitors to the first-party website. Mayer and Mitchell provides a recent presentation of research that tries to determine what information these third-parties collect [24]. Others

have attempted to determine what these third-parties do with the information they collect [15, 32].

The researchers involved in these works each propose and use various analyses to determine what information is tracked and how it is used. They primarily design their analyses by intuition and do not formally present or study their analyses. Thus, questions remain: Are the analyses used sound and/or complete? Are they related to more formal prior work?

To answer these questions, we must start with a formal framework that can express the problem and the analyses. In essence, each of these works is conducting an information flow analysis: the researchers want to know when information flows to a third-party and where it goes from there. Thus, the natural starting point for such a formalism is prior research on information flow analysis (IFA). However, despite the great deal of research on IFA (see [27] for a survey), we know of no attempt to relate or inform the research on tracking web trackers (TWT) with the models or techniques of IFA, even in an informal manner.

We believe this disconnect exists for an important reason: the traditional motivation for IFA, designing secure programs, pushes it away from analyzing third-party systems as done in TWT. Typically, the analyst is seen as verifying that a system under his control protects information sensitive to the system. Thus, the problems studied and analyses proposed tend to presume that the analyst has access to the program running the system in question. In TWT, the analyzed system is the adversary with the analyst aligned with a *data subject* whose information is collected by the system. In this setting, the analyst has no access to the program running the third-party service, little control over its inputs, and a limited

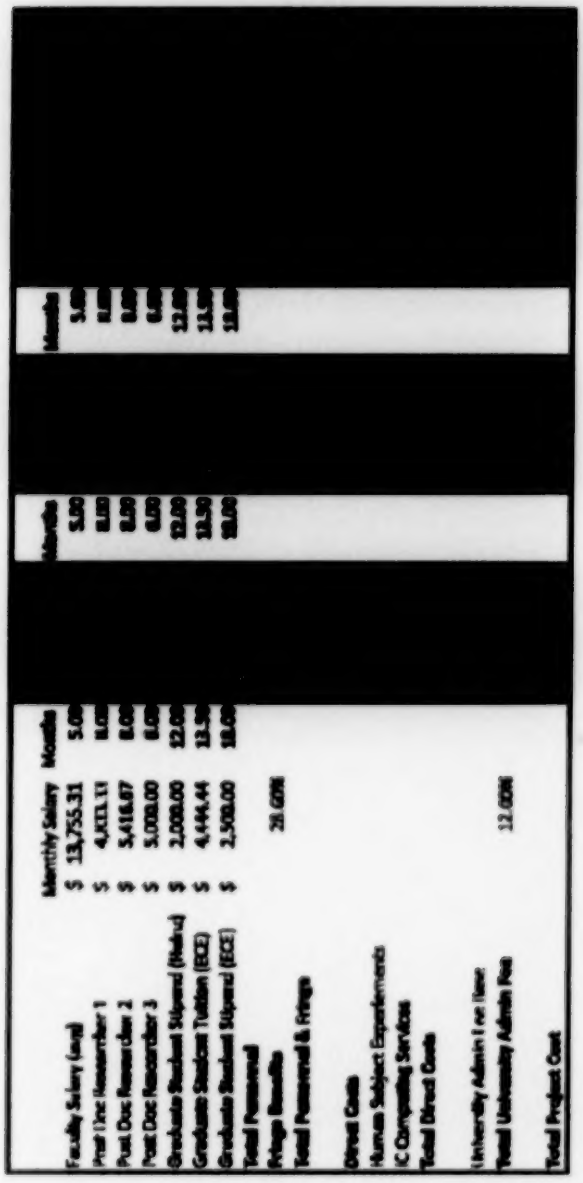
view of its behavior. Thus, the analyst does not have the information presupposed by traditional IFAs. To understand the TWT problem as an instance of IFA requires a fresh perspective on IFA. Our goal is to provide such a perspective by producing the following:

- A *theory of information flow investigations* that enables high confidence determination of whether a particular type of information (*e.g.*, a user's race or sensitive health information) influences the advertisements that he or she is shown by the advertising system. The theory will be statistical in nature and will enable this kind of determination based on evidence collected through experiments. This work will build on our prior work on this topic, which although a useful intermediate step in this direction is not statistical in nature [31]. A central idea is to construct a *differencing analysis* to enable discovery of information flows. This analysis in essence constructs two kinds of profiles that differ only in the type of personal information whose flow we are interested in (*e.g.*, race) and measures the difference in ads that are observed by the two profiles. The approach thus closely parallels how experiments are done in the natural sciences (*e.g.*, biology) to infer causality. There are numerous challenges involved in developing such a theory because of many confounding factors in the Web advertising ecosystem (*e.g.*, ad churn, geographic location) as well as the partial observability of the system (the analyst gets to only observe the behavior of the system on a small percentage of of the hundreds of millions of users who are served by the system).
- An *experimental methodology* and supporting *tools* that will enable analysts to conduct such studies. This contribution will enable others—internal auditors in

Web services companies, privacy advocacy groups, government regulators—to conduct such studies in the future to measure the privacy health of various Web-based systems that handle large volumes of personal information.

- A *validation* of the theory and experimental methodology by conducting a set of representative studies of an advertising system. The goal of these studies will be to discover the flows of personal information occurring in the advertising system, including those that are expected and those that are possibly not expected. These studies will help demonstrate the value of information flow investigations as well as to understand their limitations.

We plan to take active steps to transition the resulting technology to practice. As mentioned earlier, we believe that our experimental methodology and supporting tools will enable several different classes of stakeholders—internal auditors in Web services companies like Google, privacy advocacy groups, government regulators and even certain groups of Web users—to measure the privacy health of various Web-based systems that handle large volumes of personal information.



	Monthly Salary	Months		Months		Months
Faculty Salary (avg)	$ 13,755.31	5.00		5.00		5.00
Post Doc Researcher 1	$ 4,033.11	8.00		8.00		8.00
Post Doc Researcher 2	$ 5,418.87	8.00		8.00		8.00
Post Doc Researcher 3	$ 5,000.00	8.00		8.00		8.00
Graduate Student Stipend (Hybrid)	$ 2,000.00	22.00		22.00		22.00
Graduate Student Tuition (ECE)	$ 4,444.44	12.50		12.50		12.50
Graduate Student Stipend (ECE)	$ 2,909.00	18.00		18.00		18.00
Total Personnel						
Fringe Benefits	28.00%					
Total Personnel & Fringe						
Direct Costs						
Human Subject Experiements						
IC Computing Services						
Total Direct Costs						
University Admin Fee Here						
Total University Admin Fee	12.00%					
Total Project Cost						

Figure 1: Proposed allocations of funds.

Transition efforts will include actively interacting with relevant industry partners via visits and research collaboration (we have already initiated interactions with Google and have a record of successful transitions with other companies) and sending over students working on this project for industry internships; organizing workshops to disseminate project results to industry, government, and non-profit stakeholders (*e.g.*, we are organizing such a workshop in January 2014 jointly with MIT); and open-source release of resulting privacy-measurement tools.

The development of the methodology for information flow investigations has been supported in part by National Science Foundation grant CNS-1064688 (2011-15). The proposed project will expand the current effort by (a) producing a set of tools that automate the methodology enabling other researchers and practitioners to use these tools to conduct similar studies; and (b) conduct a set of comprehensive experiments to identify and measure flows of personal information in web advertising systems. We also plan to interact with Web services companies to explore avenues of use of these tools internally in these companies to proactively detect and correct unexpected flows.

3. Scope of effort and conflict of interest

Scope of effort We propose to carry out the described research over a period of three years. The scope of the proposed effort is approximately $1.25M divided evenly over the three years. This equates, per year, to 1 month of effort of each of the faculty, 50-67% of full-time effort of 3 post-doctoral researchers, 1.5 FTE (full-time-equivalent) PhD students. A detailed breakdown is shown in Figure 1.

The expected division of effort among the three thrusts is as follows: (1) furthering our understanding of users' privacy behaviors and online threats to users' privacy – 25%; (2) improving user-facing interfaces and technologies to increase users' understanding and control of their privacy – 55%; and (3) developing computational mechanisms to help ensure that systems and organizations adhere to privacy regulations or policies – 20%.

The precise allocation of effort and funds among researchers and thrusts may change depending on the needs of the research.

Conflict of interest As is common in academic research, several of the faculty involved in this proposal occasionally collaborate with and receive funding from various companies, including Google. Any particular collaboration does not affect the research directions we pursue outside of that collaboration, and no collaboration or relationship influences whether or which results of a scientific experiment or investigation we report. Hence, such relationships pose no conflict of interest with respect to the proposed research.

Specifically, of the faculty involved in the proposal, Alessandro Acquisti and Lorrie Cranor have both received funds from Google. In the past three years: in 2011, Cranor and Acquisti were among the CMU recipients of $178,920 as part of the Google Buzz privacy settlement, and, in 2013, a $15,000 gift to support a scholarship for the MSIT Privacy-Engineering masters program. We do not believe this causes a conflict of interest with respect to the proposed research. Any of the funding previously received from Google will not affect the scope, choice of research direction (in general or specifically), or outcome of the efforts described in this document.

4. Personnel

Alessandro Acquisti is an associate professor at the Heinz College, Carnegie Mellon University (CMU) and the codirector of CMU Center for Behavioral and Decision Research. He investigates the economics of privacy. His studies have spearheaded the application of behavioral economics to the analysis of privacy and information security decision making, and the analysis of privacy and disclosure behavior in online social networks. Acquisti has been the recipient of the PET Award for Outstanding Research in Privacy Enhancing Technologies, the IBM Best Academic Privacy Faculty Award, multiple Best Paper awards, and the Heinz College School of Information's Teaching Excellence Award. He has testified before the U.S. Senate and House committees on issues related to privacy policy and consumer behavior. Acquisti's findings have been featured in national and international media outlets, including the Economist, the New York Times, the Wall Street Journal, the Washington Post, the Financial Times, Wired.com, NPR, and CNN. His 2009 study on the predictability of Social Security numbers was featured in the "Year in Ideas" issue of the NYT Magazine (the SSNs assignment scheme was changed by the US Social Security Administration in 2011). Acquisti holds a Ph.D. from UC Berkeley, and Master degrees from UC Berkeley, the London School of Economics, and Trinity College Dublin. He has held visiting positions at the Universities of Rome, Paris, and Freiburg (visiting professor); Harvard University (visiting scholar); University of Chicago (visiting fellow); Microsoft Research (visiting researcher); and Google (visiting scientist). He has been a member of the National Academies' Committee on public response to alerts and warnings using social media.

Lujo Bauer is an Associate Research Professor in CyLab and the Electrical and Computer Engineering Department at Carnegie Mellon University. He received his B.S. in Computer Science from Yale University in 1997 and his M.A. and Ph.D., also in Computer Science, from Princeton University in 1999 and 2003. Bauer's research interests span many areas of computer security and privacy, and include building usable access-control systems with sound theoretical underpinnings, developing languages and systems for run-time enforcement of security policies on programs, and generally narrowing the gap between a formal, verifiable model and a practical, usable system. Much of his recent research has focused on understanding users' access-control and privacy needs as they interact with today's online services and on developing tools to help better meet those needs. Bauer recently served or is serving as program chair for the flagship computer security conferences of the IEEE (IEEE S&P 2015) and the Internet Society (NDSS 2014) and is an associate editor of ACM Transactions on Information and System Security.

Nicolas Christin is an Assistant Research Professor of Electrical and Computer Engineering at Carnegie Mellon University, and is affiliated with CyLab, Carnegie Mellon University's security lab. He also has courtesy faculty appointments in Engineering and Public Policy, and in the Information Networking Institute. He holds a Diplôme d'Ingénieur from École Centrale Lille, and M.S. and Ph.D. degrees in Computer Science from the University of Virginia, and did was a postdoctoral fellow at UC Berkeley. His research interests are in computer and information systems networks; most of his work is at the boundary of systems and policy research, with a slant toward security aspects. He has most recently focused on

online crime, security economics, and psychological aspects of computer security and privacy. He equally enjoys field measurements and mathematical modeling. His work on measurements of online criminal activity has garnered significant attention from the popular press (with NPR, Forbes, or the Economist among others citing various research efforts Christin led), but more importantly, helped the research community design much more accurate models of attacker behavior. Finally, his recent work on password authentication (jointly done with Lujo Bauer and Lorrie Cranor) is a successful example of integration of behavioral modeling with network measurements and mathematical analysis.

Lorrie Faith Cranor is an Associate Professor of Computer Science and of Engineering and Public Policy at Carnegie Mellon University where she is director of the CyLab Usable Privacy and Security Laboratory (CUPS). She co-directs the MSIT-Privacy Engineering masters program, the first graduate degree program in privacy engineering anywhere in the world. She has authored over 100 research papers on online privacy, usable security, and other topics. She has played a key role in building the usable privacy and security research community, having co-edited the seminal book Security and Usability (O'Reilly 2005) and founded the Symposium On Usable Privacy and Security (SOUPS). She also chaired the Platform for Privacy Preferences Project (P3P) Specification Working Group at the W3C and authored the book Web Privacy with P3P (O'Reilly 2002). She has testified before Congressional committees and is regularly invited to brief federal agencies on privacy issues. Her privacy research is widely cited by both researchers and policy makers, and frequently mentioned in the popular press. She has served on a number of boards, including

the Electronic Frontier Foundation Board of Directors, and on the editorial boards of several journals. In 2003 she was named one of the top 100 innovators 35 or younger by Technology Review magazine. She was previously a researcher at AT&T-Labs Research and taught in the Stern School of Business at New York University.

Anupam Datta is an Associate Professor at Carnegie Mellon University where he holds a joint appointment in the Computer Science and Electrical and Computer Engineering Departments. His research focuses on the scientific foundations of security and privacy. Datta's work has led to formalizations of privacy as contextual integrity and purpose restrictions on information use; and accountability mechanisms for privacy protection. His research group produced the first complete logical specification and audit of all disclosure-related clauses of the HIPAA Privacy Rule for healthcare privacy. His group's work with Microsoft Research produced the first automated privacy compliance analysis of the production code of an Internet-scale system—the big data analytics pipeline for Bing, Microsoft's search engine. Datta's work has also led to new principles for securely composing cryptographic protocols and their application to several protocol standards, most notably to the IEEE 802.11i standard for wireless authentication and to attestation protocols for trusted computing. Datta has authored a book and over 50 other publications on these topics. He serves on the Steering Committee and as the 2013-14 Program Co-Chair of the IEEE Computer Security Foundations Symposium. Datta obtained Ph.D. (2005) and M.S. (2002) degrees from Stanford University and a B.Tech. (2000) from IIT Kharagpur, all in Computer Science.

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APPENDIX E

PRIVACY PREPAREDNESS PROJECT:

A proposal of the Center for Information, Society and Policy (CISP) at IIT Chicago-Kent College of Law

I. Introduction

The Center for Information, Society and Policy (CISP) at IIT Chicago-Kent College of Law is honored to be considered for funding from the cy pres award arising out of *Gaos and Italiano* v. *Google* (N.D. Cal.). The funds would enable us to undertake a project, PRIVACY PREPAREDNESS, which is a combination of academic research, public education, and outreach to safeguard individuals' online privacy and to help people, if they so choose, implement privacy protections when they interact with the web.

Americans care more about internet privacy than ever before[1] but may not realize when their online activities have implications for their privacy or how to choose among various technologies, apps, programs and settings to implement the level of privacy protection that they desire. This project will create interactive online materials and continuously update them for that task and roll them out across the country through videos, social media and in-person training sessions.

The project will alert people to the ways in which their privacy may be compromised on the web and offer them a range of choices about the level of privacy protection they can pursue. Through an interactive website and regular blog, it will offer advice about the privacy protections offered by various operating systems, browsers, add-ons, social networks, encryption tools, and risk assessment tools (to determine the safety of websites). For example, what are the relative merits of Twitter vs. Fa-

cebook in terms of the company's commitment to privacy? Android vs. Apple iOS in terms of allowing people to control what happens to their online data? What is NoScript, under what circumstances might I use it, and what are the steps to install it? How is all this going to change my experience with the web?

The project will also produce short videos and animations to inform people what is done with their information when they undertake web searches, play online games, and use social media.

II. Need for the Project

People post personal information about themselves on the web and reveal intimate information about themselves through their searches. Currently, many people do not understand that what they are posting on the web, searching for through search engines, or revealing unwittingly when using apps can often be accessed by others. People have a misplaced trust that what they post is private. A *Consumer Reports* poll found that "61% of Americans are confident that what they do online is private and not shared without their permission" and that "57% incorrectly believe that companies must identify themselves and indicate why they are collecting data and whether they intend to share it with other organizations."[2]

Data aggregators collect identifiable information about people and market that information. Acxiom has data on half a billion people from around the world. The company has an average of 1,500 pieces of data on each person, "everything from their credit scores to whether they've bought medication for incontinence."[3] Google collects information from its 60 products and services.[4] Nielsen, a global marketing and information research company, boasts that its "Online Measurement" service

provides clients with "a 360 degree view of how consumers engage with online media." The company explains, "Our approach doesn't stop at the computer screen because we understand that online audiences don't just consume digital 'cookies'—they're a shopper, a carpooling power mom, a TV watcher, a tweeter and a texter."[5]

Individuals have difficulty keeping track of the uses that will be made of their online data. Commentators have estimated that reading the privacy policies of all the apps, social networks and search engines that people use would take a person 76 days per year.[6]

Increasingly, judgments are being made about people based on their digital doppelgängers. Seventy-five percent of employers assess people's internet presence before offering them a job. One-third of employers have rejected applicants based on their online profiles—and many have said that a photo of a person with an alcoholic drink in hand means a definite rejection.[7] A person can be categorized as more or less creditworthy depending on whether she has shopped at a bargain store online or at a higher end store.

III. Why CISP

At CISP, we undertake academic research, aid people in assessing their online privacy risks, and help policymakers develop appropriate policies. CISP faculty have advised a variety of institutions and groups on issues of internet privacy, including national legal groups, reporters, medical groups, forensic organizations, prosecutors and defense attorneys, the National Organization of Bar Counsel, computer scientists, universities, and government agencies in the United States and abroad. They have given keynote speeches on the topic in the United States, Asia, Central America, and Eastern Europe.

They are regularly quoted in the media on issues of internet privacy. Faculty members Lori Andrews, Doug Godfrey, Richard Warner, and Hank Perritt have all written books that touch on different aspects of internet privacy.

CISP currently analyzes the role that privacy plays in the law as well as in society more generally. The historical analysis undertaken by CISP shows that, with virtually every new technology in the past 125 years, including the portable camera, wiretapping, and genetic testing, privacy was initially declared dead. Yet, because of the important value of privacy to society, courts and legislatures ultimately protected privacy over technology. What are the contours of privacy in today's world? CISP explores the role of privacy and its legal underpinnings. The importance and relevance of internet policy research is highlighted by a prior cy pres award channeled to IIT Chicago-Kent for work in this field and by a Greenwall Foundation grant awarded to Professor Andrews to analyze how private medical information is collected from people's social network sites, web searches, and credit card purchases; how that information may be used against them; and what policies are needed to protect them. The activities of CISP include:

A. Social Networks, Data Aggregation, and Privacy

CISP analyzes how data aggregation may advantage and disadvantage individuals and canvasses applicable laws. It assesses the impact of information from social networks in criminal cases, divorce cases, school cases, employment cases, and other settings.

B. Social Networks and Health Information

Funded by the Greenwall Foundation, CISP analyzed the types of health information that are collected by so-

cial networks and related data aggregators and how that information is disseminated to third parties and social institutions. It pointed out the paucity of protections for health information on social networks and described how policies might be developed to protect health information on social networks in a manner that is more in line with the protections for health care information in other settings.

C. A Social Network Constitution

Professor Lori Andrews has proposed a Social Network Constitution to deal with the right to privacy, freedom of association, right to a fair trial, right to connect and other rights online.

D. Children and Internet Privacy

Even though Facebook is not open to children under age 13, 7.5 million children under age 13 use the service. FourSquare, Instagram, and other platforms are also used by children. CISP assesses the social, psychological, and legal implications of children's use of the social networks and the internet. It also analyzes proposed policies affecting children's use of the internet.

E. Law School Seminar on Social Networks

Law students interested in the implications of Facebook, Twitter, YouTube, Instagram, and other new means of communicating can take a course about the technologies, the impact, and the laws that govern them. They can also take a seminar on Network Security and Privacy or courses on the application of technology law or intellectual property law to this emerging field.

F. Liaison with Other Researchers

Within the university, more than 40 faculty members work on issues related to social networks. These faculty members, who are from a wide range of fields, including

engineering, psychology, computer science, biomedical engineering, and law, meet regularly. The faculty and research fellows at CISP also engage in research with researchers at other universities and in the private sector.

To aid in its analyses, CISP often draws on the technology expertise of faculty members and students at its parent university. For example, the Federal Trade Commission reported that, of the hundreds of apps for children, few disclosed to parents the type of information that they collected. CISP faculty instituted a project with IIT faculty and engineering students in which children's apps were downloaded and their code analyzed to see what type of information (including geolocation information) was being collected about the children when they used the apps. This allowed CISP researchers to provide data at the request of members of the U.S. Congress and help devise proposed policy to protect children's online privacy.

G. Conferences on Internet Privacy

In March 2012, CISP hosted a conference at IIT Chicago-Kent College of Law called "Internet Privacy, Social Networks and Data Aggregation." Leaders in the fields of computer science, engineering, law, and internet security discussed how social networks blur the lines between socializing and advertising, how data are collected and used, what legal remedies have been most effective and what the future holds for consumers, companies and the courts. Over 150 people attended the conference.

In October 2012, CISP hosted a conference at IIT Chicago-Kent College of Law called "Under Watchful Eyes: Privacy and the Technologies That Track." The conference analyzed the legal, privacy, and ethical issues

surrounding the collection and use of geolocation data. Over 150 people attended the conference.

In September 2013, CISP co-hosted an international conference on the use of surveillance technologies in the investigation and prosecution of financial crimes—and the privacy implications of gathering and storing that data.

In February 2014, Prof. Andrews and CISP Legal Fellow Michael Holloway partnered with The Media Consortium, a network of independent, progressive news organizations, including Democracy Now!, Mother Jones, and The Progressive, to provide trainings to journalists on technological tools for privacy protection. Over 100 journalists attended the trainings, which included workshops on email encryption, the Tor anonymity network, mobile privacy apps, the SecureDrop platform for secure, anonymous document submissions, and general online privacy principles and practices. CISP and The Media Consortium recruited trainers from organizations including the computer science department at University of Illinois at Chicago, the Guardian Project, and the Electronic Frontier Foundation. The Media Consortium has indicated an interest in collaborating in further privacy trainings for journalists.

In April 2014, CISP co-hosted a medical apps conference at IIT Chicago-Kent College of Law, "Health on the Go: Medical Apps, Privacy and Liability." There are at least 40,000 medical apps[8], and 52% of smartphone users look up medical information online from their phones.[9] Private and sensitive information about people is collected through these apps and searches, yet this information is not protected by HIPAA. The conference brought together medical app developers, policymakers and privacy experts to address how best to build privacy protections

in medical apps and to advise consumers about what is done with the information they enter into medical apps and medical searches. At the conference, Illinois Attorney General Lisa Madigan commented, "Privacy must be baked in."

IV. The Proposed Project

For the proposed PRIVACY PREPAREDNESS PROJECT, we would develop materials and tools to help people protect their privacy online, develop additional resource materials, and undertake public and professional education.

These materials and tools will be available to everyone, everywhere via the web. In addition, hands-on outreach about the legal underpinnings of internet privacy and the choices that are available through technologies, apps, and programs to protect privacy will be offered at national and local meetings of legal groups, reporters, consumer groups, the public, forensic organizations, prosecutors and defense attorneys, universities, and government agencies.

A. Public and professional education about online privacy

The information the proposed project will make available to the public and to professionals will 1) expose vulnerabilities in the technologies, devices and apps that people routinely use, 2) describe the circumstances in which legal protections exist and the circumstances in which they do not, and 3) teach people how to protect themselves online, should they so desire, including which browsers to use, how to search, how to best prevent tracking, and how to encrypt particularly sensitive information.

The class of people represented in the litigation that gave rise to this cy pres award will be benefitted by the following efforts:

- **Materials, videos, and resources** on the website that show the risks to privacy online and demonstrate the ways to deal with them and a dedicated **Blog** and dedicated **Twitter account** that contain updated information about online privacy.
- **In-person training** and **train the trainers** sessions. The project will have national outreach. CISP will train trusted intermediaries to get the word out to consumers about how to protect their privacy. In collaboration with the national group of investigative journalists (The Media Consortium), CISP will train reporters on how to cover internet privacy issues, how to explain to consumers about how to protect their privacy and how the reporters can protect whistleblowers and other sources. Project personnel will also work with high school teachers to teach them the fundamentals of online privacy so they can train their students. A related aspect of the Project will involve shorter trainings for groups of judges, lawyers, leaders of nonprofit organizations, community groups, and policymakers.
- **Technological scrutiny** of new and existing apps to assess privacy risks.

Some of the outreach will take place in Chicago. Chicago is a highly-populated area with many high schools and colleges. It is the home of various national medical and legal organizations, such as the American Medical Association and the American Bar Association, and multiple media outlets. But the trainings will not be limited to the Chicago area. Over the course of the three-year project, the project director and the legal fellow (and/or

the people they have trained) will be able to make presentations at national meetings of organizations around the country. (See Appendix A about the project director for an indication of the types of national organizations she presents to.)

In addition, IIT Chicago-Kent Student Bar Association's social media program has been recognized nationally as a "model for social media initiative."[10] It can engage students in privacy-protective activities and serve as a model for other institutions of higher learning to train students about privacy preparedness. In turn, we can leverage the power of law students to train others at limited cost.

The faculty members affiliated with CISP at Chicago-Kent are particularly well-positioned to aid consumers to protect themselves on the web. Chicago-Kent has a history of leadership in the field of computer law and the impact of digital developments on consumers. For over 30 years, the law school has had a Center on Law and Computers. Even before personal computers, the web, social networks, and data aggregation, Chicago-Kent focused on determining the appropriate use of computer technology from the vantage point of the consumer. In 1978, Chicago-Kent's "Law Office of the Future Project" changed the delivery of legal services to consumers by using computers to improve the delivery mechanisms of routine legal services to those who were unable to afford lawyers. We were known as the computer law school in the 1980s, pioneered use of e-notebooks in the 1990s, and more recently, drafted a software interface (A2J Author) that is used in more than 40 states and 4 countries to enable those not represented by counsel to navigate through the legal system. Our work garnered the Amer-

ican Bar Association's Louis M. Brown Award for Legal Access in 2008.

Our initial project in computer law undertaken 35 years ago has served as a model for the types of projects CISP does today: combining law and technology to benefit consumers. This consumer rights emphasis has also provided the foundation for numerous grant-funded projects undertaken by Chicago-Kent faculty. For example, the law school has been entrusted with previous cy pres awards, including a $5 million award to represent people who have been discriminated against because they have diabetes. The diabetes project has involved litigation and counseling on proposed legislation, working with IIT technologists to develop technologies that aid people with diabetes, and training high school teachers on the medical and legal basics for dealing with children with diabetes.

B. Academic Research

In order to enhance the benefits of the PRIVACY PREPAREDNESS PROJECT, we will also undertake two types of research projects. The first will be studies that analyze threats to privacy and the pros and cons of current technologies, apps, encryption methods, and behaviors to safeguard privacy. The second type of research will be an analysis of the special privacy concerns related to particular groups and particular types of information. These groups will include children, women, journalists, and professionals (such as lawyers and physicians). The types of sensitive information would include health care information, legal information, political beliefs and sexual preferences.

The analysis of apps and other technologies to determine the extent to which they present threats to privacy will be aided by a part-time Technology Fellow. In the

past year, we undertook a study of 275 medical apps with the assistance of a postdoctoral science fellow and found that the vast majority of the apps studied did not have privacy policies available prior to downloading the app. The apps that did have a privacy policy available often did not provide helpful or easily understandable tools to control privacy. Of the 275 apps, only eight had privacy policies stating that the app used electronic safeguards for data protection, and only five had privacy policies stating that no personally identifiable information would be sold.

People's online searches can reveal potentially stigmatizing information about them. A person may be searching for a divorce lawyer or an AIDS clinic. Such information, if disclosed, might lead to discrimination against the person or other harms. In fact, the use of online information about a person can be so harmful that Finland now has a law prohibiting employers from Googling potential employees.

Geolocation information, which people may be unwittingly disclosing (for example, when the smartphone photo a person has taken has a digital geotag), can also be problematic. The Supreme Court held in *U.S.* v. *Jones*[11] that the collection of location information implicates the Fourth Amendment. Justice Sotomayor stated that location information "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." If you know where a person has made her calls from, you would know whether she was meeting with a competitor to her current employer, attending an Occupy rally, going to an abortion clinic, or engaging in other sensitive activities.

Health information is considered so sensitive that it is protected by a federal law, the Health Insurance Portability and Accountability Act (HIPAA), when it is in the hands of medical professionals and medical institutions. However, health-related information does not have that same protection on the web. Private information is not adequately protected online. The lack of adequate privacy safeguards may mean that identifiable data about people's medical conditions are revealed to third parties who may use that information to stigmatize them or discriminate against them. Beyond inadvertent data-sharing, intentional data-sharing might take place. Just as hospitals sell people's genetic data to biotech companies by selling tissue samples without their knowledge, data aggregators sell people's online medical data.

People may be denied certain opportunities, benefits, or goods based on health information that was collected about them online. An employer might turn down an applicant based on information posted on that person's Facebook page about a doctor's appointment, about the person's desire to get pregnant or because of the person's "liking" a non-profit association related to a particular disease, such as the Cystic Fibrosis Foundation. A nursing home might deny admission to someone who had done an online search for a particular disorder that the nursing home managers do not want to deal with. By aggregating online data about an individual, marketing and research entities create more precise portraits of that individual, which then may be used for discriminatory purposes. For example, life insurance underwriting has traditionally been based on urine and blood samples that provide indications about a person's health. But now some consultants are suggesting that those tests (which are expensive and time-consuming for companies to ad-

minister) should be replaced by information from social networks and other online sources. Deloitte Consulting, LLP reports that this predictive modeling approach could save insurance companies an estimated $2 to $3 million a year and can "shorten and reduce the invasiveness of the underwriting" process.[12] Among the data collected online about a person that have been delineated as possibly making the person ineligible for life insurance is that the person has friends who are skydivers.[13]

Not only health information, but also confidential legal information, may be insufficiently protected on the web. The majority of U.S. lawyers have social network pages. Among responding ABA member-lawyers, 81% said they use social networks for professional purposes; 33% of the group used Facebook and 14% used Twitter.[14] But if a client posts information to a lawyer's Facebook page, that information loses the protection of attorney-client confidentiality.

C. Conferences and White Papers

The project will also sponsor annual conferences open to the public, lawyers, policymakers, computer scientists, and others. Policy papers will be developed each year related to the conference topic and posted on the website. At past CISP conferences, we have been able to educate at least 150 people per conference in person and have offered a streaming version of the panels over the web to other people without charge.

Year 1: In addition to its own research projects, the PRIVACY PREPAREDNESS PROJECT in Year 1 will commission six white papers—policy papers from industry representatives, government representatives, public interest representatives, consumer advocates and others about novel technological and policy means of protecting privacy.

Year 2: Privacy Preparedness Conference. This conference will build off of the research completed in Year 1 to provide a framework to evaluate privacy risks in the use of technologies in various everyday contexts—government, schools and children, workplace, and private use. The conference will consider the innovative proposals suggested in the white papers.

Year 3: Privacy Policy and New Technologies conference. Facebook is barely a decade old. Who knows what technologies will be developed to enhance or invade privacy in the next few years? This conference, held in the third year of the project, will assess the most recent technologies and will analyze existing privacy legislation at the time of the conference in order to make policy suggestions. Particular attention will be placed on showcasing and analyzing technologies that have been introduced to enhance privacy.

V. Methodology and Evaluation Component

The project will involve legal research, technological assessments, and outreach. As a part of the technological assessments, we will rely on colleagues at our parent university, the Illinois Institute of Technology, with whom we have worked on issues of internet privacy and social networks in the past.

Chicago-Kent is well-positioned to assure visibility for this project for a number of reasons. The school has international experts in the fields of social networking, privacy, and information security, and its partnership with a technology institute provides additional backing and attention to the project. Additionally, the frequency with which the project's faculty members appear on national television and in print, as well as Chicago-Kent's facility with social media and web communication, provides an advantage.

Most privacy materials posted by nonprofits, legal groups, or news organizations exist in relative stasis once developed, and only receive a small part of the organization's marketing and web communication goals. The online Privacy Preparedness Materials will be continually assessed and updated by lawyers and computer scientists and will have dedicated communications channels, including a dedicated Twitter account.

We will conduct evaluations as follows:

In-Person Trainings. CISP will keep track of the number of in-person training sessions and the number of program participants. The outcomes of the in-person trainings will be measured by before and after assessments of awareness among program participants of how participants can protect their privacy and the resources available to safeguard privacy. Project representatives will administer two surveys at the events. The first survey will assess the knowledge base of program participants before the trainings commence. The second survey will assess the program participants' knowledge at the completion of the trainings. The second survey will also ask questions regarding the effectiveness of the training format and whether the program participants found the information helpful and applicable. (We have used this method with respect to outreach trainings in the context of a cy pres award in a different field of law.)

Conferences. The effectiveness of the conferences at reaching people can be assessed based on the number of attendees and also based on the traditional surveys IIT Chicago-Kent distributes to attendees for evaluation after each of its conferences. These surveys were developed to comply with the requirements of state bars for the evaluation of continuing legal education.

Privacy Preparedness Materials. With the consent of participants, the project will keep track of the number of times the privacy materials and videos have been accessed online, downloaded or shared through social media, mentioned in the press or used by policymakers.

The project will similarly keep track of the number of visitors to the website, @ mentions, re-tweets (RTs) and favorites received. CISP will also look at citations of IIT Chicago-Kent College of Law work and mentions of the project in popular press. Finally, CISP will keep track of invitations from media organizations to discuss news events related to privacy and invitations to panels and symposia at academic and other relevant conferences.

VI. Risks and Opportunities

As with any project, there is a risk that we will not be able to reach our target audience. But CISP faculty and researchers have good relationships with reporters, the legal community, and others who will help us get the word out. There is a risk that the technology will evolve quickly, raising new privacy challenges. However, our strategy of having evolving materials on our website and of consulting technology experts at our parent university, the Illinois Institute of Technology and nationally, will help us keep in touch with the technology and tailor our advice and analyses accordingly. We have organized training sessions for educators at Chicago-area high schools, have organized large scale conferences, have spoken at a large number of academic and non-academic conferences, and have been interviewed by media reporters. There will be opportunities to expand the reach of the project, however, with our train the trainer model and our use of social media itself (Twitter, YouTube, and so forth) to increase the audience for the project's products.

VII. Personnel

The proposed project faculty are leaders in the field of internet and privacy law—Professors Hank Perritt, Harold J. Krent, Richard Warner and Lori Andrews. The director of the PRIVACY PREPAREDNESS PROJECT will be Professor Lori Andrews (who will devote half her time over a period of three years to the project). The project will also include the full-time services of a privacy legal fellow for three years. A staff of three part-time law student research assistants and a part-time Technology Fellow will also be paid from the project.

Project Director **Lori Andrews** is a Distinguished Professor of Law at IIT Chicago-Kent College of Law and the author of *I Know Who You Are and I Saw What You Did: Social Networks and the Death of Internet Privacy*. She developed a Social Network Constitution, accessible at www.socialnetworkconstitution.com. She blogs regularly on the issues of internet privacy and has written articles on internet privacy for *The New York Times*, *Playboy*, *Cosmopolitan*, and other publications. She has spoken on the issues related to internet privacy to national organizations of lawyers, judges, law enforcement agents, prosecutors, defense attorneys, professors, scientists and doctors. She has appeared on panels with key people in the internet privacy community—on a four-person panel sponsored by *The New Yorker* with Pablo Chavez, the Director of Public Policy at Google; on a panel at the University of California, Los Angeles with Rob Sherman, Manager of Privacy and Public Policy at Facebook and FTC Chairman Jon Leibowitz; and in other settings with Marc Rotenberg of the Electronic Privacy Information Center (EPIC), FTC Commissioner Julie Brill and Julie Samuels of the Electronic Frontier Foundation (EFF). She has sponsored

conferences with speakers such as Christopher Soghoian, Harvard professor Harry Lewis and Lee Rainie of the Pew Research Center's Internet and American Life Project. (See Appendix A for Professor Lori Andrews' qualifications.)

Professor **Richard Warner** has written extensively on privacy issues, including a recent book on privacy and security with Robert Sloan, entitled Unauthorized Access: The Crisis in Online Privacy and Information Security, Chapman and Hall/CRC, July 2013. Professor Warner has assisted Professor Andrews with two privacy conferences: *Internet Privacy, Social Networks and Data Aggregation* on March 23, 2012, and *Under Watchful Eyes: Privacy and the Technologies That Track* on October 5, 2012. (See Appendix B for Professor Richard Warner's curriculum vitae)

Professor **Henry (Hank) Perritt** is the author of law review articles and books on technology and the law, including Law and the Information Superhighway (Aspen Publishers 2d. ed. 2001), and Digital Communications Law, one of the leading treatises on Internet law. (See Appendix C for Professor Henry H. Perritt's curriculum vitae)

Dean and Professor of Law **Harold J. Krent** focuses his scholarship on legal aspects of individuals' interaction with the government, and has written several articles and book chapters on privacy. In analyzing the question of the government's monitoring of e-mail and other online activities, Dean Krent and Professor Perritt were members of the 2000 IIT interprofessional team that examined the FBI's e-mail surveillance system (formerly known as "Carnivore") for privacy implications. (See Appendix D for Professor Harold J. Krent's curriculum vitae)

Legal Fellow **Michael Holloway** joined CISP in November 2013. Michael is involved in research projects on the uses and dangers of remote computer access tools and on the laws applicable to "revenge porn" and other extortion websites. In February 2014, Michael presented a workshop on the Tor anonymity network as part of a series of trainings for journalists on privacy protection tools. Michael prepared materials on FDA and FTC regulation of mobile medical apps for CISP's recent conference, *Health on the Go: Medical Apps, Privacy, and Liability*. Michael graduated in 2011 from Columbia Law School, where he worked on the *Columbia Science & Technology Law Review*.

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VIII. Funding

We seek $949,875 over a period of three years to allow us to undertake a PRIVACY PREPAREDNESS project—a combination of academic research, public education, and outreach to professionals in order to safeguard consumers' online privacy.

We are requesting **$297,486** during **Year One**, which is broken down as follows:

- ***Salaries/Fringe.*** Funds will support time buyouts for one Director/professor of law (50% time), one professor of law (5% time), a second professor of law (5% time), one full-time legal fellow (100% time), three part-time research assistants, and one part-time technology fellow (at $25,000). We estimate salaries of personnel and fringe benefits will total $272,411.

- ***Activities***. Funds will support expenses for trainings of journalists and teachers for an estimated amount of **$8,000**. We will also commission six white papers at $2,000 each from distinguished policymakers and technologists for the second year conference (6 x 2,000 = **$12,000**).
- ***Supplies***. Funds will support supplies, including books, relevant publications, photocopy, postage, and food and refreshments at meetings. We estimate **$676**.
- ***Travel***. Funds will support travel for personnel—specifically airfare for attendance at trainings, meetings, or briefings. We estimate **$4,400**.

Note: In efforts to mitigate costs, we have not included all the staff and faculty time contemplated for this project. Our Director of Institutional Projects, and Assistant Dean of Administration and Finance will work on this project, and we will be drawing, without charge, on the expertise of Harold J. Krent, Dean and Professor of Law. In addition, we will not charge overhead costs.

We are requesting **$336,421** during **Year Two**, which is broken down as follows:

- ***Salaries/Fringe***. Funds will support time buyouts for one Director/professor of law (50% time), one professor of law (5% time), a second professor of law (5% time), one full-time legal fellow (100% time), three part-time research assistants, and one part-time technology fellow (at $25,000). Taking into consideration an approximate 2% salary and benefits increase, we estimate salaries of personnel and fringe benefits will total **$277,858**.
- ***Activities***. Funds will support expenses for the Privacy Preparedness Conference bringing together pol-

icymakers and technologists and focusing on the white papers commissioned the year before. We estimate conference expenses will total **$44,663** taking into consideration lodging, meals/incidentals, ground transportation and general meeting expenses. Funds will also support additional trainings of journalists and teachers. We estimate **$8,000**.

- ***Supplies***. Funds will support supplies, including books, relevant publications, photocopy, postage, and food and refreshments at meetings. We estimate **$1,500**.
- ***Travel***. Funds will support travel for personnel—specifically airfare for attendance at privacy conferences, trainings, or briefings. We estimate **$4,400**.

Note: In efforts to mitigate costs, we have not included some of the staff and faculty time to be spent on this project. Our Director of Institutional Projects, and Assistant Dean of Administration and Finance will work on this project, and we will be drawing, without charge, on the expertise of Harold J. Krent, Dean and Professor of Law. In addition, we will not charge overhead costs.

We are requesting **$315,968** during **Year Three**, which is broken down as follows:

- ***Salaries/Fringe***. Funds will support time buyouts for one Director/professor of law (50% time), one professor of law (5% time), a second professor of law (5% time), one full-time legal fellow (100% time), three part-time research assistants. Taking into consideration an approximate 2% raise, we estimate salaries of personnel and fringe benefits will total **$257,405**.
- ***Activities***. Funds will support expenses for the Privacy Policy and New Technologies Conference bringing together experts in cutting edge technologies and

privacy policy. We estimate conference expenses will total **$44,663** taking into consideration lodging, meals/incidentals, ground transportation and general meeting expenses. Funds will also support the last year of journalist and teacher trainings. We estimate **$8,000.**

- ***Travel.*** Funds will support travel for personnel—specifically airfare for attendance at privacy conferences, trainings, or briefings. We estimate **$4,400.**
- ***Supplies.*** Funds will support supplies, including books, relevant publications, photocopy, postage, and food and refreshments at meetings. We estimate **$1,500.**

Note: In efforts to mitigate costs, we have not included all our projected costs: Our Director of Institutional Projects, and Assistant Dean of Administration and Finance will work on this project, and we will be drawing, without charge, on the expertise of Harold J. Krent, Dean and Professor of Law. In addition, there will be no overhead charges.

REVISED Google Settlement – Preliminary Budget

Privacy Prepardness

IIT Chicago-Kent College of Law

Center for Information, Society and Policy (CISP)

Total Budget
Total 3 Year Period

	Award
Personnel	**673,978**
Fringe	**133,695**
Activities	**125,326**
Consultants	**0**
Supplies	**3,676**
Travel	**13,200**

IX. Conflicts of Interest

To our knowledge, no professor or staff member at IIT Chicago-Kent has a personal relationship with anyone at Google. Moreover, IIT Chicago-Kent to our knowledge never has received direct funding from Google. The law school benefited indirectly from a Google grant to then Northwestern University Professor Jerry Goldman's Oyez Project in that Professor Goldman subsequently joined our faculty.

Moreover, to our knowledge no professor or staff member at IIT has any personal connection with Google. Google has helped sponsor a number of modest technology projects over the years at IIT, including $40,000 in sponsored research toward a Pacific Island schools connectivity initiative in 2012, $1,500 to help defray the costs for a technology conference in 2011, a $10,000 gift to the Computer Science Department in 2010, and a $4,000 gift to the Computer Science Department in 2005.

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[11] *U.S.* v. *Jones*, 565 U.S. ___ (2012).

[12] Mike Batty, Arun Tripathi, Alice Kroll, Cheng-sheng Peter Wu, David Moore, Chris Stehno, Lucas Lau, Jim Guszcza, and Mitch Katcher, "Predictive Modeling for Life Insurance: Ways Life Insurers Can Participate in the Business Analytics Revolution," Apr. 2010, www.soa.org/files/pdf/research-pred-mod-life-batty.pdf.

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APPENDIX F

Proposal For Distribution of *Cy Pres* Funds To Stanford Law School's Center for Internet and Society

Executive Summary

This proposal is an application for cy pres funds distributed in connection with litigation over Google's data sharing practices in the Google Referrer Header case. Particularly in the United States, Internet policy imagines end users have the knowledge, sophistication, and tools to protect themselves from unwanted information disclosure. This "notice and choice" approach has guided policy for two decades. Unfortunately, notice and choice has repeatedly failed users, leading to an erosion of trust online and a flood of privacy surprises. The Center for Internet and Society works in the public interest to empower and support user choice online.

We propose four projects designed to improve users' ability to make online privacy decisions for themselves. First, we focus on mobile privacy. Cell phones have become embedded in our daily lives, but the data flows they create are opaque and offer even fewer privacy controls than those of desktop computers. This leaves users all the more dependent on privacy policies. Yet small mobile device screens make it difficult for users to effectively read privacy policies. We propose original research to advance best practices for mobile privacy. Second, we focus on barriers to self-help approaches. Privacy Enhancing Technologies (PETs) enable users to enact their online privacy preferences. However, a range of well-known barriers reduce PETs use. Barriers range from tricky installation to lack of usability to simple lack of knowledge that PETs exist. We will run controlled trials

to see which barriers are the most significant, in order to improve existing and new PETs development.

Third, we will analyze proposed privacy legislation. Particularly in California, members of state legislatures are attempting to fix online privacy problems with legislation. We support the idea of limited legislation as a tool to create a minimum floor of accepted practices, but we notice several proposed bills are not technically feasible. We believe our mix of legal and technical expertise could be particularly valuable to lawmakers. Finally, we propose an educational speaker series. Users cannot make decisions for themselves when they do not know how their privacy is at risk. We propose public outreach to educate, inform, and train people about both online privacy risks and available tools to mitigate those risks.

In Part I: Introduction (page 2) we introduce ourselves. We describe the Center for the Internet and Society, our current and past work including projects related to online privacy, and our direct relevance to this litigation, the Google Referrer Header case. In Part II: CIS's Cy Pres Proposal Project Descriptions (page 8) we outline our funding request. We detail the three projects set forth above, as well as funding for the personnel required to conduct them, including Project One: Mobile Privacy Research (page 8,) Project Two: Barriers to Privacy Enhancing Technologies (page 9,) Project Three: Privacy Legislation Analysis (page 11,) and Project Four: Speaker series (page 13.) We conclude with Part III: Potential Conflicts (page 16.)

Part I: Introduction

By way of this proposal, the Stanford Law School Center for Internet and Society (CIS) is seeking distribution of *cy pres* funds to CIS in *In re: Google Referrer Header Privacy Litigation*, Case No. 10-cv-04809 EJD. CIS is a

public interest technology law and policy program and a part of the Law, Science and Technology Program at Stanford Law School. We currently have seven staff members, not including our faculty director, Professor Barbara van Schewick. They are Associate Director Elaine Adolfo, Director of Copyright and Fair Use Julie Ahrens, Director of Civil Liberties Jennifer Granick, Director of Privacy Dr. Aleecia M. McDonald, and Resident Fellows Giancarlo F. Frosio (intermediary liability,) Bryant Walker Smith (robotics,) and Legal Assistant Amanda Avila. In addition to our faculty director and staff members, CIS has affiliate scholars and non-residential fellows who study privacy and other civil liberties. They contribute to our blog, events, and publications. They are listed here:<http://cyberlaw.stanford.edu/about/people>.

History of the Center for Internet and Society

CIS has been in existence for 14 years. Founded in 2000, CIS is a non-profit organization that works to improve technology law and policy through ongoing interdisciplinary study, analysis, research and discussion. CIS brings together scholars, academics, legislators, students, programmers, security researchers and scientists to study the interaction of new technologies and the law. CIS strives to inform the design of both technology and law in furtherance of important public policy goals such as privacy, free speech, innovation and scientific inquiry.

CIS's Mission

CIS's goal is to improve technology law and policy through ongoing interdisciplinary study, analysis, research and discussion. We currently focus on copyright and fair use, network architecture and public policy, and privacy. In addition, we are building our competencies in government surveillance and intermediary liability policy. In order to engage in the current and future policy

questions that arise in these areas, CIS engages with the broader Stanford University and Silicon Valley communities, to produce high quality research, analysis, arguments and tools for stakeholders seeking to understand, promote and protect civil liberties and the public interest.

Relevance of Our Work to *In re: Google Referrer Header Privacy Litigation*

The United States' policies for online privacy focus on a few sectoral laws, plus a "notice and choice" approach. *Notice* requires companies state what data they collect and how they use it. Users may then make informed *choices* about data collection and use, often with technological *privacy tools* assisting them. The notice and choice approach is particularly challenged by *third party* data flows, that is, information that goes to a company that a user did not visit online, and may know nothing about.

In these class action cases, Plaintiffs allege that the notice and choice approach did not work. Google did not document the full details of their data practices. Plaintiffs were unaware that the information they searched for was passed from Google to third parties. Thus, Google disclosed the class' search terms to advertisers without their knowledge or authorization. This kind of information sharing between a first party (Google search) and multiple unknown third parties (advertising partners) in ways unknown and invisible to Internet users, is unfortunately common.

To address this problem, the class members, and all Internet users, need more effective means of receiving notice about the privacy practices of the services with which they interact. Class members, and all Internet users, also need more effective tools to control use and transfer of their information online. When users have

notice and tools, users can exercise greater control over their data and enforce their privacy preferences in their online interactions.

CIS's consumer privacy work strives to protect an individual's sensitive personal information from unwanted sharing or disclosure by improving both notice and tools. We study the strengths and weakness of a notice and consent regime for protecting online privacy, explore how to more effectively inform consumers about how a company uses and shares personal information with third parties, and create software tools to enhance user control over their personal data.

CIS's History of Success In Improving Consumer Privacy

CIS's research in consumer privacy has forged a direct path from scholarship to positive changes for Internet users.

Notice

There are many problems with privacy policies, including users' mistaken belief that a link to a privacy policy means they are protected by law,[1] difficulty reading and understanding privacy policies,[2] and the overwhelming amount of time it would take to read policies.[3] Despite

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[1] Turow, J. Americans & Online Privacy: The System is Broken. Annenberg Public Policy Center Report, 2003 and reproduced in Hoofnagle, C.J. and King, J. What Californians understand about privacy online, 2008.

[2] Jensen, C. and Potts, C. Privacy policies as decision-making tools: an evaluation of online privacy notices. In *CHI '04, Proceedings of the SIGCHI conference on Human factors in computer systems* (New York, NY, USE, 2004,) ACM, pp. 471-478.

[3] McDonald, A. M., and Cranor, L. F. The cost of reading privacy policies. *I/S – A Journal of Law and Policy for the Information Society 4*, 3 (2008.)

these obstacles, privacy policies are the most prevalent way for Internet companies to communicate their online practices, and users' best sources of information. The challenge, then, is how to go from information buried in a privacy policy to information that users can notice, process, and use to make decisions. As in *Google Referrer*, the Class must know about data practices in order to decide to allow them or limit them.

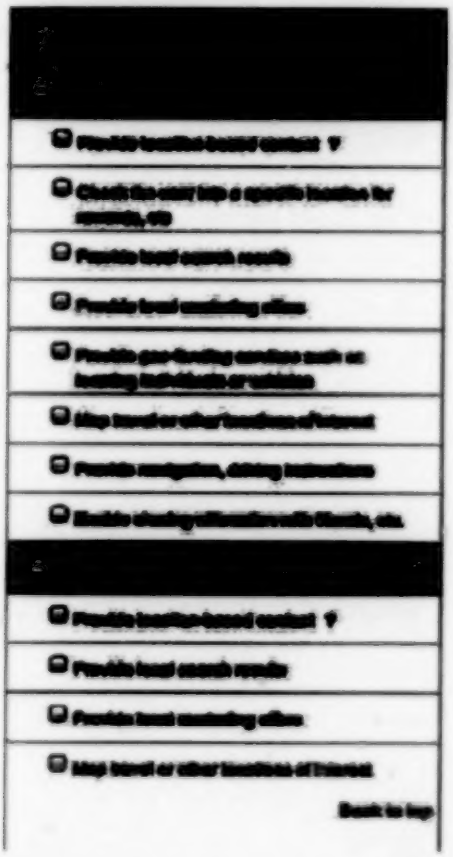

Figure 1: TRUSTe's mobile notice questions for authors

Effective privacy notice is even more challenging on small cell phone screens, and this is an increasingly important problem to solve. Mobile Internet access on smart phones and similar devices has expanded greatly. There are three times as many mobile broadband subscriptions as fixed broadband in the United States,[4] with nearly two thirds of US citizens using smartphones.[5] As with desktop search, Google dominates mobile search and is estimated to capture 70% of the funds spent on mobile search ads.[6] Mobile web browsing presents all of the same privacy challenges as desktop web browsing, plus includes new sources of information including geo-location, ambient sound, and motion sensing. Privacy controls on mobile devices have lagged. Users have experienced limited ability to ability to manage cookies, years with no ability to control data flows from apps, and a persistent lack of privacy policies.

The opportunity for mobile privacy work is to respond while the mobile ecosystem is still evolving in order to help developers create tools and notices that are practical and useful. At present, there is limited work on how to convey actionable privacy information to users on a small screen. As more users access online services over their

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[4] International Telecommunication Union's *ITU's Global ICT Developments*, 2001-2013 (2012.)

[5] Lacoma, Tyler, Mobile Design, "Smartphone Penetration on the Rise Yet Again," (July 18, 2013.)

[6] mobiThinking, "Global mobile statistics 2012," referencing the International Data Corporation's study *IDC Predictions 2011: Welcome to the New Mainstream* (December, 2010.) Similarly, Gartner estimated Google's mobile advertising revenue represents 70% of the market in *Forecast: Mobile Advertising, Worldwide, 2008-2015* (March, 2011.)

mobile devices, making app and other mobile notices effective is a high priority. With the advent of novel devices like Google Glass and increased use of sensors in devices like personal fitness trackers, cell phone screens will seem large by comparison. In the future, cell phones are expected to become the "hub" to control many new devices with sensors, sometimes described as the Internet of Things (IoT). There is a pressing need to work on meaningful privacy communication for new situations. Members of the Class will use mobile devices to search and browse online, control their cars remotely, check on home security while traveling, and other applications not yet invented.

- Our Notice by Design work applies human-computer interaction research and experimentation to the problem of giving consumers effective notice of online privacy practices. This widely discussed research leverages legal expertise in privacy with post-graduate research in user interface design. The New York Times and New York Times Magazine have referenced our work. Some of its central insights, for example the idea of "visceral notice", have been implemented by household name Internet companies, positively effecting user privacy in relation to products we use every day. Former CIS Director of Privacy Ryan Calo's Notre Dame Law Review article on this topic, *Against Notice Skepticism (In Privacy And Elsewhere,)* was selected by the Future of Privacy Forum as one of six "Privacy Papers for Policy Makers" in 2011.

- Ryan Calo joined the faculty of the University of Washington law school in 2012 and Aleecia McDonald transitioned from Resident Fellow to Director of Privacy. Ryan remains a CIS affiliate and was recently awarded Best Paper at the 2013 Privacy Law Scholars Conference for his piece, "Digital Market Manipulation."

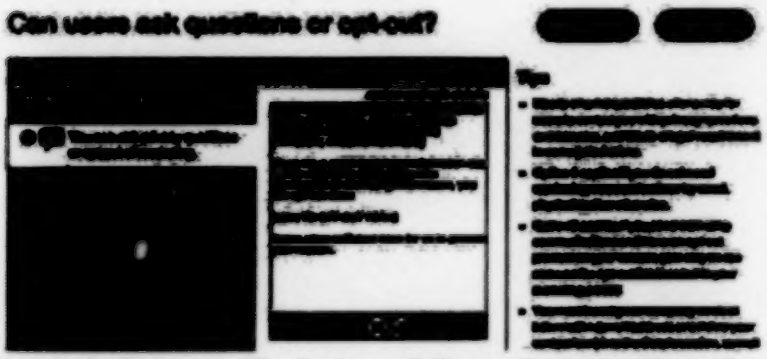

Figure 2: Privacy Choice's mobile notice questions for authors

- Aleecia and Ryan began research together on how best to present privacy notices on mobile phones and other devices, including testing existing tools from TRUSTe and Privacy Choice (see Figures 1 and 2). This resulted in a conference paper presented at the 40th Annual Telecommunications Policy Research Conference (TPRC 2012,) and a subsequent journal publication, McDonald, A. M., and Lowenthal, T. Nano-Notice: Privacy Disclosure at a Mobile Scale. *Journal of Information Policy*, Vol. 3 (2013), pg. 331-354.
- Aleecia served as a member of the State of California's Mobile Privacy Advisory Group in 2012-13. This group worked with the California Department of Justice (CalDoJ.) As a member of the Mobile Privacy

Advisory Group, Aleecia advised California officials on best practices and usability issues for mobile privacy notices. The state published guidelines including the Group's advice subsequent to CalDoJ negotiations with Apple, Google, HP, Amazon, Microsoft and RIM to ensure users of app stores could view privacy policies before installing mobile applications. Aleecia also testified about online privacy before the California State Assembly Select Committee on Privacy on March 19, 2013.

- Aleecia's research on the time it would take to read privacy policies, and the economic value of that time, established that privacy policies currently cannot adequately educate users and protect their data in practice. This work has been widely cited in the Washington Post, NBC News, The Atlantic, Slashdot, on NPR, in international press, in Federal Trade Commission (FTC) staff reports, and in a 2014 White House publication about Big Data.
- The National Science Foundation selected a joint project with Carnegie Mellon, Fordham Law, and CIS for one of two Frontier awards this year. The project includes interdisciplinary work to investigate how to take the information that currently exists in privacy policies and present it to users in ways that enable users to make better online privacy decisions.

Our research improves privacy notice practices, enabling Internet users, including the Class, to make educated choices about the privacy impact of their online activities.

Third Party Tracking and Data Flows

When users visit a website, like http://www.google.com to search online, that website is often formed from a mix of

content from multiple parties. For example, searching for "online privacy" brings results from many companies, including advertising that comes from companies other than Google. As most browsers are configured today, ads are able to set cookies on a user's computer. Cookies are small text files that often contain a unique identifier for the user, like a social security number. This lets the advertiser recognize the same user later on a different website, a practice known as *third party tracking*. Advertisers collect information about where they see users and what users are reading to build profiles of users' interests in order to show targeted advertisements. Some users find great benefit in ads that match their interests, but studies show the majority of users do not understand how data is collected or that it is shared with other parties, and do not wish to share their data.[7] This mirrors the experience of the Class members, whose search terms were disclosed to third parties without their knowledge, understanding, permission or control. CIS works on methods that put users in control of third party data collection.

- In 2010, the FTC called for a voluntary Do Not Track (DNT) system, which would give users means to express their preference to opt out of third party tracking online. In response to criticism that DNT was not technically viable, Jonathan Mayer (a junior affiliate scholar at CIS) and Arvind Narayanan (a non-

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[7] McDonald, A. M., and Cranor, L. F. Americans' attitudes about internet behavioral advertising practices. In *Proceedings of the 9th Workshop on Privacy in the Electronic Society (WPES)* (October 4 2010) and Turow, Joseph, King, Jennifer, Hoofnagle, Chris Jay, Bleakley, Amy and Hennessy, Michael, Americans Reject Tailored Advertising and Three Activities that Enable It (September 29, 2009.)

resident affiliate scholar at CIS, now on the Princeton faculty) created a prototype to demonstrate DNT. This prototype paved the way for all major browsers to add the ability for its users to send a DNT signal. The question then became what a website must do to honor an incoming DNT signal set by Internet users.

Aleecia co-chaired the WC3's Tracking Protection Working Group, an ongoing effort to establish international standards for a Do Not Track mechanism that users can enable to request enhanced privacy. This effort brings together over 100 international stakeholders including industry, academia, civil society, privacy advocates and regulators. The group is chartered to reach an open, consensus-based multiparty agreement that will establish a baseline for what sites must do when they comply with an incoming request for user privacy. However, despite three years of efforts, the stakeholders in the WC3 Working Group have not reached a consensus view of what DNT must do.

The fundamental impasse is that businesses no longer believe they can afford to limit data collection when DNT adoption rates approach 20%, and privacy advocates want DNT to strongly limit data collection and use. While CIS remains engaged in DNT work, it also seems time to try a new approach that does not require consensus agreements.

There is strong legislative interest in DNT. California AB 370 would require websites to declare how, if at all, they respond to a California user's Do Not Track request. On August 22, 2013, the California Senate voted 37-0 to approve AB 370. It came into force on January 1, 2014. Aleecia contributed to the California Attorney General's guidance on best prac-

tices for privacy notices, published in May, 2014, *Making Your Privacy Practices Public: Recommendations on Developing a Meaningful Privacy Policy.* Aleecia is also leading research to study how companies respond to the legal requirements for DNT disclosure, and estimate how many times companies disregard users' requests not to be tracked.

Part II: CIS's Cy Pres Proposal Project Descriptions

To continue and expand our work on consumer privacy, CIS requests up to $971,400 in *cy pres* funds to conduct four projects over the next three years. The four projects are independent of one another allowing funding to scale up or down. However, all four projects are contingent on funding for personnel as described in the section below on Necessary Personnel.

Project One: Mobile Privacy Research

Our prior work investigated how two popular privacy policy systems that rely on icons to convey information compare to each other, as well as to text-only presentations. We find that icons coupled with text can be effective, but small screen size makes it vital to show the information that is of top priority to a user at the time she is making privacy decisions. Understanding what, when, and how to display information effectively remains a research area with great promise.

In February, 2012, the California Attorney General's office reached an agreement with six major mobile vendors to disclose privacy policies for mobile applications prior to download. The California Department of Justice and the Federal Trade Commission are both actively seeking solutions to the problem of how to provide working privacy notice on small cell phone screens.

CIS proposes to expand our research on best practices for user privacy notice to the context of mobile devices.

- Within two years we would complete human subjects research on how to prioritize and present privacy information and create one or more papers of publishable quality along the lines of Calo's highly successful paper *Against Notice Skepticism*.
- We will also investigate the potential efficacy of privacy enhancing technologies, technical standards, and possible legal requirements to limit data flows, in order to learn if there are methods other than notice that users might prefer.
- We would then promote adoption of the lessons of this research regarding effective mobile notice with app developers, as we did with "visceral notice" and websites.
- We would also work with lawmakers, for example at the CalDoJ and Federal Trade Commission to help them understand our research and use it in their regulatory work.
- We would host a training event for up to 100 app developers. By training 100 app developers, we can expect to see those app developers create offerings with improved privacy policies. We will measure success of this training through (1) the number of app developers offering privacy policies for the first time within a month of attending the Stanford workshop, (2) the number of apps with privacy policies that adopt our suggestions for usability within three months of the Stanford workshop, (3) the number of downloads of those apps, and therefore the number of individuals with greater transparency and understanding of data practices.

($98,000, includes cost to research technology and payments to research participants in a nationally representative study: $60,000 and one event to train app developers how to instantiate mobile privacy policy notice and choice for at least 100 people to be held at Stanford: $38,000.)

Relevance and Benefit to the Class

Effective notice is a precursor to effective choice. The Class members alleged that they were given neither notice nor choice about how Google would relay their search queries to third parties. As Internet users, including Class members, migrate to mobile devices, providing effective notice will directly improve their ability to control the flow of information about them. Currently mobile users do not understand how companies use, collect, or share information. Most mobile developers do not understand they are compelled by California law to document their data policies, and do not know how to go about doing so. It is not enough to tell mobile developers they must write privacy policies, we must also determine and demonstrate how to make privacy information useable. Rather than burying practices in an unread privacy policy, salient details must be presented to users in new ways, before they make privacy decisions.

Success metrics: We anticipate that our work will improve mobile privacy notice. Our metrics will be (1) whether the central insights of this research are implemented by household name Internet companies, as happened with "visceral notice" on desktop devices; (2) whether policy makers at the FTC or CalDOJ adopt and encourage companies to implement our research insights.

Project Two: Barriers to Privacy Enhancing Technologies

In what researchers have termed the "privacy paradox," users say they care very much about privacy, but do not avail themselves of existing self-help measures to ensure privacy. This phenomenon is less surprising in light of research that users mistakenly believe they are protected by privacy laws that do not exist, and users mistakenly believe companies would never risk reputational harm by engaging in common business practices to collect, store, share, and sell user data.

With the press coverage of Snowden's documents, Internet users are becoming more aware that their information online is not as private as they once imagined. As a result, users increasingly are turning to software tools to control information about them, including the terms they search for online, the websites they visit, and their reading habits (see Figure 3). These kinds of software are known as Privacy Enhancing Technologies (PETs) and are designed to put users in control of their information. The ultimate goal is not to protect privacy as much as possible, but rather to have users' online experiences match their privacy preferences.

However, there are many well-known barriers to PETs use. First, users need to know they have privacy risks. Second, they need to know there are ways to mitigate those risks. Third, they need to be able to install PETs, which is sometimes quite difficult. Finally, many PETs are cumbersome, slow, or difficult to use. PETs developers are often small groups of volunteers rather than professional software development teams. While PETs developers would like to make their products appeal to more than a small group of enthusiasts, PETs developers often lack the resources to address significant barriers.

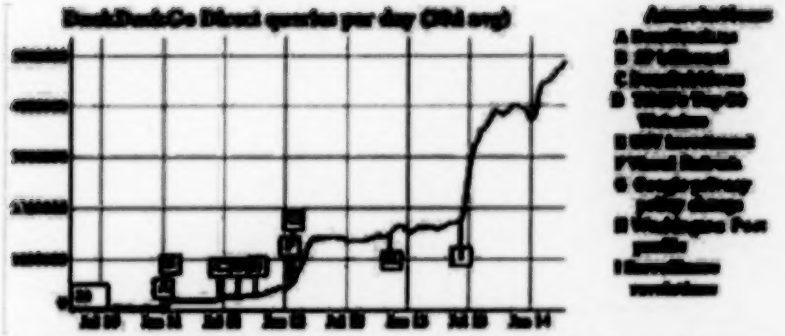

Figure 3: Duck Duck Go use jumped when Google changed their privacy policy and after press coverage of Snowden's documents.

We propose the first detailed research into the ways these barriers interfere with user adoption and use of PETs. Through a series of human subject experiments we will test pairs of configurations for PETs. For example, do research participants use PETs significantly more when installation is easier, or faster? Do research participants use PETs in ways that better match their privacy preferences when they understand how the software protects them, and how it might interfere with other features they like? To perform this analysis we will hire a part-time computer science student to create different versions of installation software for existing PETs, such as:

- Tor Browser, which limits information sharing on the web including masking IP addresses and not sending referrer headers
- DuckDuckGo, a search engine that does not track users
- Privacy Badger, a web browser plugin that blocks some forms of online tracking

- PGP, a difficult-to-use approach to encrypting email

Our research goal is to learn where PETs fail users, and which barriers to PETs use are most significant. Our results will help PETs engineers as they allocate their development resources. As a beneficial side effect, we may develop improved installation procedures or user interfaces in order to test them. We will contribute our improvements back to the development teams for each project whenever possible.

($64,400, includes cost to develop multiple variants of existing PETs ($30,000 for part-time students in computer science,) summer interns to perform research and analyze results ($14,400) and direct costs of $20,000 to perform research and pay participants.)

Relevance and Benefit to the Class

Effective privacy notices are necessary but not sufficient for users to enact their privacy preferences online. If the members of the Class had been aware their referrer header information was shared with advertisers, they could have taken steps to limit that sharing if they wished. PETs provide those steps to limit sharing. However, the members of the Class would still have experienced barriers to their efforts to use PETs to limit referrer header data collection. By researching which barriers to PETs use are more significant, we can improve PETs more rapidly, and create tools that are better able to meet the Class' privacy interests. This project is responsive to privacy choices generally, and also specifically to the referrer header issue.

Success metrics: We anticipate that our work will improve the PETs we study, and PETs overall. Our metrics will be (1) whether the central insights of this research are implemented by PETs development teams, as

happened with "visceral notice" on desktop devices; (2) publication of at least one high-quality research paper in a technical journal detailing the most significant barriers to PETs adoption and how to overcome them; (3) ongoing citations to research work, indicating diffusion of knowledge within the research community; (4) increased adoption of PETs when they meet users' privacy preferences, indicating success in lowering barriers to PETs adoption.

Project Three: Privacy Legislation Analysis

Privacy is a topic of increasing legislative interest. In 2012, the California legislature introduced nearly two dozen privacy bills. Many of these are well-intentioned bills that nevertheless would benefit from better understanding of underlying technical realities. Our interdisciplinary approach puts us in a unique position to inform the legislature on law, policy, *and* technology.

For example, the California Assembly is considering updates to the Shine the Light law, California Civil Code 1798.83. The goal is to increase transparency and understanding of data collection, including data transfers between first and third parties, which would help address issues of the Class. Unfortunately, the bill was drafted in a way that is technically infeasible for many companies, as it asks first parties to disclose information they typically will not have. With some work to redraft the approach, the bill it could be effective.

As another example, AB 242 is an act to amend Section 22575 of the Business and Professions Code to require privacy policies not exceed 100 words. The idea is that since privacy policies take too long to read, it would be better to force them to be short so users are more likely to read them. Unfortunately research shows short form privacy policies are less effective, since users assume anything not mentioned is not collected or used—

and companies cannot fit all of their data practices into 100 words. Part of the remedy for the Class is to give effective notice of privacy practices, yet this law would make it unlikely there would be enough room for that notice. Our work on effective mobile notice could help the legislature tailor this law to achieve its worthy goals.

[Figure omitted: "Making Your Privacy Practices Public" logo with seal of Kamala D. Harris, Attorney General, California Department of Justice]

Figure 4: We contributed to the AG's recommendations on Do Not Track, but lack resources for full policy engagement

Beyond California, the idea of a "right to be forgotten" online is a topic of great interest in Europe and in the U.S. (See, *e.g.* Representatives Markey and Barton's proposed "eraser button" in the Do Not Track Kids Act of 2011, H.R. 1895 (112th).) While many measures are targeted at preventing data collection, erasure proposals focus on deleting data after it has been collected, allowing a new set of remedies for unwanted data collection and distribution. In May, 2014 The European Court of Justice ruled that Google must provide access for users to delink information about themselves, which brings discussions away from mere theory. However, there are many challenges to implementing a "right to be forgotten," both technical and legal, including conflicts with freedom of expression.

While we have provided informal advice on some of the California bills, we have not had the resources to become more engaged, even as bill authors are open to input. Members of the Center for Internet and Society have strong relationships with state and federal policy makers. These relationships give CIS a path to be effective and influential in California privacy law.

With *cy pres* funding, we would publish at least three white papers responsive to privacy bills and proposed legislation under active consideration by state lawmakers. In addition to informal meetings with policy makers and briefings, we would also conduct at least one event that introduces academics and policy makers with knowledge transfer in both directions.

For this project, CIS would hire a full time legal fellow to help the Director of Privacy study pending bills and respond with published analysis in the form of white papers or publications. We would also hold a major event in cooperation with the California Assembly Select Committee on Privacy (or other appropriate partner) to bring together experts in privacy scholarship and legislative staff. (Human and technical resources for this project: $295,000—includes a full-time legal fellow for three years: $240,000, and events for $38,000.)

Relevance and Benefit to the Class: As awareness grows that online data collection is more pervasive than it appears, and as companies are vocal that they are unwilling to voluntarily limit online data collection and use, there is greater talk of legislation being the only recourse available to protect privacy interests. Without a sound technical and legal basis, privacy legislation may unnecessarily fail. The legislature risks passing laws that are impossible to implement or inadvertently harm the people they purport to protect. Because California claims jurisdiction over California citizens, any company that has a user located in California must follow California privacy laws for that user. In practice, it is too difficult to distinguish California citizens from all others, and too costly to create multiple systems. As a result, California privacy laws become de facto national laws. If the Shine the Light amendments and AB 242 were improved, these

laws could enhance transparency so members of the Class will know who collects their data and where that data goes.

Success metrics: Our goal would be to help policy makers author practical and implementable legislation, and to encourage academic researchers to contribute their thinking to relevant policy issues. Successfully passing legislation is outside of our control. However, we note that bills are routinely defeated because they are slightly incorrect at the technical layer. We see three types of success. (1) Legislative directors and policy makers attending the Stanford event would leave with greater technical understanding of how the web works. Much as users do not understand invisible data flows, legislators do not either. We will collect feedback forms at the end of the event to confirm participants have an enhanced understanding. (2) Introducing researchers and policy makers must be the start of a longer conversation, not the end. We will create a briefing book containing the biographies of participants, allowing ongoing contact over time. (3) Successfully working with legislators to amend or introduce privacy protecting bills that are technologically astute.

Project Four: Speaker series

[Figure omitted: CIS Tech Workshop 2014 logo with photographs of Monica Chen and Garrett Robinson]

Figure 5: Our first workshop of 2014 addressed invisible information flows

CIS has a popular lunchtime and evening Speaker Series. In 2011 we held four lunch talks and five evening talks. In 2012 we held four lunch talks and two evening talks. In 2014 we create a new series of hands-on workshops to teach attendees how to install and use privacy enhancing software tools. In addition, we invited promi-

nent speakers including renowned security expert Bruce Schneier and journalist Julia Angwin. We held a total of six evening events. See Figure 5 for one example. Our evening speakers have been much better attended by members of the public than our workshops or lunch events, but evening events are much more expensive to host, averaging $7000 each. Our events are professionally video-recorded and made available through our YouTube channel so that members of the public who cannot attend may still benefit from the events.

One aim of the Speaker Series is to foster public understanding of important privacy issues. If we are awarded this funding, CIS would host three additional evening events open to the public, specifically about consumer privacy online. Via these events, we both educate the public and introduce prominent privacy researchers to the general public, which is contact they may normally not have. In this way the speakers reacquaint themselves with the knowledge level and interests of people outside the privacy expert sphere. Consumer privacy topics relevant to the Class that we would host potentially include: (1) how the public can make effective online choices for privacy (2) how third party web tracking and behavioral advertising practices work and/or (3) how seemingly anonymous data can be used to re-identify people. ($21,000 for costs of three events.)

Relevance and Benefit to the Class: Education is a key aspect in putting users in control of the data they transmit. For example, Internet users who understand what referer (sic) headers are can opt to use technical means to suppress sending that information from some web browsers. These are advanced measures that require understanding how data flows work to even understand there might be an issue to address, let alone what

tradeoffs are involved. Our Speaker Series events can address these needs by educating users who are able to attend the speaker series in person, and also reaching a geographically remote audience as well.

Success metrics: (1) At least 300 people in attendance across all evening events, (2) at least three different top-notch speakers, (3) at least 100 remote attendees and downloads within a year of the event.

Necessary Personnel

With this *cy pres* award, CIS would make the position of Director of Privacy permanent. From June 2010 to July 2012, CIS had a full-time Director of Privacy who focused on consumer privacy. That former Director, Ryan Calo, left to join the faculty of University of Washington Law School. CIS funded our current Director of Privacy, Aleecia M. McDonald, for a two-year term ending 2014. While we have accomplished a great deal and brought about real changes in consumer privacy, funding remains limited. CIS anticipates that adding a permanent Director level position specifically for consumer privacy will enable CIS to accomplish the projects listed below, as well as other relevant research that would directly benefit the privacy interest of Class members in controlling the use and dissemination of their personal information. We also request a portion of the salaries of two staff members, Associate Director Elaine Adolfo and Legal Assistant Amanda Avila, to perform administrative tasks directly relevant to this *cy pres* request, including financial accounting for all research projects, managing travel and expenses for workshops and training sessions, running events and speaker series, and providing web design and maintenance. We do not seek general funding and do not request overhead. All expenses are directly tied to the privacy projects outlined above (Three year's

salary and benefits for a Director level position: $450,000. Portion of additional staff salary and benefits for three years: $60,000.)

Thus, the total CIS seeks in *cy pres* distribution from this litigation is $971,400, as detailed in Appendix A: Proposed Budget on page 18.

Part III: Potential Conflicts

Stanford Law School's development department researched any connections CIS, its umbrella organization the Law Science and Technology Program LST), or Stanford Law School might have with the parties or their attorneys. Stanford Law School has no financial or other connections with Paloma Gaos, Anthony Italiano, Gabriel Priyev, or Eric Schmidt (Plaintiffs) nor with Kassra P. Nassiri, Michael J. Aschenbrener, or Ilan Chorowsky (Attorneys.) Mr. Nassiri is a graduate of Stanford with a Master of Arts in Economics in 2000. Neither LST nor CIS have any financial connections with Judge Davila. The only Law School connection found is that, according to a White House press release dated May 20, 2010, Judge Davila taught trial advocacy at Stanford Law School before being appointed to the bench.

Contributions from the Parties.

CIS is part of the Law, Science, and Technology program, which has received funds from Google for work on patent law in 2013. Additionally, Google has donated funds to the Center for Internet and Society from 2006 to 2013. We do not believe these funds establish a conflict of interest.

All funding CIS receives is deposited into accounts controlled by Stanford Law School. Stanford Law School is fiscally responsible for and monitors the accounts. CIS

follows all law school and University policies and procedures for expending funds from our accounts.

Per Stanford University policy, all donors to the Center agree to give their funds as unrestricted gifts, for which there is no contractual agreement and no promised products, results, or deliverables. Stanford has strict guidelines for maintaining its academic autonomy and research integrity. CIS complies with all these guidelines, including the Conflicts of Commitment and Interest section of the Stanford Research Policy Handbook <http://doresearch.stanford.edu/policies/research-policy-handbook/conflicts-commitment-and-interest>. Stanford policies provide explicit protection against sponsors who might seek to direct research outcomes or limit the publication of research.

Since 2013, Google funding is specifically designated not be used for CIS's privacy work. CIS's academic independence is illustrated by the following work by Privacy Director Aleecia M. McDonald and CIS Junior Affiliate Scholar Jonathan Mayer, which may not accord with Google's corporate interests:

- Aleecia and Jonathan each contributed greatly to Do Not Track efforts, including demonstrating the technical feasibility of Do Not Track; leadership in the W3C standards process; and work with the California Attorney General's office on the language and enforcement of AB 370, California's law requiring corporate transparency regarding how they respond to Do Not Track signals. Do Not Track was an alternative to Google's preferred approach to make opt-out cookies persistent.
- Based on Jonathan's research, Google paid a record $22.5 million dollar FTC fine for circumventing users' privacy choices in Apple's Safari web browser.

- Jonathan wrote code to a change to the Mozilla Firefox browser to make it as privacy-protective as Safari. Jonathan's code is now part of the Firefox product. Aleecia created the Cookie Clearinghouse to expand upon Jonathan's improvements to Firefox. These changes could affect Google and other companies' revenues from targeted advertising.

For these reasons, we do not believe we have a conflict of interest with either Google or with the Plaintiff class.

CIS thanks the Court for the opportunity to submit this Proposal for consideration in the proposed settlement of this litigation.

I, Aleecia M. McDonald, am authorized by CIS Faculty Director Professor Barbara van Schewick to sign this proposal on behalf of CIS.

Dated: May 19, 2014 By: _____

Aleecia M. McDonald, PhD
Director of Privacy
Center for Internet & Society
Stanford Law School

Appendix A: Proposed Budget

Proposed Budget

Center for Internet & Society
Stanford Law School

	Year 1	Year 2	Year 3
Project One: Mobile Privacy Research			
Research technology, conduct nationally representative study	60,000		
Train app developers		30,000	
Project Two: Privacy Tools Research			
Half-time computer science student		15,000	15,000
Summer research intern		7,200	7,200
Conduct research, payments to participants		10,000	10,000
Project Three: Privacy Legislation			
Full-time legal fellow (salary plus benefits)	80,000	80,000	80,000
Events for policy makers and academics		30,000	
Project Four: Speaker Series			
Effective online choices	7,000		
How web tracking & advertising work		7,000	
Re-identification of anonymous data			7,000
Necessary Personnel			
Director of Privacy (salary, benefits)	145,000	150,000	155,000
Portion of Associate Director and Legal Assistant (salary, benefits) to run events, etc	20,000	20,000	20,000
Annual Total	$ 312,000	$ 365,200	$ 294,200
Total Request		$	971,400

Appendix B: CVs for Necessary Personnel

Aleecia M. McDonald
Director of Privacy
Center for Internet & Society
Stanford Law School

I research topics in Internet privacy and security. I work to contribute to a more coherent picture of how, why, and when people make choices about protecting themselves online, and what that means to them. My interests span users' mental models of online interaction, study of and creation of usable tools to support online decision making, and how people learn about and reason about online trust issues. In addition to technical tools, I focus on technically informed policy approaches in standards bodies, regulatory agencies, and legislation in the United States and European Union nations.

Education

Carnegie Mellon University Engineering & Public Policy Ph.D., September, 2010. Thesis: *Footprints Near the Surf: Individual Privacy Decisions in Online Contexts.* Committee members: Lorrie Faith Cranor (chair), Alessandro Acquisti, Deirdre K. Mulligan, Jon M. Peha.

Carnegie Mellon University H. John Heinz School of Public Policy and Management. M.S. in Public Policy and Management with a concentration in Internet Policy, May, 2006.

Carnegie Mellon University B.A., Professional Writing, 1993.

Employment

Stanford University Center for Internet & Society, Director of Privacy, staff position, 12/12 – present

Conduct privacy research. Directed three summer students (2013) in research regarding privacy access and correction rights, the "right to be forgotten" in the US and EU, and a quantitative analysis of the Chilling Effects database regarding the de-linking of copyrighted information. Created a hands-on privacy workshop speaker series covering Mozilla's Lightbeam, Tor, GPG, HTTPSEverywhere, and speakers on corporate and government surveillance. Created the Cookie Clearinghouse.

Successfully applied for the first-ever NSF funding for CIS, as part of a multi-university Frontier award.

Stanford University Center for Internet & Society, Resident Fellow, half-time staff position, 11/11 – 11/12

Under the direction of M. Ryan Calo, performed research regarding mobile privacy policies. Led efforts to standardize what it would take to comply with an Internet user's request not to be tracked online.

Mozilla Corporation, Senior Privacy Researcher, contract and part-time employment, 3/11 – 11/12

First hire into Mozilla's privacy team in the legal department. Worked with engineering to publish internal and external documents regarding Do Not Track implementations. Conducted research on privacy preferences for Mozilla Test Pilot users.

Carnegie Mellon University, Research Assistant, staff position, 5/06 – 8/06

Under the direction of Professor Jon M. Peha, managed a group of three students to investigate spyware traffic on the Carnegie Mellon network. Determined schedule and priorities for students. Used Snort on Red Hat with custom anonymization tools to ensure privacy. Responsible for IRB (Institutional Review Board) interactions.

Performed data analysis in mySQL, SAS, and R.

Center for Democracy & Technology, Summer Intern, 5/05 – 7/05

Authored two internal papers on RFID (Radio Frequency Identification) including research on security issues and privacy. Participated in events on layered privacy notices, Real ID, and the PATRIOT Act. Edited written comments to the Federal Election Committee. Attended FEC and Senate Intelligence Committee hearings.

Prior Writing Experience

A decade of experience working for software startups. Specialized in single-source cross-platform documentation, ranging from online help to API manuals. Wrote and edited thousands of pages; as team lead, was responsible for scheduling and mentoring new hires; advocated for usability testing and customer contact to meet reader's needs.

Professional Service

- Member of EPIC's Advisory Board (2014) [press release].
- Member of Center for Democracy & Technology's Academic Advisory Board (2014).
- Cookie Clearinghouse, Director (June 2013-present). The Cookie Clearinghouse provides information for users to make choices about online privacy. The Cookie Clearinghouse publishes free-to-use information for web browsers, users, and others [statement from Mozilla].
- World Wide Web Consortium (W3C), Tracking Protection Working Group, co-chair, 8/11 – 11/12. The Tracking Protection Working Group is chartered to improve user privacy and user control by defining

mechanisms for expressing user preferences around Web tracking and for blocking or allowing Web tracking elements. As co-chair, I focused on standardizing the meaning of Do Not Track. We worked on consensus decisions involving over 100 working group members from advertising/self-regulatory groups, corporations, browser makers, privacy advocates, and academics.

- California Office of Privacy Protection's Mobile Privacy Policy Advisory Group (2012).

Publications

Journal Publications

1. McDonald, A. M., and Lowenthal, T. Nano-Notice: Privacy Disclosure at a Mobile Scale. *Journal of Information Policy*, Vol. 3 (2013), pg. 331-354.
2. McDonald, A. M., and Cranor L. F. A Survey of the Use of Adobe Flash Local Share Objects to Respawn HTTP Cookies *Journal of Information Policy*, Vol. 7, Issue 3 (2011), pg. 639-687.
3. McDonald, A. M., and Cranor, L. F. Americans' Attitudes About Internet Behavioral Advertising Practices. *Proceedings of the 9th Workshop on Privacy in the Electronic Society (WPES)* October 4, 2010.
4. Leon, P. G., Cranor, L. F., McDonald, A. M., and McGuire, R. Token Attempt: The Misrepresentation of Website Privacy Policies through the Misuse of P3P Compact Policy Tokens. *Proceedings of the 9th Workshop on Privacy in the Electronic Society (WPES)* October 4, 2010. [CMU Tech Report]
5. McDonald, A. M., Reeder, R. W., Kelley, P. G., and Cranor, L. F. A Comparative Study of Online Privacy Policies and Formats. *Privacy Enhancing Technologies Symposium*, August 5-7 2009. [Author's version]

6. McDonald, A. and Cranor, L. The Cost of Reading Privacy Policies. *I/S: A Journal of Law and Policy for the Information Society*. 2008 Privacy Year in Review issue. [Author's version]

7. Cranor, L., Egelman, S., Sheng, S., McDonald, A., and Chowdhury, A. P3P Deployment on Websites. *Electronic Commerce Research and Applications*, Vol. 7, Issue 3 (November 2008). Pages 274-293. [Author's version]

8. Reeder, R., Cranor, L., Kelly, P. and McDonald, A. A User Study of the Expandable Grid Applied to P3P Privacy Policy Visualization. In *Proceedings of the Workshop on Privacy in the Electronic Society* (WPES 2008), Washington, DC, USA, October 2008.

9. James, R., Kim, W. T., McDonald, A. M., McGuire, R. A Usability Evaluation of a Home Monitoring System. SOUPS '07: *Proceedings of the 3rd Symposium on Usable Privacy and Security*. Pages 143-144, July 2007.

10. McDonald, A. M. and Cranor, L. F. How Technology Drives Vehicular Privacy. *I/S: A Journal of Law and Policy for the Information Society*, 2(3), Fall 2006, 981-1015. [Author's version]

Conference Proceedings

1. McDonald, A. M. User Perceptions of Online Advertising. *Yale ISP Conference* (March 25-26, 2011).

2. McDonald, A. M., and Peha, J. M. Track Gap: Policy Implications of User Expectations for the 'Do Not Track' Internet Privacy Feature. *39th Research Conference on Communication, Information and Internet Policy* (Telecommunications Policy Research Conference) September 25, 2011.

3. McDonald, A. M, and Cranor, L. F. Beliefs and Behaviors: Internet Users' Understanding of Behavioral Advertising. *38th Research Conference on Communication, Information and Internet Policy* (Telecommunications Policy Research Conference) October 2, 2010.
4. McDonald, A. M. Cookie Confusion: Do Browser Interfaces Undermine Understanding? In *Proceedings of the 28th International Conference Extended Abstracts on Human Factors in Computing Systems* (2010). CHI EA '10. [Author's version]

Technical Reports

1. McDonald, A. M. and Cranor, L. F. A Survey of the Use of Adobe Flash Local Shared Objects to Respawn HTTP Cookies. [CMU Tech Report]
2. Leon, P. G., Cranor, L. F., McDonald, A. M., and McGuire, R. Token Attempt: The Misrepresentation of Website Privacy Policies through the Misuse of P3P Compact Policy Tokens. [CMU Tech Report]
3. McDonald, A. M., and Cranor, L. F. An Empirical Study of How People Perceive Online Behavioral Advertising. CyLab Technical Report 09-015. November 10, 2009. [CMU Tech Report]
4. Cranor, L. F., McDonald, A. M., Egelman, S. and Sheng, S. 2006 Privacy Policy Trends Report. CyLab Privacy Interest Group. January 31, 2007. [Author's version]

In Review

1. McDonald, A. M. When Self-Help Helps: User Adoption of Privacy Technologies. To appear in *Visions of Privacy in the Modern Age*, EPIC (2014).

2. Reidenberg, J., McDonald, A. M., Schaub, F., Sadeh, N., Acquisti, A., Breaux, T., Cranor, L. F., Liu, F., Grannis, A., Grey, J., Norton, T., Ramanath, R., Russell, N. C, Smith, N. A., Wilson, S. Disagreeable Privacy Policies: Mismatches between Meaning and Users' Understanding. (Abstract submitted; manuscript in preparation.)
3. Grogan, S. and McDonald, A. M. Can I See Too? Contrasting Data Access and Correction in the United States and Europe.
4. McDonald, A. M. Browser Wars: A New Sequel? To appear in *The Journal on Telecommunications and High Technology Law (JTHTL)*, Vol. 11 (2013). [Slides from talk]

Related Non-Academic Publications

1. W3C Tracking Protection Working Group suite of documents (as a co-chair, I was primarily responsible for the Tracking Preference Expression Definitions and Compliance draft, but also contributed text to the Tracking Preference Expression draft, and commented on the Tracking Selection Lists draft) 2011-2013.
2. Mozilla Corporation, The Do Not Track Field Guide (co-authored with Sid Stamm; substantial input from Alex Fowler) 2011.
3. Mozilla Corporation, Online help for Do Not Track (authored the initial help files regarding Do Not Track shipped with Mozilla's Firefox browser) 2011.
4. McDonald, A. M. Position Paper for the W3C Do Not Track Workshop W3C Workshop on Web Tracking and User Privacy, Princeton, April 28-29, 2011.

Awards and Honors

Towards effective Web privacy notice and choice: a multi-disciplinary perspective. Team member of a multi-university NSF Secure and Trustworthy Cyberspace (SaTC) Frontier award. [NSF press release | Stanford press release]

CyLab Usable Privacy and Security Meritorious Achievement Certificate, 2010.

Barbara Lazarus Women@IT Fellowship, 2006-7. Received full tuition and stipend support for one year of doctoral scholarship.

Friedman Fellowship, summer 2005. Received support for a summer of technology policy work in Washington, DC.

Teaching Experience

Stanford University. ***Law-405, Privacy and Technology***, Spring 2013 Designed and co-taught with Jennifer Granick. Taught the legal basis for privacy, ways in which new technologies challenge existing legal and social frameworks, "notice and choice" and other theories for online privacy, how online advertising intersects with privacy, privacy enhancing technologies (PETS), privacy by design (PbD), and re-identification.

Carnegie Mellon University. ***Project manager. Policy Dimensions of New Space Technologies***, Spring, 2008. Responsible for a team of six undergraduate students as they defined, designed, and performed research regarding "new space" (entrepreneurial rather than NASA-led) business models, technologies, and federal policies. We submitted findings to our client, the Federal Aviation Agency. Created and graded quizzes. Contributed to assigning midterm and final grades.

Guest Lecturer

- Stanford University. M. Ryan Calo's law class, April 2012. Topic: Do Not Track.
- University of California, Berkeley. Deirdre K. Mulligan's Technology and Delegation, Fall 2011. Co-presented with Nick Doty. Topic: Do Not Track Overview.
- Carnegie Mellon University. Lorrie Faith Cranor's Usable Privacy and Technology, Fall, 2011. Topic: Do Not Track.
- Carnegie Mellon University. Lorrie Faith Cranor's Usable Privacy and Technology, Spring, 2008. Topic: Online privacy policies. Also led a class tour of a biometrics laboratory.
- Carnegie Mellon University. Lorrie Faith Cranor's Usable Privacy and Technology, Spring, 2007. Topic: Visualizing privacy
- Carnegie Mellon University. Lorrie Faith Cranor's Privacy Policy, Law, and Technology, Fall, 2007. Topic: Privacy policies and privacy communication.

Editorial Experience

- Program Committee, Hot Topics in Privacy Enhancing Technologies (HotPETs), 2014.
- Program Committee, ASE International Conference on Privacy, Security, Risk and Trust (PASSAT), 2014.
- Reviewer, Journal of Information Policy (JIP), 2014.
- Program Committee, IEEE Web 2.0 Security and Privacy, (W2SP), 2014.
- Program Committee, Workshop on Privacy in the Electronic Society (WPES), 2012.

- Program Committee, Privacy Enhancing Technologies Symposium (PETS), 2011.
- Reviewer, Information Systems Frontiers, 2010.
- Program Committee, Privacy Enhancing Technologies Symposium (PETS), 2010.

Presentations

Policy

Do Not Track briefings and progress updates. While co-chair of the W3C Tracking Protection Working Group, I conducted outreach to keep policy makers informed. From September, 2011 to June, 2013 I held approximately two dozen meetings and spoke with members of Congress and their staff members, European policy makers at the DG INFSO, as well as policy makers within the NTIA, Commerce Department, and White House.

Testimony before the California Assembly Select Committee on Privacy. Privacy Implications of the New Mobile App Ecosystem. March 26, 2013.

Testimony before the California Assembly Judiciary Committee, the Assembly Business, Professions and Consumer Protection Committee, and the Assembly Select Committee on Privacy. Balancing Privacy and Opportunity in the Internet Age. December 12, 2013.

Supported Alex Fowler's testimony to the US Senate Commerce Committee Hearing on Do Not Track, June 27, 2012.

Discussion with the California Attorneys General Consumer Protection Lawyers. Organized by Chris Hoofnagle, University of California at Berkeley. December 14, 2011.

Joseph Wender, Legislative Director for US Representative Ed Markey. Briefing on privacy technologies. October 18, 2011.

FTC staff regarding mobile privacy research. March 20, 2012.

FTC Commissioner Brill and staff. Preview of research findings on user expectations for Do Not Track. July 13, 2011.

Federal Trade Commission staff. Preview of research findings on user expectations for Do Not Track. June 15, 2011.

Federal Trade Commission staff. Beliefs and Behaviors: Internet Users' Understanding of Targeted Advertising. October 13, 2010.

Supported Lorrie Faith Cranor's panel discussion on consumer privacy expectations at the Federal Trade Commission's first privacy round table, December 7, 2009.

Supported a portion of Lorrie Faith Cranor's testimony to the Federal Trade Commission Ehavioral Advertising: Tracking, Targeting, & Technology town hall meeting, November 2, 2007.

Invited Talks

- World Affairs Council. The Internet of Things: Ubiquity Fueled by Innovation (moderator). May 7, 2014.
- Stanford Technology Law Review Symposium. CalOPPA panel regarding the "Do Not Track" provisions of AB 370 (moderator). April 11, 2014.
- American Bar Association. Video Games and Big Data: The More You Play, the More Others Learn, Ethical Obligations. March 17, 2014.

- Stanford Parents' Weekend. Internet Privacy: Policies and Practices. February 22, 2014.
- University of Amsterdam Institute for Information Law (IViR) and University of California, Berkeley School of Law. Workshop on Browsers and Tracking Protection. February 12, 2014.
- Stanford Political Science department. Regulatory challenges and privacy issues associated with mobile technologies. January 17, 2014.
- Stanford Institute for Economic Policy Research. Big Data, Big Issues. October 25, 2013.
- University of California, Berkeley. TRUST security seminar. September 26, 2013.
- Microsoft (LCA Speaker Series). The Cookie Clearinghouse. September 17, 2013.
- Privacy Identity Innovation (PII). Data Collection and Consent: Next Steps for Digital Advertising. September 16, 2013.
- Terms and Conditional May Apply. Discussion following local movie premier, August 3, 2013.
- AdMonsters. Cookie Clearinghouse. July 10, 2013.
- IAPP Summit. The Status of Do Not Track. March, 2013.
- Public Policy Students Colloquium. Internet Privacy: Policies and Practices. April 9, 2014.
- USC Annenberg Innovation Summit 2013 (discussant). April 4, 2013.
- Mobile 2.0. Mobile Security and Privacy and Trust - How Will Consumers Be Protected? September 11, 2012.

- Interactive Advertising Bureau (IAB) Town Hall. Do-Not-Track and Digital Advertising: What Happens Next? June 12, 2012.
- Future of Privacy Forum's App Privacy Summit (discussant). April 25, 2012.
- Microsoft (Online Services Division). December 8, 2011.
- Katholieke Universiteit Leuven. Do Not Track and US Privacy Bills. June 24, 2011.
- Institute for Information Law of the University of Amsterdam and the Berkeley Center for Law & Technology of the University of California School of Law. Online Tracking Protection Workshop. June 22-23, 2011.
- Online Tracking Protection & Browsers. Regulatory landscape: consent to be tracked? Panelist. June 22-23, 2011.
- Federated Social Web Europe, Following Social Advertising in the United States. June 3-5, 2011.
- Rapleaf 2011 Personalization Summit. Personalization and Privacy: A Birds Eye View. Panelist. May 26, 2011.
- Privacy Identity Innovation (PII) 2011. Panelist. May 18-21, 2011.
- W3C Workshop. Position paper for the W3C Do Not Track Workshop.
- Yale ISP, From Mad Men to Mad Bots. Discussion of the Psychology of Online Advertising. March 25-26, 2011.
- Admonsters Conference on Do Not Track. May 3, 2012.

- Microsoft. Beliefs and Behaviors: Internet Users' Understanding of Targeted Advertising. October 28, 2010.
- Carnegie Mellon Silicon Valley Talks on Computing Systems. August 11, 2010.
- Google Tech Talk. Privacy Targets: Three User Studies on Internet Privacy and Targeted Advertising. June 1, 2010.
- eMetrics panel discussion with Bob Page (Yahoo! Analytics) and John McKean (Center for Information Based Competition.) "The Great Cookie Debate or Your Personally Identifiable Information or Your Life!" October 22, 2009.
- Google Tech Talk. Online Privacy: Industry Self Regulation in Practice. September 17, 2009.

Conference Presentations

- University of Colorado. Silicon Flatirons. November 2, 2011.
- Symposium On Usable Privacy and Security (SOUPS). The Battle over the Behavioral Advertising Choice Mechanisms. Panelist. July 22, 2011
- 9th Workshop on Privacy in the Electronic Society (WPES). Americans' Attitudes About Internet Behavioral Advertising Practices, with L. F. Cranor. October 4, 2010.
- 38th Research Conference on Communication, Information and Internet Policy (TPRC). Beliefs and Behaviors: Internet Users' Understanding of Behavioral Advertising, with L. F. Cranor. October 2, 2010.
- Privacy Law Scholars Conference (PLSC). Impressions and Privacy: A study of American Internet Us-

ers' Attitudes about Targeted Advertising, with L. F. Cranor. June 3, 2010.

- Privacy Enhancing Technologies Symposium. A comparative study of online privacy policies and formats, with R. Reeder, P. G. Kelley, and L. F. Cranor. August 5-7 2009.
- The 36th Research Conference on Communication, Information and Internet Policy (TPRC). The Cost of Reading Privacy Policies, with L. Cranor. Sep 27, 2008.

Media Coverage

Interviews regarding privacy with CBS, NBC, NPR, The Washington Post, The New York Times, Time Magazine, Tech Republic, The Register, ComputerWorld, Bloomberg BNA, Adweek, Ad Age, Business Insider, Politico, The Atlantic, and many others.

Do Not Track efforts generated thousands of articles, few of which I contributed to. Coverage of research regarding user expectations of Do Not Track:

- Davis, Wendy. Study: Consumers Define Do-Not-Track More Broadly Than Web Companies. ***The Online Daily Examiner***. (3 May, 2011)
- Tarran, Brian. Do-not-track isn't just about advertising, say web users. ***Research***. (4 May, 2011)

Coverage of LSO ("Flash cookie") study:

- Davis, Wendy. Have Web Sites Cut Back On Flash Cookies? ***Daily Online Examiner***. (31 Jan, 2011)
- Mullen, Joe. New Study Shows Persistence Of 'Flash Cookies' ***Paid Content***. (1 Feb, 2011)
- Tarran, Brian. Flash cookie respawning 'on the wane', say Carnegie Mellon researchers. ***Research***. (3 Feb, 2011)

Coverage of errors in P3P compact policies:

- Davis, Wendy. Privacy Snafu As Web Sites Bypass Cookie-Blockers. ***Daily Online Examiner***. (10 Sep, 2010)
- Dissent. Is your browser being lied to? Survey says: "Maybe". ***PogoWasRight***. (13 Sep, 2010)
- Marc. Cookie Control. ***p2pnet news***. (13 Sep, 2010)
- Marc. Cookie Control: Part II. ***p2pnet news***. (14 Sep, 2010)
- Maier, Fran. Let's talk P3P. TRUSTe. (13 Sep, 2010)
- Richmond, Riva. A Loophole Big Enough for a Cookie to Fit Through. ***The New York Times***. (17 Sep, 2010)
- Tarran, Brian. Oh crumbs! Cookies left unblocked by code errors, say academics. ***Research-Live***. (13 Sep, 2010)

P3P compact policies enforcement actions:

- *Del Vecchio et al* v. *Amazon.com* class action filing
- Eaton, Nick. Suit: Amazon fraudulently collects, shares users' personal info. ***Seattle PI***. (3 Mar, 2011.)
- Enright, Allison. Privacy suit takes aim at Amazon. ***Internet Retailer***. (4 Mar, 2011.)

Coverage of mental models of online advertising and behavioral targeting:

- Davis, Wendy. Study: Consumers Equate BT With 'Privacy Harm' ***Daily Online Examiner***. (17 Nov, 2009)
- Kessler, Sarah. Online Behavior Tracking and Privacy: 7 Worst Case Scenarios. ***Mashable***. (3 Nov, 2010)

- Trager, Louis. Privacy Desires Unmet: User Ignorance, Assumptions Undermine Targeted Ad Self-Regulation, Say Researchers. *Communications Daily*. (11 August, 2010) [CommDaily is only available to subscribers]

Our findings about the value of the time required to read privacy policies were covered by technology and legal publications, and blogged internationally in multiple languages. Highlights:

- Radio interview with Free Press on The Cost of Reading Privacy Policies (17 Oct, 2008)
- Anderson, Nate. Study: Reading online privacy policies could cost $365 billion a year. ***Ars Technica***. (8 Oct 2008)
- Davis, Wendy. Online Execs Object To Privacy Statement Report. ***MediaPost's Online Media Daily***. (9 Oct 2008)
- McGee, Matthew. Average privacy policy takes 10 minutes to read, research finds ***OUT-LAW News***. (6 Oct 2008)
- ***Slashdot***, 20 Hours a Month Reading Privacy Policies (10 Oct 2008)
- Whoriskey, Peter. Lost in the Fine Print: It Would Take a Week to Read All Your Privacy Policies. ***Washington Post I.T.*** (26 Sept 2008)
- Wilson, Tim. Users, Enterprises Pay for Poor Privacy Policies, Study Says. ***Dark Reading***. (7 Oct 2008)

ELAINE ADOLFO

January 2011-Current
Associate Director - Stanford Center for Internet and Society

Working within CIS, the Associate Director for CIS reports to the Faculty Director and is responsible for managing the operations of CIS including developing and implementing effective strategies to enhance the online presence of CIS through the web, social media or traditional print media, supervising center administrative staff, directly supporting the Faculty Director, and managing the finances and events for the center.

Develop and implement an effective web strategy for CIS

Manage re-design of CIS website, from the initial specification, calls for proposal to the actual re-design and content migration.

Proactively plan and track new content and ongoing updates. Execute updates and changes on schedule. Create and manage schedules for content additions and changes (including text, photo, and other web assets) and communicate project delivery plan and timelines to all project stakeholders.

Create content culled from the Faculty Director and the Fellows for distribution on their blogs, the CIS webpages in the SLS website, and all major social media outlets (Facebook, Twitter, etc). This involves digital communication of upcoming events, books, publications and or personal blog posts that benefits the reputation of CIS.

Prepare/format final content in web file formats.

Produce wire-frames, screen designs, webpage graphics, and other final assets such as final page designs, HTML, and color-corrected photos and graphics, optimized for

the web based on the sites' overall design guidelines, usability standards, and template protocols-to fulfill faculty director's and fellows' requests.

Supervise the work of students and outside consultants or contractors, such as Drupal consultants or front-end web developers.

Develop and implement an effective social media strategy for CIS.

Create and manage the CIS Facebook account and provide ongoing support. This involves cross promoting events placed in the blog into Facebook, adding events, dealing with users' comments and notifying the faculty director and fellows of any issues or topics raised in Facebook that might be of interest.

Create and manage the CIS Twitter account. Perform daily monitoring and raise issues or topics raised in Twitter that might be of interest to the faculty director and the fellows.

Be informed of the latest projects by the faculty director and the fellows and recommend ways their work can be promoted in the social space. Recommend and implement search engine optimization for these materials.

Provide ongoing support for the faculty director and the Fellows with all mass email communications to the public. This involves updates to newsletters and email blasts promoting an event or publication related to CIS. Monitor statistics of success of these different tools of communication and make assessment on future distributions.

Manage the production of and provide graphic design support for print media (i.e. CIS working papers & white papers and an annual report to be used at a variety of public venues)

Work with outside designers on various printed pieces. Coordinate with outside print houses for bids, specs, paper samples, and schedules.

Provide graphics support to the faculty director, including creation of content and graphics for other uses including: color corrected digital photos for print collateral, graphics for PowerPoint presentations, and the creation of PDFs for electronic distribution.

Provide direct support to the Faculty Director including travel planning, correspondence, calendar management, managing accounts receivable issues, and communications.

Manage the faculty director's literature database.

Coordinate and manage the Faculty Director's research assistants.

Manage the finances for the center including tracking and managing the budget, reimbursements for the center, and all financial reporting.

With the Law School Program Group, plan and execute all events for CIS including conferences, workshops and the speaker series.

Manage the administrative staff for the center including one administrative associate, interns, and research assistants.

Manage the recruiting process for center hires including fellows and support staff. Work with the faculty director to anticipate staffing needs.

Represent CIS within the law school, for example at meetings of the directors of the various centers.

June 2009-December 2010
Web Designer/Content Manger for the Communications Department at Stanford Law School
Design, manage and maintain content on all aspects of the law school's website. Update content through the CMS and with HTML updates. Design graphics including iconography and photographs. Create a variety of print materials from admissions brochures, faculty scholarship viewbooks and the annual photo directory. Manage student workers and train department colleagues on the use of blogs, social media tools and other online media.

2004-2009
Assistant to Lawrence Lessig at Stanford Law School
Primary duties consisted of managing Professor Lessig's schedule. This involved daily tracking of his schedule, managing appointments, building complex travel plans, and managing research assistants for 2-3 classes per semester. Managed and monitored Lessig's website Lessig.org. Cleared spam and inappropriate comments in his blog. Helped colleagues in the many groups he was affiliated. This involved administrative tasks and web tasks. Managed and implemented events on the Stanford campus and around the world.

2003-2004
Administrative Assistant for Residential Education at Stanford University
Assisted with the RA process for undergraduates. Created training materials for RAs while also planning events for student groups.

2002-2003
Producer - Apple Computer
Managed and produced the .Mac website for Apple Computer. This involved working with engineering, design and marketing groups to implement new designs on a daily basis. Worked with international teams to implement site changes and managed the schedule for translations with outside contractors at international locations. Produced launch campaigns from the point of creation, development, coding, launch and Q&A. Implemented designs for both web projects and presentations to senior staff.

2000-2002
Producer for the Tools Business Unit - Macromedia
Managed production team and produced the launch of three product launches. Developed mockups and editorial schedule for online promotions and tutorials. Worked with product management in planning online designs that met with business goals. Worked with engineering on creating key applications that optimized customer experience and saved money for the company. Organized production schedules of freelance production artists and engineers. Analyzed site activity using Netline and provided suggestions based on statistical results.
Coordinated production efforts with an international production team. All content was translated in 10 languages for a simultaneous launch.

Education:
1998 University of California at Berkeley
Major: English Literature with emphasis on Modernist Literature

Amanda Avila

Administrative Associate

Stanford Law School, Center for Internet and Society

10/06 – Present

- Assist in building and maintaining the CIS digital community through the CIS website and CIS' social media channels. This includes daily content updates to our website that range from cross-posting blog posts, embedding new videos, adding new publications, creating photo albums, tracking all CIS Affiliates activities, and more as CIS content develops. Basic HTML knowledge and intermediate knowledge of social media tools is required for this role.
- Draft content used to engage constituents and grow channels. Curate digital content from Google Alerts and input from our CIS Affiliates. Implement social listening efforts and report back to Associate Director on issues needing special attention.
- Prepare email campaigns for distribution to our CIS mailing list and the Stanford community.
- Assist with travel arrangements for CIS staff.
- Plan and schedule conferences, meetings, and special events based on input from the Associate Director. Coordinate all aspects of these events from sending out email campaigns, booking vendors, and processing reimbursements payments.
- Purchase office supplies, order phones and office equipment. Responsible for setting up maintenance agreements on equipment and other vendor agreements.

- Reconcile ORACLE invoices with payments. Prepare reimbursements and allocate expenses to the correct accounts
- Other general clerical assistance including greeting visitors, distributing mail and faxes, answering telephones, photocopying, sending and receiving packages.
- Custodian for the division pcard and travel card. Verify expenses and clear transactions to the correct account, following university, department and IRS policies.
- Maintain up-to-date various distribution lists.
- Prepare legal documents with guidance from Directors.
- Prepare informational materials for CIS visitors and interns which include information about the resources available to them on campus to logistics at SLS.

Legal Assistant

Fonda & Fraser, LLP, Anaheim, California

10/02 – 9/06

- Handled wide variety of responsibilities in the support of a team of one senior and two associate attorneys to ensure the timely preparation of complex cases from discovery to trial phase. Responsible for filing court documents, providing necessary filing fees, retrieving documents from court when necessary.
- Maintained communication pipeline between attorneys, clients, healthcare providers, insurance carriers, law firms and government agencies. Drafted, transcribed, revised and finalized correspondence, pleadings and motions. Typing 75+ WPM.

- Extensive experience obtaining and gathering case-relevant data and materials through internet and law library research. Well versed in the use of Lexis and Westlaw research databases.
- Coordinated and maintained billing from vendors and experts for all cases, including closed and settled matters.
- Handled calendaring/scheduling of all appearances, meetings and depositions including coordination of travel, scheduling of court reporters, interpreters, and copy services.

APPENDIX G

[World Privacy Forum logo omitted]

May 4, 2014

World Privacy Forum Cy Pres Distribution Proposal

The World Privacy Forum[1] is pleased to submit a proposal for this online privacy-focused Cy Pres distribution. This proposal contains three parts, I: Overview; II: Proposal; III: Addendum.

The body of the proposal is 20 pages. An addendum includes additional biographical and publication summaries of WPF staff and experts, details and biographical summaries of the independent advisory board overseeing this grant, and a roster of recent WPF work, publications, testimony and lectures, and media reports.

I. Overview

Following is an overview of the proposal, deliverables, need for the work proposed, benefits to the class, and brief discussion of WPF's mission and purpose as an organization as well as our work and role in privacy.

A. Overview of Project Proposal and Deliverables

The World Privacy Forum is proposing two substantial projects for this Cy Pres distribution. The projects

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[1] The World Privacy Forum is a non-profit public interest and consumer education research group. We are the only privacy-focused non-profit in the US that focuses solely on in-depth privacy research and consumer privacy education. The mission and purpose of our organization is to protect and advance consumer privacy in a digital era, particularly in the areas of technology, health care, finance, and the Internet, among other areas of privacy. WPF is based in San Diego, California, and has published many ground-breaking privacy studies of national and international interest, as well as consumer education. Please see <http://www.worldprivacyforum.org>.

are interrelated. The first project provides the research and factual foundation for the education and direct consumer support the second project provides.

The first project is a substantial research project that uncovers and brings to light third-party data flows and consumer harms stemming from consumers typing search queries into online search boxes, and submitting other information online through forms and other means. The research focuses on variety of types of web sites with search query boxes that can lead, and have led to, consumer harms. For example, medical-related, financial-related, data broker, "people finder," and other web sites often have search query boxes and online forms tied to third party data flows, which may be difficult for consumers to detect. This project has a significant research component, substantial deliverables, and a consumer education component.

This project meets the requirements of the cy pres by uncovering and documenting third party data flows online, documenting specific online consumer privacy harms, educating and protecting consumers and the cy pres class about and from the online harms in the project area, providing direct support to consumers who have experienced privacy problems and need assistance, informing policy makers about risks to consumers and the cy pres class members by disclosing their information to ISPs and websites, by suggesting solutions, and by establishing a fact pattern to support effective, positive change for consumer privacy.

Deliverables for the first project include:

- Three substantive research reports (medical focus, financial focus, databroker and peoplefinder focus) These three reports will uncover, factually document, and shed light on third party data flows, activities at

these sites using information typed into search query fields and other online forms, consumer harms arising from documented practices, and make corrective policy recommendations and solutions based on the findings.

- One consumer-focused report on online privacy based on the research and the results. This report will be written and designed specifically for consumers, including what to do, solutions regarding risks of disclosing information to ISPs and web sites, specific advice and tips for specific types of sites, and general privacy tips, inclusive of search engine tips and other online privacy tips. The report will be structured in a way that allows maximum readability and accessibility.
- 4 free-to-consumers ebooks.
- 3 consumer education videos. These videos will highlight for consumers the risks they face when they disclose information to third parties online, and give consumers solutions, tips, and practical work-arounds for using technology in a way that is also privacy-protective.
- Digital brochures (one pagers, wallet cards summarizing consumer tips and information).
- Curriculum materials for teachers and educators focused on the three types of web sites researched. These materials will assist teachers of grades 6-12 to educate younger class members on risks of disclosure and solutions.
- Half-day conference to disseminate findings of project research, curriculum, and research and educational materials to teachers, educators, community leaders, policy makers, and NGOs. The materials for

this workshop will be specifically tied to this research and the consumer advice and information established by the fact patterns uncovered and documented in the research.

The second project is a national consumer education project focused on bringing online privacy education to all consumers, with a particular focus on vulnerable consumers who often miss online privacy educational campaigns due to financial, linguistic, educational, medical, or other barriers. This project will create and deliver online privacy training customized to vulnerable consumers, in a way that is meets their needs in order to facilitate effective communication and help.

While the first project has its own broad consumer communication component, the second project will take the research material and hone it and refine it for communicating specifically for key vulnerable consumer populations and consumers and cy pres class members affected by the harms uncovered by the research, but the least likely to be reached by traditional, broadly focused education campaigns.

Deliverables for the second project include:

- Direct consumer support for duration of grant (3 years): support for consumer queries about online privacy via email and phone.
- Direct consumer outreach. (workshops, free-to-consumer training sessions both online and off, and other direct to consumer outreach.)
- Robust consumer privacy education materials (based on cy pres research) specifically tailored for the following groups:
    - Teens
    - Seniors

- Financially vulnerable
- Victims of crime
- Individuals with medical or other challenges including disability
- Underserved populations
- Spanish speakers

- Consumer materials will be published online, and some materials will also be printed for delivery to consumers who require or strongly prefer print delivery. Materials include
  - Tipsheets and focused consumer guides (tailored to audience)
  - One-pagers (tailored to audience)
  - Wallet cards (tailored to audience)
- 8 instructional videos (tailored to audience)
- Training curriculum (One training curriculum containing information about consumer education for vulnerable populations, with specifics for each group. The curriculum is intended to be used as an adjunct to the curriculum developed in Project One and is intended to be used by both educators, community leaders, NGOs, and other individuals working directly with vulnerable populations.)

Both projects are designed to meet significant consumer privacy knowledge and educational needs, to document third party data flows, the support consumers directly, and to create materials that will provide research and information that will factually document online consumer privacy harms, and by so doing allow policy makers to better see and understand the issues and assist this class of consumers. The project will provide tools

and techniques to assist consumers in solving online privacy problems.

To ensure transparency, timely deliverables, and accountability for these projects, WPF has convened an advisory board to oversee the implementation of the proposed projects.

B. How these Projects Address, Serve, and Benefit the Class

The proposed projects and resulting deliverables address, serve and benefit the class members by:

- Providing research about third party data flows in regards to information consumers submit to online web sites via search query boxes or online forms.
- Educating the class members, including vulnerable class members, about the risks associated and documented regarding disclosure of information to third parties online, including ISPs and websites.
- Providing information and solutions to policy makers regarding online privacy and third party data flows impacting consumers.
- Providing consumer education in multiple formats (print, video, online) that assist consumers in understanding privacy impacts, risks, and potential harms and provide workarounds and tools for avoiding privacy harms.
- Providing direct consumer support and tools/workarounds for consumers who need direct assistance with online privacy questions and concerns.

C. Transparency and Oversight

WPF will be reporting the results of research, consumer education, curriculum materials, and trainings and will be creating numerous published materials as a result

of this cy pres. The research, consumer, and educational material will be made publicly available free of charge, and will be widely disseminated. WPF will be reporting on the progress of the grant on its web site at regular intervals.

Additionally, we have convened an independent advisory board specifically to provide oversight for this cy pres and the related proposals. WPF will regularly report to the advisory board and consult with them about project deliverables, budget, and implementation.

D. Overview of WPF's Work

Our mission and purpose is aligned completely with the goals of the settlement. The mission and work of the World Privacy Forum is to protect consumer privacy in a digital era and to create the tools and knowledge consumers need to shape and control their information and their digital lives.

WPF is a public interest research and consumer education group focusing exclusively on consumer privacy, in particular, digital privacy. We are the only privacy-focused public interest research group in the US, and we have built up a large body of research, consumer outreach, and accomplishments in the area of consumer privacy and digital and online privacy in various topic areas. Our organizational mission and goals completely revolve around consumer privacy, and all of our operations and projects do as well.

We have a strong and well-earned reputation for work of the highest caliber that is also impactful and groundbreaking. Our work informs policymakers and consumers of risks and solutions with deeply researched materials that often break new ground. For example, two of our recent reports, *The Scoring of America: How Secret*

Consumer Scores Threaten Your Privacy and Your Future, (April 2014) and Data Brokers and the Federal Government, (October 2013)—reports that are original in their research and bring new information to the public—were cited by the White House in its most recent privacy report on Big Data (May 2014), and our most important recommendations to enhance consumer privacy in the area of big data and data brokers were adopted in the White House report. WPF was also asked to discuss the *Scoring of America* research material at an FTC workshop on predictive analytics regarding impacts and risks to consumers.

Our work also impacts consumer privacy at the ground level. For example, our consumer privacy work has directly resulted in new consumer protection laws of significance. Our Medical Identity Theft report, which identified, documented, and discussed medical identity theft for the first time (*Medical Identity Theft: The Information Crime that Can Kill You*, 2006) included recommendations that directly resulted in the California medical data breach statute, which then influenced a change in the Federal HIPAA regulations to include a requirement to inform consumers of medical data breaches. Today, medical identity theft is a well-known and acknowledged consumer issue that many stakeholders, including the US government, are working on. Medical data breach statutes are now seen as commonplace, but prior to our report, this was not the case.

WPF was a key part of the lead drafting team that successfully brought to completion a new national-level mobile application short form privacy notice as part of the US Department of Commerce NTIA Multi-Stakeholder Process (2012-2013). Our recommendations to expand the definition of medical privacy and to include

data brokers in the notice were accepted, as was our recommendation to ensure privacy notices were consistently available from apps on mobile devices.

Earlier, WPF crafted the Do Not Track proposal and language, and brought that issue forward for the first time (2008). The Do Not Track issue has received global attention and a great deal of national policy work. Our work also educates consumers directly on privacy issues. We maintain and update key consumer privacy resources, unique in their depth and usability, such as the Patient's Guide to HIPAA, Data Broker Opt Out List, Top Ten Opt Out List, Medical ID Theft FAQ for Victims, and many other resources. Two members of WPF's team co-authored a reference book on online privacy that was published in 2011. (*Online Privacy*, Robert Gellman and Pam Dixon, ABC-CLIO).

WPF has testified on the issue of consumer privacy protection before Congress multiple times, most recently in December 2013 on data brokers, in 2011 about consumer expectation of privacy both online and offline, and in 2009 about online privacy, the modern permanent record, and consumers. WPF has also testified before the FTC, FDA, and other federal agencies many times on the topic of consumer privacy. Our reports and our work receive consistent, substantial press coverage, and have for many years.

Topics we have engaged with include: Search engine privacy, online privacy, ad privacy, mobile privacy, employment and online job search privacy, data brokers, online background checks, social media privacy, communications privacy, financial privacy (including online), opt out, self-regulation and privacy, health privacy, identity theft, medical identity theft, genetic privacy, biometrics and privacy including digital signage networks and retail

privacy, privacy and big data, privacy and vulnerable populations, privacy and sensitive information, privacy and victims of crimes and domestic violence, among other consumer-focused privacy topics.

II. Proposal

We are proposing two interrelated projects; the first project provides significant privacy research and education that supports the cy pres goals and cy pres class members, the second project provides a national education campaign and direct consumer support based on the facts established by the research that supports the cy pres goals and cy pres class members. The second project tailors education and consumer support materials for vulnerable populations in addition to the general consumer education campaign.

A. Project One: Research and consumer education around online search boxes, forms, and referral headers that lead to privacy mischief (For example, data brokers, people finders, loan application sites, medical-related search boxes, and other online search boxes.)

Consumers who type in queries and fill in a variety of forms online may have their information sold, disclosed, and used in ways that are unexpected and potentially harmful. This area is where a great deal of privacy mischief and outright consumer harm is occurring.

Consumers typically begin their web browsing with a search box of some sort, and then continue typing in queries across web site search boxes as they read information, shop, communicate, and explore. Unknown to many if not most consumers who are actively typing in search queries, a significant number of search boxes online lead back to online data brokers and their many affiliates. Some search boxes for online financial and loan

sites lead to scammers and identity thieves. Some of the information, when it is disclosed to third parties, puts financially vulnerable consumers on lists of people who are living in or near the poverty line, information which then can be sold. Some search boxes and registration forms on medical-related sites lead to third-party data flows that allow consumers' information to be shared on data broker lists. There are many other examples. Some unseen third-party data flows have been documented, for example, WPF has documented some of these issues in our work on data brokers including Congressional testimony and two recent reports. There are, however, an astounding variety of these types of challenging search boxes online, and many of the most important ones are still under-researched, and under-documented online.

This proposed project meets the need for research and factual information and insight about solutions for the cy pres class in this areas. This project specifically investigates and illuminates this issue of consumer risk related to disclosure online via search boxes and forms, providing factual information for policymakers and key information and advice for consumers. This project meets the needs of the class members by providing vital research, consumer education, outreach, and support in this critical area. It also meets the needs of the class by providing critical information to policymakers on this issue about solutions, based in actual fact. It also provides information about third party data flows.

WPF is the leading privacy group in the area of online privacy and data brokers, and is uniquely positioned to conduct this project successfully. We have already conducted a great deal of research related to this topic, and are well-situated in expertise, experience, and focus to undertake this project and complete it successfully.

This project will create three in-depth research reports about the hidden data flows occurring behind data broker sites, online people finders, consumer list brokers, online loan application sites, medical web sites, and other key areas where consumers type in sensitive information. The reports will tease out the facts and details of these sites, which have not been heretofore documented. The project will also fund a very significant national consumer education campaign around the report findings, with online and offline education that includes education through multiple channels, including video, direct consumer support and education, e-books, workshops, and a variety of online materials.

1. Project goals and description

A key goal of this project is to uncover, document, and bring transparency to the data privacy practices and third party data flows of a variety of web sites in key areas that are of critical importance to consumers, but are either under- or undocumented. Consumers who give their information to sites via search queries or other means often do not see or know about the back-end or secondary uses of their submitted data, particularly in regards to data broker activity, which is highly personal to consumers, and has marketplace impacts. For example, our recent Scoring of America report uncovered and documented that consumers who reveal certain diseases online, some of them doing so by simply filling out a form for more information, may have that information used in unexpected ways—such as setting a price for their health plan premium.

We have identified three key areas to research that are of key concern for consumers, and pose high risk for consumer harm, that is, risks of disclosures and third party data flows at:

- Data brokers, broker-related "people finder" web sites, and online consumer list brokers.
- Medical-related web sites.
- Financial-related web sites.

By focusing on the sites with the highest harm risk to consumers, we have the opportunity to uncover unique harms, risks, and solutions associated with each type of site. Our work has taught us that the risks for all web site types is not identical.

A second goal of this project is to provide information to consumers so they can make informed and effective choices about their risks when presented with a search box online or a form to fill in. There are an astounding variety of these types of boxes and forms, and consumers have little material about potential consequences or effective work-arounds, or how to identify when risk is present. To meet this goal, WPF will write a robust consumer guide based on the factual information uncovered in the research. The guide will be written for consumers in a digestible format and will expose and discuss this information specifically for consumers.

The research component of this project allows WPF to ground-truth and factually document actual online practices, including referral header practices from search boxes across a wide swath of the Web. The consumer education and outreach component will allow us to distill our knowledge and engage with the class members to assist them with the very real problems and challenges posed by using these kinds of search boxes and information tools online.

WPF has been engaged for the past year and a half in a groundbreaking research project on data brokers. We have published two major reports with our findings, with

a third to come. These reports have documented two aspects so far of fundamental data broker privacy issues and understanding the operations of data brokers (government use of data brokers, predictive analytics and data brokers). Along the way in our current research, we have learned some things that we did not expect, and the information has direct bearing on this proposal and these class members.

For example, the symbiosis of online data broker activities with aggressive affiliate programs and other activities that use aggressive and often hidden to the consumer referrer-header techniques from search boxes—among other techniques—to capture unwary consumers and consumer information online, is widespread. Consumers are routinely captured from multiple compelling search boxes across the Internet. There is not enough consumer-focused, sector-specific documentation of this, there is not enough consumer education around this, and there is almost no consumer education on this topic dedicated to serving the vulnerable consumer populations that need the information the most.

2. Project Deliverables:

This proposed project will fund three in-depth research reports about data brokers, online people finders, and consumer list brokers and the specific online and policy issues related to their activities relating to consumers. The reports will tease out the facts and details of these sites.

These reports serve the class precisely, because they deal directly with the class who is typing search queries into search engines and search boxes. The research is complex, and we know from our current project that three focused reports in three areas are the correct research approach to documenting this issue.

The other component this project would create is a full consumer guide based on the research, which would form the basis of an education campaign online and [illegible] about data-broker fueled people finders, list brokers, and a wide range of other data broker activities online. WPF has a good understanding of the educational necessity of reaching out to all segments of the class who can be impacted by these data broker activities, including all members of the class from those with a great deal of knowledge to vulnerable populations such as seniors and teens and disabled individuals who are often directly targeted by bad actors using sophisticated technologies as these consumers search for help or just other people or even information about themselves online. No such materials exist at this time. Note: Digital materials created for this project will be mobile-compatible.

Full list of deliverables for Project One includes:

- Three substantive research reports (medical focus, financial focus, databroker and peoplefinder focus) These three reports will uncover, factually document, and shed light on third party data flows, activities at these sites using information typed into search query fields and other online forms, consumer harms arising from documented practices, and make corrective policy recommendations based on the findings.
- One consumer-focused report on online privacy (This report will be written and designed specifically for consumers, including what to do, specific advice and tips for specific types of sites, and general privacy tips, inclusive of search engine tips and other online privacy tips. The report will be structured in a way that allows maximum readability and accessibility.)
- 4 free-to-consumers ebooks (This will make the three reports and the consumer guide available across mul-

tiple platforms to increase availability to consumers and to policy makers.)

- 3-4 consumer education videos (Each video briefly discusses an aspect of the consumer tips resulting from the research.)
- Digital brochures (one pagers, wallet cards summarizing consumer tips and information based on the research)
- Curriculum materials for teachers and educators focused on the three types of web sites researched
- Half-day online privacy conference to disseminate findings of research, curriculum, and research and educational materials to teachers, educators, community leaders, policy makers, and NGOs. The materials for this workshop will be specifically tied to this research and the consumer advice and information established by the fact patterns uncovered and documented in the research.

3. Why this project is needed

Search boxes abound online. Most consumers begin their web browsing with a search box of some sort, and then continue typing in queries across web site search boxes as they read information, shop, communicate, and explore. Unknown to many consumers, a significant number of search boxes lead back to online data brokers and their many affiliates. Consumers who search out medical or financial information would be surprised to learn the third party data flows impacting where their information goes and how it is ultimately used. This is where a great deal of privacy mischief is occurring.

Consumer understanding of and factual information about data brokers and their operations online is a significantly under-researched area. As a result, consumer

outreach and education in this area is similarly lacking. These gaps are due in large part to the difficulties of conducting meaningful, robust research in this area. It takes excellent depth of privacy expertise, technical expertise, policy expertise, and it also takes an in-depth knowledge of the data broker system. The combination of this skill set is quite rare. Meanwhile, in the absence of transparency and a sufficient factual knowledge base, substantial numbers of data brokers and shady, aggressive affiliate operations are causing great harm and suffering to consumers, in particular, this cy pres class.

These research and consumer education materials do not exist at this time. The World Privacy Forum is the organization with the most knowledge of data brokers, medical privacy, and other online privacy activities in the United States today. Combined with our privacy and technical and education skills, we are among the most qualified organization in the US to do this work, if not the most. WPF already has an experienced and proven research and education team in place to execute this project nationally. We have written several FTC data broker complaints that have resulted in FTC investigations and subsequent enforcement actions in this area already. If we are funding for both of our large proposed projects, we will be able to take this research and deliver consumer materials to a wide variety of class members, including those who are hard to reach. (See Project One in this proposal.)

4. Project Requirements

To complete this three-year project we will need $540,000 total for staffing and materials to research the reports, write the reports, fact check the reports, edit and proof the reports, and create the final content deliv-

erables. The project will be budgeted at approximately $180,000 a year, paid over three years.

We will also use the funding to distill the report information into high-quality consumer tips, guides, one-sheeters, wallet cards, and educational videos. We test the consumer-focused content with class members, create a national rollout and distribution plan, and then execute that plan with the content.

Specifically, we will need the following materials and staff as discussed below to complete the project:

- **Research Component:** We will use our own personnel to conduct the research for the reports. The WPF specializes in research, and we have a great deal of experience in producing research of the highest caliber. We will use our proven team for this project, and we will use an independent qualified fact checking company for quality assurance.

  Personnel, Research Component:

  - Research – lead investigator (Pam Dixon)
  - Research – research assistant (Marianne Fitzpatrick, staff)
  - Research – legal analysis (Robert Gellman)
  - Research – fact checking (First pass, staff. Second pass review, including technical review, outsourced for quality control.)

- **Consumer material writing, editing, posting, maintenance:** We will primarily use our own personnel to write, test, and finalize the consumer-facing content resulting from this project. (Please see organizational information for bios of our executive director and other collaborating experts for the writing/testing portion of this project.) We anticipate

substantive and ongoing consumer content. (See "Other Project Components below.)

Personnel, Consumer material writing, editing, posting, maintenance:

- Writing, editing: Pam Dixon, Bob Gellman, other staff.
- Final proofing: (First pass, staff, second pass, technical: outsourced)
- Maintenance and updating: WPF staff.

- **Consumer Education and Outreach/ Content distribution plan:** WPF staff will ensure the consumer education component is a robust part of the distribution, rollout, and consumer outreach. We will also confer with the independent project advisory board, which has education expertise.

  Personnel, Consumer Education and Outreach project staff:

  - Consumer education director: The WPF consumer education director will be responsible for rolling out and executing the outreach segment of this project, which will include online and offline components.
  - Consumer education assistance and outreach: Staff
  - Project Oversight: Executive director, independent advisory board.

- **Web and data visualization:** We will work with John Emerson to create the web pages and the visual components of the materials. (Please see organizational information for biographical summary.)
- **Video education component:** For this project, we will create educational videos for consumers and how-

to videos for specific search query issues. We plan for the project to require approximately 3 consumer education videos. WPF staff will complete the video components.

Additional Project Components:

- **Digital and print brochures, one-pagers, and wallet cards:** We will create digital materials that can be repurposed across many mediums, including paper. All materials will be distributed online, and we will give people the ability to further print out the materials via our site. (This would function very similarly to the FTC's consumer education print outs; see <http://www.ftc.gov/bcp/edu/microsites/idtheft/become-a-partner.html>.)
- **Curriculum materials for teachers and educators in key outreach environments:** WPF will extend the impact of this project by creating and delivering materials to individuals who can reach further into the community of class members. We will craft curriculum materials to assist with this.
- **Half-Day Privacy Training Conference:** After the research has been completed, we will host a half-day conference to convene privacy groups, consumer groups, industry stakeholders, government stakeholders, and other relevant stakeholders to discuss the issues raised in the research and to disseminate training materials. The focus will be on sharing knowledge and finding practical and policy solutions for consumers and developing a coalition of groups to continue further work on the consumer privacy issues raised in the research, as well as encouraging a public dialogue.

5. Project Budget

The project budget is 540,000 (over three years) or 180,000 per year.

Expenses:

Personnel

Research (4 reports, teaching curriculum) (legal, technical, and policy research): $300,000

Review and Fact Check (4 reports, teaching curriculum) (Full review, including technical review of research): $25,000

Writing (4 reports, consumer materials, curriculum materials): $100,000

Video/Filming/Editing/Final preparation (3 videos): $7,000

Editing/Proofing (including line edit and final proofing of 4 reports, curriculum, consumer materials) $15,000

Web/report/ebook layout (website preparation of 4 reports, curriculum, report layout and formatting, ebook formatting, layout, and final preparation.): $25,000

Consumer Education/Outreach/Dissemination: (Specifically of Project One deliverables to a national consumer audience) $15,000

Infographic design for data flows and illustrations (illustrations will be used in reports, web, ebook, printed/digital materials for consumers): $10,000

One half-day conference to disseminate curriculum materials, train non-profits, community leaders, consumer advocates, and teachers: (personnel costs) $5,000

Other Project Expenses:

Operations and material costs directly associated with the proposed project. No separate or unrelated overhead costs are included.

Project ebook ISBN (ISBNs from Bowker to allow publication of 4 free consumer ebooks across several platforms) $2,000

Project Postage: $1,000

Project Printing: $5,000

Project Travel (Travel budget is to support project deliverables only): $5,000

Half-day training conference: This conference is expressly to disseminate curriculum materials, train nonprofits, community leaders, consumer advocates, and teachers. We will endeavor to find in-kind donations to host the conference and will seek to minimize funding going toward those operations. Any funds remaining will go toward direct consumer support. $25,000

B. Project Two: Online privacy and Internet search outreach and education for teens, seniors, and under-served, vulnerable individuals

This project creates consumer educational content around online privacy and disseminates it in multiple mediums for vulnerable cy pres class members and consumer populations nationally.

The educational content will facilitate communicating the findings of the research and consumer advice uncovered in Project One of this proposal, which is directly related to the cy pres needs. An important advancement this project brings is to develop a robust array of tailored, focused national consumer education campaigns

around online privacy specifically for a variety of vulnerable consumer populations.

The vulnerable population education and outreach part of this project is of high importance because a substantial gap in online consumer privacy education and outreach for teens, seniors, minority, and under-served populations such as disabled adults and financially-challenged consumers exists. This gap specifically includes members of this cy pres class, and has not been adequately addressed, as discussed below. This consumer education gap is one WPF has been concerned about for some years now. We see it as essential to tailor educational materials that are highly factual directly to groups of consumers to as to best comminicate.

This project also provides for much-needed direct consumer support to consumers who have need of privacy assistance related to online disclosure risks and consequences.

1. Project Goals and Description

This project will fund a multi-faceted national consumer online privacy educational campaign that closes the gaps with appropriate educational materials and effective delivery methods for the content. The first goal of the project will be crafting appropriate and focused educational materials, which will range from video to print to curricula to online tips and other items, and will be specifically designed for each segment of consumers we are working to reach. For example, materials focused for teens, seniors, financially vulnerable, victims of crime, and other vulnerable populations. The second goal of the project is to provide direct consumer support and education to class members, and to ensure outreach so as to be proactive in assisting consumers.

The vision is for an inclusive approach, with focused, consumer privacy-specific materials reaching new audiences online and off, and collaboration with teachers and senior and other community center directors to ensure vital, appropriate, specific, and helpful online privacy messaging reaches these class members. Our deep and long privacy expertise and consumer assistance expertise combined with our ability and knowledge of executing national educational campaigns is an invaluable and significant asset in this work.

This project directly targets the consumer education goals of the cy pres, with a focus on reaching all consumers, and in particular, vulnerable consumers, with critically important privacy education that is tailored to prevent harms, provide solutions and direct consumer support to assist consumers who have gotten into privacy challenges online and need assistance. This is a three-year project.

2. Project Deliverables

The deliverables for this project take the information and materials from the online privacy research conducted in Project One and tailor the information specifically for dissemination to consumers nationally, and in particular tailor the information for dissemination to vulnerable populations.

Deliverables for the second project include:

The deliverables for this project will be tailored for vulnerable populations.

- Direct consumer support for duration of grant (3 years): support for consumer queries about online privacy via email and phone.

- Direct consumer outreach. (workshops, free-to-consumer training sessions both online and off, and other direct to consumer outreach.)
- Robust consumer privacy education (based on cy pres research) materials tailored for:
  - Teens
  - Seniors
  - Financially vulnerable
  - Victims of crime
  - Individuals with medical or other challenges
  - Underserved populations
  - Spanish speakers
- Consumer materials to be published include: (Materials will be published online, and some materials will also be printed for delivery to consumers who require or strongly prefer print delivery. Digital materials will be mobile compatible. Materials will also be made into podcasts.)
  - Tipsheets and focused consumer guides
  - One-pagers
  - Wallet cards
- 8 instructional videos (tailored to audience)
- Training curriculum (One training curriculum)

3. Why This Project is Needed

We are sensitive to meeting the specific needs of this cy pres class. WPF receives many consumer phone calls directly related to online privacy needs and problems. Most of them are from people who are online, but who did not realize some of their actions online had the possibility of bringing them harm. This project would provide fund-

ing to facilitate reaching more consumers with better-targeted privacy information, and to support consumers who need direct assistance in the sometimes messy job of cleaning up the impacts of harmful disclosures, including unintended consequences of self-disclosed information. The deliverables for this project will be measurable, robust, and substantial, and we will be able to sustain an educational effort in order to allow for adequate penetration of the privacy messaging.

As discussed previously, the consumer privacy education gap is significant. Focused, online-privacy-specific materials sensitive to this cy pres class in vulnerable population categories are currently unavailable. General online safety materials exist for a few of the segments, but the educational materials specific to the actual problems and challenges experienced by the cy pres class members and the requirements for assisting them and informing them of specific risks of online disclosures do not yet exist. Second, the class members this part of the project is focused on are the least likely to be touched by the currently available general Internet safety education that is conducted primarily online, as this education is most typically directed through outreach and education directed toward individuals with pre-existing baseline sets of computer skills, computers, and online privacy knowledge.

4. Project Requirements

To complete this three-year project we have allocated $460,000 total for staffing and materials to create the content, test the content with class members, create a rollout and distribution plan, and then execute that plan with the content. This will be a three year project.

Specifically, we will need the following materials and staff as discussed below:

- **Consumer content writing, editing, posting, maintenance:** We will use WPF staff to research, write, test, and finalize the consumer guide. (Please see organizational information for biographical summaries of our executive director and other collaborating experts for the writing/testing portion of this project.)

  Personnel, Consumer content, writing, editing, posting, maintenance:

  - Research, writing, editing – (Staff)
  - Research assistant, editing, posting, maintenance (Staff)
  - Writing, editing (Staff)
  - Research – fact checking (Staff, with outsourced fact check for second pass.)
  - Video – (Staff)
  - Content testing (First pass, staff. Second pass, outsourced)
  - Spanish Translation (Outsourced)

- **Content distribution and consumer outreach and educational plan:** We will use WPF staff, consult with the advisory board, and consult with a contractor to ensure the consumer education component is a robust part of the distribution, rollout, and consumer outreach.

  Personnel, Content distribution and consumer outreach and educational plan:

  - Consumer education director: WPF's consumer education director will be responsible for rolling out and executing the outreach segment of this project, which will include online and offline components.

- Consumer education assistance and outreach: Staff
- Project Oversight: Executive Director
- We anticipate hiring a contractor to assist the education director in the rollout phase and to assist in coordinating workshops, free-to-consumer training sessions both online and off, and other direct to consumer outreach.
- Direct consumer support: We anticipate hiring one person to provide direct consumer support via phone and email.

- **Web designer**: We will work with John Emerson to create the web pages and the visual components of the materials. We will create a section of the web site to facilitate direct consumer support for the materials and topics related to this grant. (Please see organizational information for his bio.)

Other Project Components:

- **Digital and print brochures, one-pagers, and wallet cards**: We will create digital materials that can be repurposed across many mediums, including paper. All materials will be distributed online, and we will give people the ability to further print out the materials via our site. (This would function very similarly to the FTC's consumer education print outs; see <http://www.ftc.gov/bcp/edu/microsites/idtheft/become-a-partner.html>.)
- **Curriculum materials for trainers, community leaders, teachers and educators in key outreach environments**: a vital part of this project is creating and delivering tailored materials to individuals who can reach further into the community and continue

doing so. We will craft curriculum materials to assist with this.

- **Workshops in key cities to "train the trainers":** In order to complete a national rollout, we will hold three to four workshops that will bring together community workers serving the class members. We will provide training funded by this Cy Pres to give them the tools they need to provide direct assistance to class members. We have already completed a similar national rollout of this kind of program for medical identity theft, and national privacy training for National Network to End Domestic Violence trainers.

5. Budget for Project Two

The budget for Project Two is $475,000 over three years.

Expenses:

Personnel

Research (7-8 tailored consumer guides and other materials, curriculum) $50,000 (research focus will be on tailoring content appropriately for each segment. Research will include consulting with specialists and experts in each segment area for correct consumer approach for the segment, including content approach and materials and presentation approach.)

Writing (Including Spanish language materials): $50,000

Review and Fact Check: (Full review, including technical, and review by experts and testing for consumer comprehension.) $10,000

Translation (Consumer materials, including guides) Will be dependent on length, estimated $3,000

Video/Editing: (8 videos, including videos with Spanish translation) $20,000

Final proofing of electronic and print consumer education deliverables: $8,000

Web/consumer education materials layout (7-8 tailored consumer guides and additional listed materials, plus curriculum): $10,000

Consumer Education/ Outreach/ Training: $50,000 per year, x 3 years = $150,000

Consumer workshops (Personnel costs, 3-4 workshops): $15,000

Infographic design for data flows and illustrations (illustrations wiii be used in printed/digital materials for consumers and training curriculum and will be tailored to the audience.): $10,000

Direct consumer support/helpline: (dedicated personnel support for responding to consumer queries, provide consumer assistance) $35,000 per year x 3 = $105,000

Web site modifications to facilitate consumer support via online queries: $3,000

Other Project Expenses:

Costs directly associated with the proposed project.

Project Postage: $3,000 (We anticipate mailing more materials as part of the consumer outreach).

Project Printing: $5,000

Project Travel: $5,000

Web hosting costs directly associated with supporting the project: $3,000

Consumer Workshops (3-4): $25,000

C. Overall Project Budget Narrative (Both Projects)

We are allocating a budget of 1,020,000 over a period of 3 years to complete the two interrelated projects described in this grant. Project One is allocated $540,000 over three years, Project Two is allocated $475,000 over three years. The specific allocations are discussed under each project, above. We are budgeting $5,000 for unexpected costs. Any unused funding will be directed toward direct consumer support.

We are allocating the funds fully toward fulfilling the proposal deliverables, with zero general operations overhead or fringe benefits taken from the funds. Operational funds are directly related to project implementation only. As an organization focused solely on consumer privacy research and consumer privacy education, all grant funds will go toward the purpose of completing the proposed project that meets the needs of the cy pres settlement. WPF's mission and purpose is entirely privacy-focused.

An independent review board will be overseeing implementation of the grant, and ensure all grant funds are used for the purposes of the grant as specified in this proposal. WPF will be reporting grant disbursements throughout the project to the board for transparency purposes and to ensure strict adherence to the proposal budget. The review board members' biographical summaries are included in the addendum.

The projects are interrelated in that the research relevant to the cy pres class is created in Project One, and the general and targeted (vulnerable populations) national educational campaign and direct support and proactive consumer outreach and education are supported in Project Two.

Project Incidental Costs as part of operations and personnel:

We anticipate incidental costs directly related to this grant to accrue as we complete these projects. We are allocating a small portion of the grant to cover unexpected project-related costs such as printing deliverables, mailing deliverables, and other costs directly related to completing the grant. In a three-year grant, we do not expect the cost to be zero, neither do we expect it to be in excess of $5,000. We are budgeting $5,000 over a period of three years for this category. Any remainder monies will go toward direct consumer support.

D. Conflict of Interest Statement

The World Privacy Forum does not have any known conflicts with this cy pres.

Staff: No one on staff has worked for Google, and no one on staff has done a project for Google. No one on staff has family members who work for Google.

Board: No member of the board has worked for Google, and no one on the board has done a project for Google. No one on the board has family members who work for Google.

Operational control: WPF is an independent public interest research group. No one at Google, on staff or associated, has any operational control over WPF. No Google employees or directors, or former Google employees or directors have oversight over any WPF projects.

WPF Project oversight: WPF undertakes significant research and public education projects. Our projects are independent, and no one from Google has oversight of any WPF projects, or ever has. For this project, WPF has created an independent advisory board, none of

whom work for Google. The advisory board's biographical summaries are included in the addendum.

Funding: Our funding comes from foundation grants, cy pres, individual donations, and corporate donations. Our policy and practice is that all corporate funds, if and when accepted, are strictly for general support only, and there are no stipulations or strings attached. We strongly protect our independence, and we make this clear to all funders.

In the past three years specifically, our funding has come from foundation grants, cy pres, individual donations, and general support from commercial companies. We have accepted general support funding from Google with no strings attached. Prior and during the funding period, we have demonstrated complete independence from the funding, and have explicitly and effectively spoken out about Google privacy practices we deemed incorrect and have undertaken work to get those practices corrected. For example, in 2012 we submitted a complaint to the FTC about Google's Safari practices. That complaint is available on our website. The complaint was effective. In its settlement press release, the FTC specifically mentioned WPF. Over the years, we have been very active and effective in calling attention to practices that we question regarding Google. We wrote and disseminated a 31-group sign on letter in 2004 regarding Gmail practices. In 2010 we questioned some of the cloud practices the city of Los Angeles was seeking to put in place, particularly in regard to HIPAA among some other privacy concerns. At the time, this was a Google project. We have a reputation for fairness and firmness, and it is one we have worked hard for. When a company misbehaves and jeopardizes consumer privacy, we will and we do speak up.

E. Organizational Details and Contact Information

Pam Dixon, Executive Director, is the primary contact for the World Privacy Forum.

We are located at:

World Privacy Forum
3108 Fifth Avenue, Suite B
San Diego, CA 92103

The World Privacy Forum has current and active 501 C 3 status.

EIN number: 35-2241027

Part III. Addendum

This addendum includes more detailed information about the World Privacy Forum, our work, testimony, biographical summaries of independent project advisory board, WPF project staff, and WPF publications.

A. World Privacy Forum Organizational Background

1. About WPF

The World Privacy Forum[2] is a non-profit, nonpartisan 501(c)(3) public interest research and consumer education group focused on conducting in-depth research and consumer education in the area of privacy, with a focus on health care privacy and technology. Our core mission is to provide substantive research and consumer information that documents and analyzes critically important privacy issues and to provide consumer information and educational support in the area of privacy. We also provide direct support to consumers. Our work has often broken critical new ground, and the World Pri-

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[2] <http://www.worldprivacyforum.org>.

vacy Forum's reports and consumer information have achieved extremely high visibility and credibility, as well as enjoying short and long-term positive impacts.

Our reports and work on Online Privacy, Data Brokers, Mobile privacy, Digital Signage, Medical ID Theft, Personal Health Records, HIPAA, Gentic privacy, and pharmacy and pharmacogenomic privacy have had substantial impact at a policy level, and at a consumer level. Our work in mobile privacy led to a national "nutrition label" standard privacy policy for mobile app developers in 2013. A California medical data breach notification bill was introduced as a result of a recommendation in our Medical ID theft report. That bill is now California law. Medical ID theft is a commonly known crime now; in 2006, we coined the term and documented this crime for the first time. We published the first report and consumer guide to warn about the privacy and confidentiality risks of PHRs, or Personal Health Records, especially those held outside of HIPAA protections. We published the first guide to HIPAA for patients, which is still the only guide of its kind. We have, for three years, cochaired the California Privacy and Security Advisory Board, a California state-level board that reports to the California Secretary of Health. We have been the consumer representative in the process of developing privacy and security guidelines for electronic health record exchanges in California. We have had substantive impacts in many other medical privacy areas, which we discuss in more detail below.

The World Privacy Forum is based in San Diego, California.

The World Privacy Forum fills a unique need for unbiased, in-depth public interest research with a focus on consumer privacy and education. Our work is almost en-

tirely focused on benefitting and educating consumers of all ages, and a good portion of our work is focused on California consumers. (Particularly in technology and health care privacy.)

The Forum was founded in 2003, and is incorporated and based in California. The Forum has achieved measurable and consistent success in each project it has undertaken, and receives consistent, very high-profile press coverage of its activities, as well as consistently high praise from regulators, legislators, academics, and consumers. The New York Times, Wall Street Journal, Time, BusinessWeek, Los Angeles Times, San Francisco Chronicle, NBC, CBS, ABC, and many others have covered World Privacy Forum activities and materials.

WPF has a combined total of 35 years of experience in general privacy policy, privacy analysis, research, legislation, writing, and documentation. We have long experience in researching, documenting, and educating consumers about new and existing areas of privacy inquiry.

A list of our publications may be found at http://www.worldprivacyforum.org/topics.html.

Some highlights include:

- *The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future* <http://www.worldprivacyforum.org/2014/04/wpf-report-the-scoring-of-america-how-secret-consumer-scores-threaten-your-privacy-and-your-future/>
- *Data Brokers and the Federal Government: A New Front in the* Battle for Privacy Opens <http://www.worldprivacyforum.org/2013/10/report-data-brokers-and-the-federal-government-a-new-front-in-the-battle-for-privacy-opens/>.

- *Paying Out of Pocket to Protect Your Health Privacy: A New but Complicated HIPAA Option.* <http://www.worldprivacyforum.org/2014/01/wpf-report-paying-out-of-pocket-to-protect-health-privacy/>.
- *Medical ID Theft: The Information Crime that Can Kill You* <http://www.worldprivacyforum.org/medicalidentitytheft.html>.
- *A Patient's Guide to HIPAA* (updated with the Sept. 2013 changes to HIPAA.) http://www.worldprivacyforum.org/hipaa/index.html>.
- *Privacy in the Clouds: Risks to Privacy and Confidentiality from Cloud Computing* <http://www.worldprivacyforum.org/cloudprivacy.html>.
- *Personal Health Records: Why Many PHRs Threaten Privacy* <http://www.worldprivacyforum.org/pdf/WPF_PHR_02_20_2008fs.pdf>.
- *PHR Consumer Guide* <http://www.worldprivacyforum.org/pdf/WPF_PHRConsumerAdvisory_02_20_2008fs.pdf>.
- *Genetic Privacy Page (Key issues, detailed comments, and resources.)* http://www.worldprivacyforum.org/geneticprivacy.html.
- *The Two Way Mirror Society: Privacy Implications of the New Digital Signage Networks* <http://www.worldprivacyforum.org/pdf/onwaymirrorsocietyfs.pdf>
- *Consumer principles for Digital Signage Networks, including child protection principles* <http://www.worldprivacyforum.org/pdf/DigitalSignageprinciplesfs.pdf>.

- *Consumer Guide to Medical ID Theft* <http://www.worldprivacyforum.org/FAQ_medicalrecordprivacy.html>.
- *Top Ten Opt Outs* <http://www.worldprivacyforum.org/toptenoptout.html>.
- *Many regulatory filings on privacy, including filings on FTC PHR Data Breach regulations, the Genetic Information NonDiscrimination Act (GINA), many filings on HIPAA to HHS, and numerous filings on California health privacy regulations.*

2. WPF Online Privacy Projects

A key focus of WPF is online privacy. We work nationally, internationally, and at the state level. We note that we have conducted other work, for example biometric research, however we highlight this work in particular here due to its relevance to the cy pres class.

Online Privacy Reference Book: Bob Gellman and Pam Dixon co-authored a definitive reference book on online privacy to be used in academic institutions (ABC-CLIO, 2012). During the course of writing the book, the WPF authors had the opportunity to interview leading people in the field and explore where the gaps are in online privacy.

Internet Privacy Project: WPF has maintained an Internet privacy project since opening its doors. Our first report was on job search online, our second major report was on online credit reports, and many other consumer tips and materials at WPF focus on online privacy. We are well-known for our work on cloud privacy as well as search privacy and online advertising privacy issues. WPF is the originator of Do Not Track, Pam Dixon coined the term, wrote the first Do Not Track proposal

and submitted it to the FTC during public testimony. Now DNT is a national and global idea, and it is actively being discussed regarding implementation. At least one state law has been passed regarding DNT.

Electronic Health Record Privacy: The WPF has also done a great deal of work in the area of online health records. The WPF served on the California steering committee for the national HISPC project, and has testified before the National Committee on Vital and Health Statistics on the privacy, security, and confidentiality issues relating to a National Health Information Network, and what that might look like for consumers.

We have published a significant report on Personal Health Records, which are online health records. Ours was the first privacy report on this important topic. We also published consumer education materials to go along with this report.

Most recently, in California, we assisted in the privacy review of California state's proposed regulations for Health Information Exchanges. After our review for the state, we wrote sample comments and circulated them to assist the privacy and consumer community in writing recommendations for more stringent privacy protections.

Co-Chair California Privacy and Security Advisory Board (Consumer representative): The WPF was appointed by the California Secretary of Health to the position of co-chair of the CalPSAB, a state board dedicated to increasing the medical privacy and security of health records in an electronic environment. Our role is as a consumer representative.

As consumer representative, we introduced and achieved a Fair Information Practices-based model for California privacy regulations. We also fought very hard

to require patient consent before medical records were exchanged in HIE systems. We were successful in that very long fight. Recently, we have assisted with the creation of privacy guidelines for HIEs in the state of California.

Online Pharmacy records privacy: The WPF has filed a substantial complaint over pharmaceutical marketing privacy with the Federal Trade Commission. That complaint is currently being reviewed by the FTC.

We are very proud of our work in achieving a fair result with the online iPledge system. We testified before the FDA twice in regards to an egregious privacy situation regarding the iPledge RiskMAP. (http://www.worldprivacyforum.org/pdf/WPF_RiskMAP_FDA28June2007fs.pdf and http://www.worldprivacyforum.org/pdf/WPF_FDAiPledge_08012007fs.pdf) Due to our testimony and efforts, (See also http://www.worldprivacyforum.org/pdf/NCVHS_letterWPF08022007fsw.pdf) the FDA iPledge RiskMAP (a program designed to reduce risks to patients on Accutane) patients taking Accutane are no longer bound by a privacy policy that allows the direct marketing of their privacy information.

We have also been very active in Pharmacogenomic recommendations at the Secretary's Advisory Committee on Genetics, Health and Society. We have been the only privacy group to file detailed comments on this important process. Our main interest has been to highlight the presence of marketing of consumers' genetic information online, outside of HIPAA. See http://www.worldprivacyforum.org/pdf/WPF_SACGHS_comments12192007fs.pdf, http://www.worldprivacyforum.org/pdf/WPF_SACGHS_05232007fs.pdf, more at worldprivacyforum.org.

3. Current WPF Projects

Currently, the World Privacy Forum is completing the following projects:

- We are completing the third in a series of major national data broker reports, to be published June 2014. (Two reports are already published, October 2013, and April 2014.).
- We are in the process of a significant Big Data project regarding vulnerable populations, with a focus on economically vulnerable populations and other vulnerable populations. (2014-2016).
- We are in the midst of our second medical ID theft report (2014).
- We completed and published a significant online opt-out informational tool for consumers, it is the largest data broker opt-out list available online. (Published December, 2013).
- We have completed the creation of an online informational clearinghouse of HIEs for California patients. (Phase I completed July 2012, Phase II completed July 2013. New materials will be published June 2014.)
- We published a major update of our popular guide, Patients' Guide to HIPAA, with full updates for changes in HIPAA that became law September, 2013. (Update published Sept. 20, 2013).
- We have completed a major national project on short form privacy notice for mobile applications, where WPF was a lead drafter. (June 2013.)

4. Operations and Budget

The majority of funding the World Privacy Forum receives goes directly related to its programs, not to GNA. Our operating budget reflects this. For these proposed

projects, costs are related directly to the project activities and the final deliverables.

Our annual operating budget is at an artificially depressed level because we are operating on a shoestring in regards to salaries. The Cy Pres funds would allow us to have a proper capacity funding of approximately $350,000 to $400,000 per year over three years, and would greatly increase our ability to execute our mission and purpose as an organization focused on protecting consumer privacy. We already have a strong team. We would give our current team more hours while still keeping costs as low as possible. We would add one person to focus on direct consumer support.

C. Biographical Summaries

The following individuals will work on the proposed projects.

A. Cy Pres Independent Advisory Board Biographical Summaries

As part of the cy pres grant proposal process, the World Privacy Forum has formed an advisory board to assist with the implementation and oversight of the cy pres funds and activities for the projects we have proposed. The role of the advisory board is provide oversight and transparency for the funds administration, to ensure the robust implementation of the grant programs, and assistance with fine-tuning any implementation issues that arise during the process of completing the grant activities. The Executive Director of WPF will regularly report on grant progress, funds use, and activities to the board so as to provide a trusted oversight mechanism.

Each member of the board has significant experience with national grant projects, and each has demonstrated

exceptional professional judgment as well as deep privacy expertise. Each individual has confirmed their desire to be included in this advisory board to assist pro bono with this grant process, and are excited about the proposed projects, which they see as being of significant value.

1. **Priscilla Regan, PhD and Chair. Department of Public and International Affairs, George Mason University**

Dr. Regan is a Professor in the Department of Public and International Affairs at George Mason University. Prior to joining that faculty in 1989, she was a Senior Analyst in the Congressional Office of Technology Assessment (1984-1989) and an Assistant Professor of Politics and Government at the University of Puget Sound (1979-1984). From 2005 to 2007, she served as a Program Officer for the Science, Technology and Society Program at the National Science Foundation. Since the mid-1970s, Dr. Regan's primary research interests have focused on both the analysis of the social, policy, and legal implications of organizational use of new information and communications technologies, and also on the emergence and implementation of electronic government initiatives by federal agencies.

Dr. Regan has published over forty articles or book chapters, as well as Legislating Privacy: Technology, Social Values, and Public Policy (University of North Carolina Press, 1995). As a recognized researcher in this area, Dr. Regan has testified before Congress and participated in meetings held by the Department of Commerce, Federal Trade Commission, Social Security Administration, and Census Bureau. She has received grants from the National Science Foundation. She was a member of the National Academy of Sciences, Computer Science

and Telecommunications Board, Committee on Authentication Technologies and their Privacy Implications. Dr. Regan received her PhD in Government from Cornell University and her BA from Mount Holyoke College.

2. Nathan Good, PhD.

Dr. Nathan Good is Principal of Good Research and Affiliate Researcher for UC Berkeley's TRUST center. A fundamental goal of his work is helping companies create networked systems devices and services that are simple, secure and respectful of people's privacy. He is a co-author of the UC Berkeley web privacy census, and contributing author to books on privacy and the user experience of security systems. Prior to Good Research, Nathan was at PARC, Yahoo and HP research labs.

At Berkeley, he worked with TRUST and the Samuelson Law & Technology Clinic and was a member of the 2007 California Secretary of State Top-to-Bottom Review of Electronic Voting Systems. Nathan has published extensively on user experience studies, privacy, and security related topics and holds patents on software technology for multimedia systems and event analysis.

His research has been reported on in the Economist, New York Times, CNN and ABC and he has testified on his research before the House, Senate and FTC. Nathan's recent work on Privacy and Design was recognized for a best paper award at the Privacy Law Scholars Conference, and was featured in both IAPP and the Future of Privacy Forums top 6 Privacy Papers for Policy Makers. Nathan has a PhD in Information Science and a MS in Computer Science from the University of California at Berkeley and was a member of LifeLock's Fraud Advisory Board.

3. Linda Ackerman, Esq.

Linda Ackerman is an attorney who specializes in privacy. She is a Ponemon Institute Distinguished Fellow, and was a principle contributor to the development of the California Attorney General's guide to medical identity theft. She has also written a number privacy and security policies and data sharing agreements for health information exchanges, and she has served as Chief Privacy Officer of the Long Beach Network for Health.

Previously, she was a member of a key national advisory board, the Transportation Security Administration's Secure Flight Working Group. She was also a member of the board of directors of the California Regional Health Information Organization (CalRHIO) and the Real ID Privacy and Security Workgroup convened by the California Office of Privacy Protection. As the co-founder of a nonprofit organization focused on consumer privacy, Ms. Ackerman learned about nonprofit corporate governance and continues to act as an attorney/advisor in that subject area.

Ms. Ackerman received her undergraduate degree from Mt. Holyoke College. She is a graduate of St. Louis University Law School and has an MA in history from San Francisco State University.

B. WPF Staff and Project Team Bios

1. Pam Dixon, Executive Director

Pam Dixon will be the principal investigator researching and writing the research and educational content for the proposed Cy Pres distribution projects. She will also be responsible for overseeing the video content for the projects, and will be the person who coordinates the final deliverables for the projects.

Pam Dixon is the founder and executive director of the World Privacy Forum, a public interest research and consumer education group she founded November 2003. The forum is based in San Diego, California. An author and a researcher, Dixon is the author of nine books, hundreds of articles, and numerous major research studies in the area of privacy, including her pioneering report on medical identity theft (World Privacy Forum, May 2006) and digital signage privacy (2010). Her most recent book, Online Privacy, is coauthored by Bob Gellman and was published by ABC-CLIO in 2012. Her new book, the A to Z of privacy, is being published in 2014.

Dixon's privacy research has been impactful on a national and international scale. Her data broker research, co-authored with Robert Gellman, has been widely disseminated and has been quoted by the White House in its policy paper on Big Data and privacy. Her medical ID theft report has resulted in the crime of medical identity theft to be brought into public view and recognized officially as a new crime beginning in 2007 by the Department of Justice and the FTC. The report has also led to new consumer protection legislation (medical data breach law) in California and other states as well as at the federal level. Her report on Digital Signage Networks led to Congressional testimony as well as an FTC hearing on the issue, and the consumer privacy principles she crafted on the topic were largely adopted. Recently, she was one of the lead drafters for short form privacy notices for mobile apps for the NTIA Department of Commerce multistakeholder process.

Pam Dixon has served as the co-chair of the California Privacy Security and Advisory Board, a position she was appointed to by the California Secretary of Health. Other recent reports include *The Two Way Mirror Society:*

Privacy Implications of the New Digital Signage Networks and *Privacy in the Clouds: Privacy and Security Implications of Cloud Computing*, among others. Pam Dixon was one of the experts who created the materials for the well-known *Patient's Guide to HIPAA* at the World Privacy Forum. This consumer guide is the first consumer guide to HIPAA written, and has been very well-received.

Formerly a research fellow and principal investigator with the Privacy Foundation at Denver University's Sturm School of Law, Dixon worked with famed Internet security and privacy expert Richard M. Smith on Privacy Foundation Projects. During her tenure there, Dixon focused in particular on researching and writing about workplace and technology-related privacy issues in a series of ground-breaking reports and consumer education guides. She was the principal investigator and author of the first report to consider the privacy of online job search sites, something that at the time was not even thought of as an issue.

Dixon is the recipient of a Johns Hopkins University Fellowship for outstanding teaching. Dixon's work has been covered extensively by the media, including Time, the New York Times, the Washington Post, Good Morning America, the BBC, Newsweek, the Wall Street Journal, Fortune, Readers' Digest, the Los Angeles Times, Business Week, the Associated Press, 48 Hours, CBS, NBC, ABC, CNN, Fox, PBS, MSNBC, and NPR. She was an on-air technology contributor to TechTV's Money Machine for two years, and is currently a ClearChannel Radio commentator on technology, privacy, and security matters. She has been a ClearChannel commentator for more than 7 years. A complete bio is available for Pam

Dixon at http://www.worldprivacyforum.org/aboutus.html.

Books and Articles:

Most recently, Pam Dixon co-authored *Online Privacy*, a reference book on online privacy along with co-author Robert Gellman. The book was published in 2012 by ABC CLIO books. She is the author of seven prior books published by Random House, John Wiley & Sons, Petersons, others. She has also written hundreds of articles for newspapers, primarily the Orange County Register and The San Diego Union Tribune. Also, numerous articles for World Privacy Forum web site, particularly consumer tips, privacy tips, etc. For more, see www.worldprivacyforum.org and see <http://www.pamdixon.com/articles.htm> for a selection of articles dating back to 1998.

Lectures, Testimony, highlights only:

- **US Federal Trade Commission**: March 2014, Alternate Consumer Scoring Products, testimony.
- **US Senate, Congressional Testimony**: December 2013, Testimony of Pam Dixon, Senate Commerce Committee, *What Information do Data brokers Have on Consumers?* <http://www.worldprivacyforum.org/wp-content/uploads/2013/12/WPF_PamDixon_CongressionalTestimony_DataBrokers_2013_fs.pdf>.
- **Biometrics 2013**: Biometric privacy, October 2013.
- **US Federal Trade Commission**: May 2013, Senior Identity Theft, testimony.
- **Visiting Scholar**: Pacific Northwest College of Art, Portland. (Privacy in a Modern Era, April 2013)
- **US Federal Trade Commission/IAPP**: Privacy in Developing Countries, March 2013)

- **US Department of Commerce**, June 2012-July 2013, NTIA Multistakeholder process, lead drafter of mobile online short form privacy notice.
- **CES Leaders in Technology**, January 2013.
- **Churchill Club**: January 2013, Privacy Gaps.
- **United States Congress**, Testimony of Pam Dixon Executive Director, World Privacy Forum Before the Subcommittee on Commerce, Manufacturing, and Trade of the House Committee on Energy and Commerce, *What's a Consumer to Do? Consumer Perceptions and Expectations of Privacy Online*, October 13, 2011 <http://www.worldprivacyforum.org/2011/-10/public-comments-testimony-whats-aconsumer-to-do-consumer-perceptions-and-expectations-of-privacy-online/>.
- **United States Congress**, Testimony of Pam Dixon, Subcommittee on Communications, Technology, and the Internet, and the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce. *The Modern Permanent Record and Consumer Impacts from the Offline and Online Collection of Consumer Information November* 2009 <http://www.worldprivacyforum.org/pdf/TestimonyofPamDixonfs.pdf>.
- **Federal Trade Commission**, 2009-2010, Privacy Roundtable Hearings, three segments of testimony about online privacy.
- **Federal Trade Commission**, April 2008, testimony on medical identity theft, personal health records, and genetic privacy issues.
- **Secretary's Advisory Committee on Genetics, Health, and Society**, February 2008, Testimony on direct-to-consumer genetic testing and privacy issues.

- **University of San Diego, Guest Lecturer**, February 2008, graduate class on genetics, ethics, and privacy.
- **Federal Trade Commission**, November 2007, Testimony on behavioral advertising, submission of report and consensus document.
- **Joint FDA /AHRQ Public Meeting**, June 26, 2007, Rockville, Maryland. Testimony on marketing uses of patient information in Risk Minimization Action Plans (RiskMAPs). Written testimony available.
- California Health Information Association Statewide Conference: **June 13, 2007. Presentation on Medical Identity Theft, solutions for victims and healthcare providers.**
- National Academies of Science, Institute of Medicine, Board on Health Sciences Policy meeting: **June 6, 2007, Washington, D.C. Formal presentation on Privacy and Genome-Wide Association Studies: Issues and Solutions.**
- **California State Assembly Health Committee**: April 24, 2007, expert testimony on medical identity theft and data breach.
- **American Health Information Community (HHS)**: September 29, 2006, Washington DC. Testimony, *Medical Identity Theft and Authentication Issues.* Written testimony available.
- **The University of San Diego**: March 20, 2006. Panel discussion on China, the Internet, censorship, and privacy presented by KPBS, The Center for Ethics in Science & Technology and the Values Institute of the University of San Diego.
- **National Conference of State Legislatures Fall Forum**: Dec. 7, 2005, Chicago. Presentation on RFID and medical privacy in the hospital environment,

- **Neurosciences Institute, Center for Ethics in Science and Technology, San Diego:** "Searching the Internet: Who's Watching?" November 2, 2005,
- **National Committee on Vital and Health Statistics:** August 16, 2005, San Francisco, CA. Hearing of the Privacy and Confidentiality subcommittee. Testimony by Pam Dixon on medical privacy, medical records, electronic health records, and the proposed National Health Information Network.
- **California Senate Select Committee on the Legal, Social & Ethical Consequences of Emerging Technologies, Informational Hearing:** May 13 2005, San Diego. Expert testimony, Pam Dixon.

2. Robert Gellman, legal analysis, research, writing

Robert Gellman will be assisting in the writing and research for the projects. He will also conduct a fact review of the completed materials to ensure accuracy and fairness.

Robert Gellman is a privacy and information policy consultant in Washington, D.C. A graduate of the Yale Law School, Gellman has worked on information policy issues for more than 25 years. He worked for 17 years as chief counsel to a Subcommittee in the House of Representatives responsible for information policy activities, oversight, legislation, and reports on privacy matters, freedom of information, the Privacy Act of 1974, government information dissemination activities, health record confidentiality, archives, and other information policy matters. (Subcommittee on Information, Justice, Transportation, and Agriculture, House Committee on Government Operations.)

He served as a member of the Department of Health and Human Service's National Committee on Vital and Health Statistics (1996-2000), a federal advisory committee with responsibilities for health information infrastructure matters.

Mr. Gellman has worked with the World Privacy Forum on many of its key consumer reports and educational guides. His World Privacy Forum credits include the Medical Identity Theft report and guide, the Patient's Guide to HIPAA, Privacy in the Clouds (the first major privacy report on cloud computing to be published), and many others.

Publications: (Partial list only)

- *The Deidentification Dilemma: A Legislative and Contractual Proposal*, 21 Fordham Intellectual Property, Media & Entertainment Law Journal 33 (2010). Available here or here.
- *Why Deidentification Fails Research Subjects and Researchers*, 10 American Journal of Bioethics, 28-30 (2010). Available here.

  Health Privacy: The Way We Live Now, The Privacy Papers, Free Congress Foundation (2002 Second Quarter), available at <http://www.privacyrights.org/ar/gellman-med.htm>.
- *A Better Way to Approach Privacy Policy in the United States: Establish a Non-Regulatory Privacy Protection Board*, 54 Hastings Law Journal 1183 (2003).
- *Twin Evils: Government Copyright and Copyright-Like Controls Over Government Information*, 45 Syracuse Law Review 999 (1995).
- *Privacy, Consumers, and Costs: How The Lack of Privacy Costs Consumers and Why Business Studies*

of Privacy Costs are Biased and Incomplete (March 2002), available at <http://www.epic.org/reports/dmfprivacy.pdf> and at <http://www.cdt.org/publications/dmfprivacy.shtml>.

- *A General Survey of Video Surveillance Law in the United States* in Reasonable Expectations of Privacy? Eleven Country Reports on Camera Surveillance and Workplace Privacy (2005) (T.M.C. Asser Press).
- *Designing Genetic Information Policy: The Need for an Independent Policy Review of the Ethical, Legal, and Social Implications of the Human Genome Project*, House Report 102-478 (1992).
- *Fragmented, Incomplete, and Discontinuous: The Failure of Federal Privacy Regulatory Proposals and Institutions*, VI Software Law Journal 199 (1993).
- *Public Records—Access, Privacy, and Public Policy: A Discussion Paper*, 12 Government Information Quarterly 391 (1995).

A complete list of Mr. Gellman's hundreds of publications is available at www.bobgellman.com.

3. Marianne Fitzpatrick, MBA

Marianne holds the position of Senior Project Manager. Her responsibilities include performing project management activities to ensure strategic objectives are achieved in a timely manner and accurately for the Forum. She is a compliance expert, and is deeply knowledgeable about consumer financial privacy. As such, she also participates in WPF projects, for example, the NTIA Multistakeholder process and the forthcoming WPF data broker research report.

Marianne is an MBA-degreed professional with extensive compliance managerial experience most recently at

JP Morgan Chase supporting the Bank's attorneys through Program Management activities such as:

- Chair, Weekly Operational Breaks Resolution Meetings with Legal, Senior Operations Managers, Audit and Compliance as well as other delegates from around the world.
- Led Semi Annual Unit Response to Corporate Audit and Compliance for Sarbanes Oxley (SOX). Change Management Unit Lead.
- Led Executive Complaints Resolution for items in a litigation status with the Bank, for example, Congressional, Office of Consumer Complaints.
- Policy and Procedure Subject Matter Expert (22 Unit Process Documentation Kits).
- Led Litigation projects such as Uniform Data Business Analytics, Washington Mutual Litigation Account conversion, Thin Client Conversion, Business Continuity Plan Development and more.

While at Chase, Marianne was selected as the 2009 Chase Portrait Honoree for outstanding demonstration of core values. She also received Multiple Top-Performer Awards and Honors and the Unit Scorecard was an Exceeds rating during her time at Chase.

4. Breann Robinson

Breann Robinson is Consumer Education Director, with special focus in the area of Teen, Senior, and vulnerable populations Privacy Awareness and Education. Breann has come on board WPF specifically to focus on creating consumer privacy education programs and to execute national roll-outs.

Breann's experience in consumer education programs was honed during her time as a Peace Corps Volunteer.

While in the Peace Corps, Breann worked with the Directorate of Public Health, in Albania (Burrel) where she designed and implemented successful school-based health campaigns. From initiating a Women's Health Campaign that was able to transport valuable health information and resources to six surrounding villages to developing a Dental Hygiene program that was taught to over 200 students, Breann made big strides to help her community. She also facilitated development and sustainability by providing English courses to students and Physicians, leading a weekly Book Club for women, and introducing an important SAT informational courses for youth.

Breann was also an Instructor at TERI, Inc. for developmentally disabled adults while she earned her Financial Management degree from California State University of Long Beach.

At the World Privacy Forum, Bree has been developing consumer privacy education programs and materials to target hard-to-reach consumers who have not been served by existing programs or materials. Her emphasis is on online privacy, and she is implementing the program in multiple mediums online and off.

5. Blake Hamilton, Media and Communications Fellow

Blake Hamilton is a photojournalist and investigative reporter. Blake has produced multiple video series for WPF, including a groundbreaking video series about Privacy in India shot on location in India, as well as a complete video consumer education kit for Health Information Exchanges, part of a grant project to create consumer education for this topic area. He has also crafted a series of biometric videos for WPF, a series which is ongoing. In addition to video, Blake assists with Spanish

language work at the WPF and serves as WPF's webmaster.

Blake's international portfolio includes environmental work, including filming, editing, and producing a short documentary on environmental challenges in the Chilean Salmon Farming Industry.

Other photography work includes contributions to Ethos Magazine, a student-run quarterly magazine, at the University of Oregon, where he also worked as a photo editor. In this position, Blake established an online version of the magazine. The website recently won the Columbia Scholastic Press Association's Collegiate Digital Magazine Silver Crown. Blake has lived in Argentina and Chile, is fluent in Spanish, and currently lives in San Diego, California.

6. John Emerson, data visualization text design

John Emerson is a highly regarded web and text designer and data visualization expert. He has crafted extensive web, text, ebook, and data visualization materials for WPF as well as the Committee to Project Journalists, UN Trust Fund to End Violence Against Women, Human Rights Watch, Amnesty International USA, Idealist.org, Center for Economic and Social Rights, Columbia University, and many others.

For the WPF, he has created the groundbreaking Medical ID theft map that visualizes 20 years of identity theft by zip code and city. He has also crafted WPF's HIE project map and other data visualizations and materials such as the Health Data Breach map.

His consultancy, Backspace, is a design consultancy dedicated to research, development and promotion of design in the public interest. See http://backspace.com/

is/in/the/house/work/web.html for more about his Backspace and John Emerson's work.

No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT GOOGLE LLC

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QUESTION PRESENTED

Whether the district court acted within its discretion in approving the parties' *cy pres* settlement as "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), where both lower courts found that (1) the concededly adequate settlement fund could not feasibly be distributed to the unknown individual class members, (2) the recipients of *cy pres* funds were established institutions that committed to use the funds to benefit class members by addressing issues similar to those raised in the complaint, and (3) the recipients were independent of the parties and their counsel.

RULE 29.6 STATEMENT

Respondent Google LLC is a wholly owned subsidiary of XXVI Holdings Inc., which is a wholly owned subsidiary of Alphabet Inc., a publicly traded company. No publicly held corporation owns more than 10% of Alphabet Inc.'s stock.

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INTRODUCTION

Petitioners ask the Court to impose a bright-line ban on *cy pres* settlements—and overturn the settlement here—based principally on past *cy pres* abuses that have nothing to do with this case. Petitioners miss the point: *Cy pres* relief provides the best available mechanism to resolve low-settlement-value claims in a way that provides widespread, meaningful benefits to large and indeterminate classes. The *cy pres* settlement approved here illustrates how a properly guided exercise of equitable discretion avoids the abuses that petitioners deride, while benefiting class members far more than the *de minimis* payments to a trivial proportion of the class that (if petitioners have their way) would be the only permissible remedy. In the narrow category of cases eligible for *cy pres* relief, petitioners' rigid prohibition of *cy pres* relief would either prevent settlements or divert settlement funds from class members to claims administrators.

Google agrees with petitioners that class actions—and class-action settlements—can lead to abuse. We agree as well that district courts should carefully scrutinize settlements to ensure that they provide benefits to the class that accord with a reasonable assessment of the case's value. Here, everybody agrees that the amount of the settlement was adequate under Rule 23(e); indeed, the government suggests that Google may have paid too much. Nor is there any doubt that an effort to identify and compensate all class members—even a nontrivial proportion of them—would have exhausted the settlement fund.

Petitioners' proposed ban on *cy pres* settlements would not solve any underlying problems with class

actions. To the contrary, accepting petitioners' position would eliminate a valuable tool needed to compromise a small category of cases where the administrative costs of direct payments to class members are prohibitive. Banning *cy pres* settlements thus would make class-action litigation even more costly and inefficient, imposing a cure that worsens the disease.

That is not to say that *cy pres* remedies should be common. Rather, district courts should have discretion to approve a *cy pres* remedy only if three conditions are satisfied:

(1) the settlement fund, while sufficient in light of the lawsuit's merits, cannot feasibly be distributed to the class members after administrative and other costs are paid;

(2) the recipients of *cy pres* awards commit to use distributed funds in a specified way that benefits the class or substantial portions of it and addresses issues related to the basis of the lawsuit; and

(3) the recipients are independent of the parties, their counsel, and the district court.

The settlement here satisfies these conditions. Petitioners have no serious response to the findings of both lower courts that it was infeasible to distribute approximately $5 million in settlement funds to the indeterminate class of 129 million people; administrative costs would consume even small payments to even 1% of the class. The *cy pres* recipients are of the highest quality and submitted detailed, grant-like proposals for projects closely targeted to the Internet privacy issues raised by plaintiffs' claims. Class members apparently agreed that the settlement's benefits to them were

sufficient; only 13 opted out of the class. And, unable to identify material conflicts of interest, petitioners are forced to maintain that institutions such as Harvard's Berkman Center for Internet & Society cannot act independently simply because a graduate of Harvard Law School represents a party.

Petitioners have presented no basis to deprive courts of the equitable power to approve *cy pres* settlements, like this one, that meet the limiting criteria above. The judgment of the court of appeals should be affirmed.

STATEMENT

A. Factual Background

Respondent Google LLC operates a free Internet search engine that processes more than a billion search requests every day. JA16-17.[1] When a user submits search terms, within a fraction of a second Google Search returns a list of relevant websites in a new "search results page." JA17, 24.

To produce each search results page, Google's servers first generate a unique Uniform Resource Locator, or URL, that includes information about the user's search query. JA17. Users can then click one of the links provided on the search results page, which redirects the user to the desired site. *Ibid.*

In the normal course of operation at the time the complaints were filed, the user's web browser (*e.g.*, Internet Explorer or Safari) transmitted to that website information known as a "referrer header." See JA17. The referrer header communicated the

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[1] These facts are drawn largely from plaintiffs' pleadings. Google does not admit their truth or accuracy.

URL of the webpage that the user last visited, informing the requested website how the user got to the page. *Ibid.*; see *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how referrer headers work). If a user clicked on a website from Google's search results page, the referrer header generated by the user's web browser communicated the URL of the search results page, which, according to plaintiffs, included the user's search terms. JA17.

B. Proceedings Below

1. *The* Gaos *and* Priyev *actions*

Plaintiffs alleged that Google violated their privacy rights when referrer headers were disclosed to third-party websites. The purported privacy violation resulted from the alleged reproduction of users' search terms in the URL of the search results page.

a. In 2010, respondent Paloma Gaos filed a putative class-action complaint against Google in the Northern District of California. See 5:10-cv-04809-EJD (N.D. Cal.), Dkt. No. 1. Gaos asserted violations of the Stored Communications Act of 1986 ("SCA"), 18 U.S.C. 2701 *et seq.*)), as well as several California state-law claims. The district court granted Google's motion to dismiss the initial complaint because Gaos had "failed to plead facts sufficient to establish Article III standing" for any of her claims. JA21.

Gaos's first amended complaint raised largely the same claims. This time, the district court dismissed all but Gaos's SCA claim. JA31.

The district court explained that "Gaos does not identify what injury resulted" from the alleged

dissemination of search queries in referrer headers, and thus had failed to "allege[] injury sufficient for Article III standing with respect to her non-statutory causes of action." JA26. Nonetheless, the court concluded that Gaos had standing to pursue her SCA claim based on *Edwards* v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010), cert. granted, 564 U.S. 1018 (2011), cert. dismissed, 567 U.S. 756 (2012), which held that asserting the bare violation of a statute established Article III standing "without additional injury." JA29.[2] The district court cautioned, however, that "although Gaos ha[d] alleged sufficient injury for standing based on a violation of the SCA" in light of *Edwards*, "this finding does not mean Gaos has properly stated a claim for relief under the SCA." JA30 n.4.

Gaos, joined by additional plaintiff Anthony Italiano, filed a second amended complaint (SER746-788) in an attempt to cure the defects identified by the district court.[3] That complaint speculated that a website operator or other unidentified third party could identify someone based on search terms because Google's users, including plaintiffs, sometimes conduct "vanity searches"—*i.e.*, searches for their own names. SER776. Plaintiffs further speculated that, although referrer headers do not

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[2] This Court since has held that a plaintiff does not "automatically" satisfy Article III standing requirements "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016). Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

[3] "SER__" refers to respondents' Supplemental Excerpts of Record in the court of appeals.

specify a user's name, a hypothetical "adversary" could use the "Science of Reidentification" to "combine anonymized data" from referrer headers "with outside information to pry out obscured identities." SER770-773.

Google once again moved to dismiss on standing and other grounds. That motion was fully briefed but never decided.

b. In February 2012, respondent Gabriel Priyev filed a similar action in the Northern District of Illinois. See 12-CV-01467 (N.D. Ill.), Dkt. No. 1. Google moved to dismiss that complaint as well.

Rather than defend the original complaint, Priyev twice amended it. Before Google responded to the second amended complaint, the *Priyev* action was transferred to the Northern District of California and consolidated with *Gaos*. All of the plaintiffs then filed a consolidated class-action complaint (SER660-707), seeking to represent "[a]ll persons in the United States who submitted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification." SER697 (emphasis omitted).

2. *The proposed settlement and its approval*

After an all-day mediation session, the parties entered into a settlement agreement and release in March 2013. Pet. App. 69-111. The settlement class tracks the class definition in the consolidated complaint and is estimated at 129 million members. Pet. App. 5. Google agreed to pay $8.5 million, which was to be put into a settlement fund. After covering notice and administrative costs, $5,000 incentive awards for each of the three named plaintiffs, and whatever amount of reasonable attorneys' fees and

costs the district court awarded, the remainder (approximately $5.3 million) would be distributed among six *cy pres* recipients to fund projects devoted to Internet privacy issues and designed to benefit broad segments of the plaintiff class: Carnegie Mellon University; World Privacy Forum; Illinois Tech's Chicago-Kent College of Law Center for Information, Society, and Policy; Stanford Law School Center for Internet and Society; Berkman Center for Internet & Society at Harvard University; and AARP Foundation. Pet. App. 5, 24-25.

At the preliminary approval hearing, class counsel explained that the parties had sought to "rais[e] the bar for all cy pres settlements" by "treating the cy pres allocation more like a grant making organization would treat * * * prospective grant recipients." JA39. Specifically, class counsel sent letters to proposed recipients seeking written proposals on "exactly what they're going to do, who is on staff, and how the budget will be allocated within the project" and asking recipients to commit to "a set of metrics that they can use to measure the success of the program" which would be "publish[ed] to the class and to the court down the road." JA50-51.

Potential recipients responded to this invitation with detailed proposals. See JA53-81.[4] The Stanford Center for Internet and Society, for example, proposed using *cy pres* funding for a variety of projects bearing on Internet privacy issues, including how best to provide notice of privacy practices to users accessing the Internet on mobile devices;

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[4] The joint appendix includes executive summaries of the proposals that were accepted. The full proposals are appended to the class respondents' brief.

analysis of and a conference on pending Internet privacy legislation; and in-person and online education efforts addressing consumer privacy online. JA58-61. Chicago-Kent proposed to develop an online "Privacy Preparedness Guide" and associated videos, online outreach, and in-person training sessions and conferences targeting Internet privacy. JA73-75. And Carnegie Mellon proposed the technical "design of specific interfaces and tools that improve privacy for class members and other users; as well as algorithms that could be used * * * to measure the privacy compliance of various web-based systems, including search engines." JA57. Each proposed recipient also listed previous contributions by Google. Pet. App. 17.

Google also agreed to make additional disclosures on its website to better inform its users how referrer headers and web history operate and to direct them to more information on how Google handles search queries generally. Pet. App. 40, 82.

The district court granted preliminary approval of the settlement. JA82-100. The court observed that "[t]his case is somewhat unique in that the size and nature of the class renders it nearly impossible to determine exactly who may qualify as a class member." JA98. "In fact," it noted, "this class potentially covers all internet users in the United States." *Ibid.* Under this circumstance, the court found, "the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class." JA96.

Recognizing that direct notice was not possible, the district court approved the parties' proposed notice campaign. JA98. That campaign included (1)

Internet banner ads in English and Spanish; (2) press articles; (3) a bilingual website dedicated solely to the settlement; and (4) a toll-free telephone number where class members could obtain additional information and request a written class notice. Pet. App. 39.

Only 13 of the 129 million putative class members—about 0.00001%—opted out of the class, and only five class members (including the two petitioners) entered written objections. Pet. App. 6.

After an extensive fairness hearing (JA111-169), the district court granted final approval of the settlement (Pet. App. 31-61), holding that petitioners and the other objectors had not met their burden of demonstrating that the settlement was not fair, adequate, and reasonable. In particular, the court rejected petitioners' argument that a *cy pres*-only settlement class should never be certified. Pet. App. 37-38 (citing *Lane* v. *Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), cert. denied *sub nom. Marek* v. *Lane*, 571 U.S. 1003 (2013); *Nachshin* v. *AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011)). The district court additionally found that petitioners and the other objectors failed to overcome class counsel's showing that the "cost of distributing [the] settlement fund to the class members would be prohibitive" in light of the size of the class and the administrative expense of direct distribution. Pet. App. 58.

The district court also recognized "the very real risk of never obtaining or losing class status in the absence of settlement." Pet. App. 45. And the court characterized the settlement amount as more than adequate in light of the "significant and potentially case-ending weakness in the SCA claim brought

about by the Ninth Circuit's decision in *Zynga Privacy Litigation*." Pet. App. 58-59.

Finally, the court rejected the objectors' contention that the *cy pres* recipients were tainted by conflicts of interest. Having reviewed the recipients' proposals (Pet. App. 48), the court observed that the recipients "have a record of promoting privacy protection on the Internet, reach and target interests of all demographics across the country, were willing to provide detailed proposals, and are capable of using the funds to educate the class about online privacy risks." Pet. App. 47-48.

3. *The Ninth Circuit's decision*

The Ninth Circuit affirmed. Pet. App. 1-23. Considering "*cy pres*-only settlements * * * the exception, not the rule," the court of appeals rejected petitioners' argument that *cy pres*-only settlements are categorically improper. Pet. App. 8. Rather, those settlements may be appropriate "where the settlement fund is 'non-distributable' because 'the proof of individual claims would be burdensome or distribution of damages costly.'" *Ibid.* (quoting *Lane*, 696 F.3d at 819).

The Ninth Circuit upheld the district court's finding that the settlement fund was not distributable. The court observed that the ratio of the fund amount to be distributed ($5.3 million) to the class of 129 million individuals was a "paltry" sum of four cents per class member. Pet. App. 9. In addition, the court approved the district court's finding that trying to compensate even a small percentage of class members—"millions"—would consume the settlement fund: "sending out very small payments to millions of class members would exceed the total

monetary benefit obtained by the class." *Ibid.* (quoting district court).

The court of appeals rejected petitioners' categorical preference for payments to a "min[u]scule portion of the class"—either through a "random lottery distribution" or by offering a small sum "on the assumption that few class members will make claims." Pet. App. 9. The court noted that, although an alternative settlement of that kind may be technically "possible," it was not required so long as the actual settlement is fair, reasonable, and adequate under Rule 23(e). Pet. App. 9-10.

The court then turned to the six *cy pres* recipients. It chastised petitioners for their "unfair and untrue" assertion that the district court "rubber-stamped the settlement." Pet. App. 12. Instead, the court of appeals held, the district court correctly found that the six *cy pres* recipients satisfy the "'nexus' requirement by being tethered to the objectives of the underlying statute and the interests of the silent class members." Pet. App. 12-13. The court noted the rigorous "selection process employed to vet the *cy pres* recipients in this litigation" and the district court's "careful[] review" of the "detailed proposals" submitted by the recipients. Pet. App. 16. And because the recipients met the exacting standards mandated by the court's precedents, Google's previous donations to some recipients and the fact that some recipients "are organizations housed at class counsel's *alma maters*" were not "absolute disqualifier[s]" as petitioners urged. Pet. App. 12-16.

In other words, petitioners had failed to "raise substantial questions about whether the selection of the recipient[s] was made on the merits." Pet. App.

14 (quoting Principles of the Law of Aggregate Litigation § 3.07 cmt. b (Am. Law Inst. 2010) ("ALI Principles")). The court observed, for instance, that "some of the recipient organizations have challenged Google's Internet privacy policies in the past" and that "[e]ach recipient's *cy pres* proposal identified the scope of Google's previous contributions to that organization, and * * * explained how the *cy pres* funds were distinct from Google's general donations." Pet. App. 16-17 & n.7. Likewise, the court concluded that because "[t]he recipients are well-recognized centers focusing on the Internet and data privacy," petitioners' argument that the settlement should be invalidated merely because class counsel have degrees from some of the institutions that house the recipients "can't be entertained with a straight face." Pet. App. 19.

Judge Wallace "agree[d]" with the majority "that a *cy pres*-only settlement was appropriate in this case," Pet. App. 23, and "express[ed] no opinion on the definitive fairness" of the settlement, Pet. App. 30. Dissenting in part, he would have remanded to the district court for further fact-finding about the selection of the specific *cy pres* recipients. Pet. App. 24, 30.

SUMMARY OF ARGUMENT

1.a. Like the class action itself, the *cy pres* doctrine is rooted in equity practice. The class action evolved in response to challenges in efficiently adjudicating disputes where numerous similarly situated parties had common claims against an adversary. And the same courts developed the *cy pres* doctrine when funds held in trust could not be spent in accord with the first choice of the settlor.

The two doctrines logically converged in response to the increased use of class actions after the 1966 revisions to the Federal Rules of Civil Procedure. Modern class actions more frequently presented insuperable challenges to direct distribution of class settlement funds or damages awards.

Until distributed, a class settlement is held in trust for the class members. When direct payments are not feasible, *cy pres* remedies provide the next best method of delivering benefits to the class.

b. The federal courts retain the power to approve *cy pres* relief. The Federal Rules of Civil Procedure did not silently abrogate the equitable powers of the district courts, and no Rule expressly addresses *cy pres*.

Nor does the Rules Enabling Act, 28 U.S.C. 2072, somehow bar approval of a *cy pres* settlement. That relief does not "abridge, enlarge or modify" any substantive right. Any class member who wants to seek individual damages may do so. But others are as free as any individual litigant to compromise their claims for a noncash benefit. And a *cy pres* settlement does not modify substantive rights merely because noncash relief is not mentioned in the source of law providing the cause of action. As this Court has repeatedly recognized, relief imposed by settlement may differ from what could be imposed after trial.

And the professed concerns about compelled speech in violation of the First Amendment are insubstantial; an objecting class member can simply opt out. In any event, petitioners' First Amendment concerns could not justify a complete prohibition on

cy pres settlements; even here, petitioners challenge only one of the six recipients on that basis.

2. *Cy pres* settlement relief is "fair, reasonable, and adequate" under Rule 23(e) when it meets three criteria. The settlement here satisfied each.

a. *First*, direct distribution of settlement funds to class members must be infeasible. That most often occurs when an adequate settlement amount provides little money per class member and the administrative cost of direct distribution is high because the class members are neither known nor readily ascertainable.

Here, the settlement provided four cents per class member. The costs of identifying, verifying, processing, and paying claims would exceed available funds unless the claims rate was substantially under 1%. Confirming the claims rate would siphon off still more of the settlement to the claims administrator.

b. *Second*, there must be a nexus between the proposed use of *cy pres* distributions by the chosen recipients and the issues raised by the lawsuit, to ensure that class members benefit from the settlement that are related to the claims in the complaint. The recipients here were well-established entities, primarily at premier academic institutions. Each submitted a detailed proposal directed at protecting consumers' privacy on the Internet. That proposed technical, policy, and educational activity would benefit the class as a whole far more than token payments to a few class members—especially for the 99% or more who would receive nothing.

c. *Third*, the *cy pres* recipients must be independent of the parties, their counsel, and the district court. That fact- and case-specific analysis is

necessarily discretionary. Here, Google had previously made donations to several recipients in amounts that were lower than the *cy pres* distributions proposed here, and that were not tailored to benefit the class. Far from the "allies" petitioners depict, two of the recipients had complained to the FTC about Google practices. Petitioners also challenge the Harvard, Stanford, and Illinois Tech/Chicago-Kent recipients on the ground that some of plaintiffs' counsel attended those law schools. As the court of appeals observed, that contention does not pass the straight-face test.

d. Petitioners' concerns about attorneys' fees speak to a broader issue with the administration of class actions. Because the same considerations arise in *cy pres* settlements that arise in other settlements, any constraint on district courts' discretion to award fees should apply equally to all class actions. Imposing a lodestar hourly model as a presumptive measure for attorneys' fee awards would help properly align incentives with sound policy.

ARGUMENT

I. Federal Courts Have The Power To Approve *Cy Pres* Remedies In Class-Action Settlements.

A. *Cy pres* is an appropriate exercise of the federal courts' equitable powers.

The class-action device and the *cy pres* doctrine share roots in the courts of equity. The convergence of these practices in the form of *cy pres* remedies in class-action settlements is an appropriate and unremarkable step in the centuries-long evolution of equity practice.

1. *Class actions are an "invention of equity."*

Rule 23 "stems from equity practice." *Amchem Products Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997); accord *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832-33 (1999) (describing Rule 23's equitable "roots"). The class suit itself was "an invention of equity"—a solution to the problem of providing redress when only some of the injured group members could be identified or feasibly brought before the court. *Hansberry* v. *Lee*, 311 U.S. 32, 41 (1940).

As Justice Story articulated English equity practice, where "the parties are very numerous[] and the court perceives[] that it will be almost impossible to bring them all before the court; or where the question is of general interest," the "administration of justice" was better served by permitting some subset of the injured parties to proceed—through a representative action where appropriate—on the theory that imperfect redress was better than no redress at all. *West* v. *Randall*, 29 F. Cas. 718, 722 (No. 17,424) (C.C.D.R.I. 1820) (Story, J.); see also *Ortiz*, 527 U.S. at 833. Thus, "the Court of Chancery groped its way toward a theory of the lawsuit that has become, with its many embellishments and contradictions, the modern class action." S. Yeazell, From Medieval Group Litigation to the Modern Class Action 69 (1987).

Early American courts borrowed from English bills of equity that used representative litigation to address contemporary needs. See Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 687-88, 709 & n.79 (1941) (collecting cases). Among these was the bill of peace, which would lie "to establish the title of the plaintiff against numerous parties insisting upon the same

right." *Whitehead* v. *Shattuck*, 138 U.S. 146, 153 (1891).

The creditor's bill emerged around the same time. Yeazell, *supra*, at 222. This Court confirmed that the creditor's bill, "a suit in equity * * * for the common benefit of all," provided "the only appropriate remedy in the courts of the United States" for competing creditors with claims to the assets of an insolvent corporation. *Stone* v. *Chisolm*, 113 U.S. 302, 308-09 (1885). This rule was designed to prevent "the grossest inequality" that would result if an "individual creditor" could "collect the whole amount of his claim against the corporation * * * to the exclusion of other creditors whose claims are equally meritorious." *Low* v. *Buchanan*, 94 Ill. 76, 80 (1880). The creditor's bill evolved into the "common fund" class. See Fed. R. Civ. P. 23(b)(1), Advisory Comm. Note (1966).

Early group litigation rules codified equitable practice. See Fed. R. Eq. 48 (42 U.S. (1 How.) xlii, lvi (1843)). In particular, Federal Equity Rule 38 made clear that absent parties would be bound by any action brought on their behalf—as this Court had suggested in *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288 (1853). Equity Rule 38 provided: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 363-64 (1921) (quoting 33 S. Ct. xxix). Federal Equity Rule 38 was ultimately incorporated into Rule 23 of the original Federal Rules of Civil Procedure. And the numerosity and commonality factors in current Rule 23(a)(1)-(2) reflect equity class-action practice.

In sum, the class action evolved as an "invention of equity," *Hansberry*, 311 U.S. at 41, crafted to accommodate shifting societal norms and needs to redress group harms. "[S]ome affirmative technique for bringing everyone into the case and making recovery available to all" was required, Kalven & Rosenfield, *supra*, at 688—especially for claims that would otherwise be "too small to warrant individual litigation," *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968).

Because Rule 23 resulted from the natural progression of equitable rules, nothing suggests an intent to shut the equitable toolbox that courts had long used to remedy group wrongs. Indeed, far from abolishing (or precluding) equitable practices not specifically addressed, Rule 23, like other rules promulgated under the Rules Enabling Act, 28 U.S.C. 2072, left those doctrines and practices in place.

2. *The* cy pres *doctrine is likewise rooted in inherent equitable powers.*

The use of *cy pres* in the United States is also rooted in equitable practice. *Cy pres* gained popularity in American courts in the early 20th century with "the great increase in charitable trust property." E. Fisch, The Cy Pres Doctrine in the United States 173-74 & n.24 (1950) (collecting cases). It provided a means of saving charitable trusts that "might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator." *Evans* v. *Abney*, 396 U.S. 435, 441 (1970); see, *e.g.*, *Estate of Hinckley*, 58 Cal. 457, 512-13 (1881) ("general devolution * * * of all judicial power" includes "power of *cy pres*").

From the legal French phrase *cy près comme possible*, literally "as near as possible," *cy pres* "is the doctrine that equity will, when a charity is originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible." Bogert's Trusts and Trustees § 431 (2018); Restatement (Third) of Trusts § 67 cmt. a (2003) (settlor's "intention will be given effect 'as nearly' as may be"). For example, when a settlor proposed to establish a hospital in her name but a different hospital was formed in the interim, *cy pres* was used to maintain a ward in the existing hospital. *Adams* v. *Page*, 79 A. 837, 838 (N.H. 1911).

3. Cy pres *converged with the class device in response to the shifting nature of class actions.*

The *cy pres* doctrine serves an analogous purpose in the class settlement context. A class action settlement creates a fund that matches the value of the claims, which raises the question how to dispose of that fund. "In class actions, courts have approved creating cy pres funds, to be used for a charitable purpose related to the class plaintiffs' injury, when it is difficult for all class members to receive individual shares of the recovery and, as a result, some or all of the recovery remains"—whether because the sheer cost of notice and claims administration would exhaust the class settlement fund, or because class members are too difficult (and expensive) to locate or identify. *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 588 F.3d 24, 33-34 (1st Cir. 2009) (Lynch, J.); see *Masters* v. *Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (Miner,

J.); *Powell* v. *Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997) (Arnold, J.).

The *cy pres* solution reflects "[t]he essence of equity jurisdiction": "the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *United States* v. *Noland*, 517 U.S. 535, 540 (1996) (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944)). Equitable "flexibility" (*Hecht*, 321 U.S. at 329) of this kind is especially appropriate because the framers of the 1966 Rules amendments "anticipat[ed] innovations under Rule 23(b)(3)." *Ortiz*, 527 U.S. at 842.

Cy pres doctrine logically and legitimately converged with the class-action device shortly after the adoption of Rule 23(b)(3) in 1966 expanded the availability of class actions for damages. The growth in those actions led to two problems in class administration: (1) uncollected damages, see, *e.g.*, Shepherd, Note, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448 (1972); and (2) difficulties in the distribution of funds where "the amount expended on the paper work which would be necessary in order to file and prove a claim may exceed the amount of damages sustained," *Eisen*, 391 F.2d at 567.

Both problems arise in class actions where any actual harm is so abstract, small, or doubtful that it is difficult to quantify. As the Ninth Circuit observed in a case where the "average individual recovery" was estimated at only "two dollars" if the plaintiffs won outright, "the amount of recovery would be entirely consumed by the costs of notice alone," so that the "principal, if not the only" party who benefits from a direct-compensation order is the plaintiffs' counsel. *In re Hotel Telephone Charges*,

500 F.2d 86, 91 (9th Cir. 1974); see also *Democratic Central Comm. of D.C.* v. *Washington Metropolitan Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996) (per curiam) ("The prohibitive cost of notification, together with the cost of distribution, would greatly reduce, or even exceed, the total amount of the funds.").

In short, class-settlement *cy pres* arose out of a need for a "pragmatic and sensible" solution to the problem of class compensation in low-value, large-class settlements. *New York ex rel. Koppell* v. *Keds Corp.*, 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994); *Miller* v. *Steinbach*, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974). In these circumstances, a settlement that provides a benefit to be shared by the entire class comes closer to effectuating the purpose of the class suit, and Rule 23(b)(3)'s broader goal of class compensation, than does a large payment to a claims administrator and at best small payments to a tiny subset of the class.

4. *The use of* cy pres *in class settlements reflects the fiduciary character of class actions.*

It made doctrinal as well as practical sense to adapt the equitable *cy pres* device developed in the trust setting as an "evolutionary response," *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980), for use in class actions where the fund that class representatives have obtained is too small to be distributed to class members. This Court and other courts have recognized a "class representative's fiduciary duty" to the absent class members. *Standard Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 594 (2013) (citing *Back Doctors Ltd.* v. *Metropolitan Property & Casualty Ins. Co.*, 637 F.3d 827, 830-31

(7th Cir. 2011)); see also *Deposit Guaranty*, 445 U.S. at 344 n.4 (Stevens, J., concurring). Indeed, the Court long ago noted that a shareholder who sues in a corporate derivative action "assumes a position, not technically as a trustee perhaps, but one of a fiduciary character" because "[h]e sues * * * as representative of a class comprising all who are similarly situated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549 (1949). Because of this "fiduciary character," "this Court has found it necessary * * * to impose procedural regulations of the class action not applicable to any other." *Id.* at 549-50.

Class representatives' fiduciary role is particularly close to that of a traditional trustee when settlement funds earmarked for the class have not yet been distributed. The notion of a class representative as trustee in that circumstance dovetails with traditional equity jurisprudence addressing "limited fund" class actions. That jurisprudence recognized that a plaintiff who sues to protect a common fund on behalf of himself and others similarly situated has "acted the part of a trustee in relation to [that] common interest." *Internal Improvement Fund Trustees* v. *Greenough*, 105 U.S. 527, 532 (1881). In a common fund, *all* class members (not only those who file claims) are "the equitable owners of their respective shares in the recovery." *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 482 (1980).

Equity demands no less in the modern class-action context, whether the class is certified under the common-fund provision in Rule 23(b)(1) or under the other two subsections of Rule 23(b). The class representative or class counsel who obtains the class

settlement effectively assumes the role of a trustee with a duty to act in the best interests of *all* class members. See Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 Yale L.J. 1591, 1600 (1987).

5. *A settlement providing class members noncash benefits is consistent with a class representative's fiduciary duty.*

Voicing an unexplained prejudice favoring minimal cash payments over any other relief, petitioners urge that a class representative's fiduciary obligations *compel* parties to settle large-class, small-value claims in a way that wastes most or all of the settlement fund on administrative costs in order to confer a trivial benefit on a minuscule portion of the class. But that premise runs counter to this Court's recognition that a remedy need not be "pecuniary" or involve direct remuneration in order to confer a "substantial benefit" on absent class members. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 394-95 (1970).

The Principles of the Law of Aggregate Litigation agree: "Nothing in this Section [3.07] would require that a settlement actually recover money for class members, so long as the class is apprised of that fact in a properly constructed settlement notice." ALI Principles, *supra*, § 3.07 cmt. b. Moreover, the class representative owes a fiduciary duty to the *entire* class—not just to the few who might file claims. The class device developed in part to "ensure[] that * * * the class as a whole was given the best deal" when a "limited fund" or single resource was available to satisfy common claims shared by numerous potential plaintiffs. *Ortiz*, 527 U.S. at 839. The decision to aggregate otherwise trivial recoveries into a fund

that can confer a meaningful benefit on the *whole* class is entirely compatible with the class representative's fiduciary obligations.

B. No valid legal principle prohibits *cy pres* settlements.

Petitioners and their *amici* contend that, as a matter of law, *cy pres* awards are never permitted in class-action settlements. Petitioners maintain that the Rules Enabling Act and the First Amendment preclude approval of *cy pres* settlements. Neither does so.

1. Cy pres *settlements are consistent with the Rules Enabling Act and the Federal Rules of Civil Procedure.*

Petitioners—elliptically (Br. 33)—and some *amici* contend that approval of a *cy pres* settlement violates the Rules Enabling Act, 28 U.S.C. 2072. But Rule 23(e) authorizes courts to approve settlements so long as they are fair, reasonable, and adequate. The Rules Enabling Act provides that federal rules of procedure shall not "abridge, enlarge or modify [a] substantive right." 28 U.S.C. 2072(b). This provision is not implicated when a court approves a proposed class settlement, because "a class-action settlement—like any settlement—is a private contract of negotiated compromises," *not* a "substantive adjudication of the underlying causes of action." *Marshall* v. *National Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015). Every court of appeals to squarely consider the question has thus concluded that a decision to approve a class settlement "does not implicate the Rules Enabling Act." *Ibid.*; see also *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1116 (10th Cir.

2017); *Sullivan* v. *DB Investments, Inc.*, 667 F.3d 273, 312 (3d Cir. 2011).

In addition, the Rules Enabling Act does not abrogate the equitable powers of the federal courts. On the contrary, this Court has recognized that the district courts retain significant inherent powers that the Rules do not displace.[5] A court can approve an individual settlement that directs funds to a third-party recipient, and it can do so in a class context so long as it complies with appropriate equitable constraints.[6] Indeed, if Rule 23 limited this discretion, it might alter substantive rights in violation of the Act. Tellingly, neither the 2018 amendments to Rule 23 nor any prior amendments limit the availability of *cy pres* settlements. After significant discussion, the Rules Committee declined to act on suggestions that it do so. See Agenda, Committee on Rules of Practice and Procedure 424 (Jan. 7-8, 2016) (noting use of "more creative awards * * * in cases involving small injuries to large

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[5] *E.g.*, *Landis* v. *North American Co.*, 299 U.S. 248, 255 (1936) (stay of litigation); *Link* v. *Wabash R.R.*, 370 U.S. 626, 633 (1962) (sanctions such as dismissal for want of prosecution); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507-08 (1947) (dismissal on *forum non conveniens* grounds); *Luce* v. *United States*, 469 U.S. 38, 41 n.4 (1984) (*in limine* evidentiary rulings).

[6] Individual plaintiffs routinely settle legal disputes in exchange for the defendant's agreement to do something for a third party. See, *e.g.*, https://bit.ly/2wbHspW ($200,000 payment by city to community program to settle lawsuit over Starbucks arrest); https://bit.ly/2ojoabo (payment by toy company of $1 million to education charities to settle lawsuit by Beastie Boys); https://bit.ly/2wgIoqH (payment to Make-A-Wish foundation to settle patent litigation).

numbers of consumers, most of whom cannot be easily identified"), https://bit.ly/2Ly1gX3.

Thus, it makes no difference if, as petitioners maintain, "[s]ettlement fund proceeds * * * belong solely to the class members." Pet. Br. 33 (quoting *Klier* v. *Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (in turn citing ALI Principles, *supra*, § 3.07 cmt. b)). That beneficial ownership simply underscores the class representative's trustee-like role, and the propriety of using the *cy pres* device when a settlement fund cannot feasibly be distributed to the individual class members.

It is equally irrelevant that underlying causes of action ordinarily do not provide for a *cy pres* remedy. A "federal court is not necessarily barred from entering a consent decree"—a type of settlement—"merely because the decree provides broader relief than the court could have awarded after a trial." *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986). *Cy pres* payments are not punishment, but are part of an agreed-upon resolution of plaintiffs' claims that benefits plaintiffs.

And a party does not need specific statutory authorization to settle a cause of action on particular terms. That is because a "legal settlement agreement is a contract." *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1065 (2015). "[P]art of the consideration" for the contract is the "dismissal" of the claims by the plaintiff. *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). In return, the plaintiff may accept any course of conduct from the defendant that does not violate public policy. See generally Restatement (Second) of Contracts § 79 (1981). And

the defendant's "return promise may be given to the [plaintiff] or to some other person." *Id.* § 71(4). "It matters not from whom the consideration moves or to whom it goes." *Id.* § 71 cmt. e.

2. *The First Amendment does not foreclose* cy pres *settlements.*

Petitioners argue that *cy pres* relief should be prohibited because it can "infringe upon the First Amendment rights of class members by requiring them to subsidize political organizations they disapprove of without their explicit consent." Pet. Br. 17. This issue at most could affect the selection of some recipients in some cases. Here, petitioners claim that only one *cy pres* recipient (the AARP) implicates their expressive rights by using petitioners' roughly 0.7-cent individual contributions (*i.e.*, 1/6 of their 4-cent share of the settlement). See Pet. App. 131.

There is no compelled speech here. Consistent with Fed. R. Civ. P. 23(e)(4), Section 6.1 of the settlement agreement entitled class members to opt out of the settlement for any reason. Pet. App. 87. That option is open to any class member who does not want to be associated with speech undertaken by a *cy pres* recipient. This Court determined more than 30 years ago that opt-out provisions generally satisfy the due-process rights of absent class members. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985).[7] The Court's rationale for approving opt-out

[7] Petitioners have not adequately raised a due process challenge merely by quoting (Br. 30) from a law review article saying that "cy pres threatens the due process rights of * * * class members"; petitioners never say how. The suggestion by Cato Institute that Rule 23(b)(3) itself violates due process is a critique of class actions, not of *cy pres* settlements.

processes in *Shutts* applies with equal force here. "[T]he Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." *Id.* at 813.

Contrary to *Shutts*, petitioners contend that "silence is not consent." Pet. Br. 37 (citing *Knox* v. *SEIU, Local 1000*, 567 U.S. 298 (2012)). That assertion proves too much, as the class-action system is based on the proposition that individuals with little to gain from pressing individual actions can be presumed to join in a collective action. Moreover, *Knox* did not impugn the effectiveness of opting out, but on the contrary cut short an effort to nullify an opt-out arrangement. 567 U.S. at 314. *Knox* thus weighs against petitioners' position.[8]

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[8] In invalidating the mandatory agency-shop arrangements that formed the backdrop for *Knox*, the Court emphasized that its decision was limited to the public sector. *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2479 & n.24 (2018). The Court found it "questionable" that "Congress's enactment of a provision allowing, but not requiring, private parties to enter into union-shop arrangements was sufficient to establish governmental action" for First Amendment purposes. *Ibid.* (citing *American Manufacturers Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40, 53 (1999)).

Under that reasoning, a district court's decision to approve a proposed settlement under Rule 23(e) is not state action triggering the First Amendment. This Court has "never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it." *Sullivan*, 526 U.S. at 53.

II. To Be Fair, Adequate, And Reasonable, *Cy Pres* Relief Must Satisfy Appropriate Conditions, Which This Settlement Did.

Approval of *cy pres* class-action settlements comes within the courts' equitable powers for the reasons discussed above. But that does not mean that awards of *cy pres* relief are "fair, adequate, and reasonable" in every case. Fed. R. Civ. P. 23(e). On the contrary, as the court of appeals recognized, *cy pres* settlements must remain "the exception, not the rule." Pet. App. 8.

In "assess[ing]" the fairness of *cy pres* "as a general matter," this Court should "clarify the limits on the use of such remedies." *Marek*, 571 U.S. at 1003 (Roberts, C.J., respecting denial of cert.). Among those considerations are "whether new entities may be established"; "how existing entities should be selected"; the "respective roles of the judge and parties * * * in shaping a *cy pres* remedy"; and "how closely the goals of any enlisted organization must correspond to the interests of the class." *Ibid.*

To ensure an appropriate result under principles of equity and class-action law alike, *cy pres* relief should be limited to a narrow class of settlements that satisfy three conditions drawn from the consensus view of the courts of appeals.

First, *cy pres* relief should be used only when the settlement fund cannot feasibly be distributed to class members in meaningful amounts after administrative and other costs are paid.

Second, to be "fair, reasonable, and adequate" under Rule 23(e), *cy pres* relief must reflect a nexus between the uses to which the *cy pres* funds will be put and the interests of the class members—as the

courts of appeals uniformly require. A *cy pres* distribution must provide class members with some form of related benefit in exchange for releasing their claims, and thus would redress any injury class members may have sustained (cf. Gov't Br. 22-25).

Third, there should be no conflicts of interest among the proposed *cy pres* recipients, the parties, their counsel, and the district court. The touchstone is whether the selection is made on the merits of the proposals.

Because the settlement in this case satisfied each of these conditions, petitioners' parade of anecdotal abuses involves other cases, almost all of them decided before the Chief Justice's statement in *Marek*. The settlement here stands on its own, however, and the judgment of the court of appeals should be affirmed.

A. Payment to class members must be infeasible.

Cy pres by definition is a "next best" form of relief. Pet. App. 7 (quoting *Nachshin*, 663 F.3d at 1038). Approval of a *cy pres* settlement is a reasonable exercise of judicial discretion only if the available funds are sufficiently small and the class sufficiently large and indeterminate that payment to the class—usually the simplest and best relief—is not feasible.[9]

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[9] As the government notes, the 2018 amendments to Rule 23(e) will explicitly direct district courts to evaluate the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Gov't Br. 27 (quoting Fed. R. Civ. P. 23(e)(2)(C)(ii) (effective Dec. 1, 2018)).

This reflects the view of the courts of appeals that have addressed the issue. See, *e.g.*, *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (noting general agreement that "*cy pres* distributions are most appropriate where further individual distributions are economically infeasible"); accord *Klier*, 658 F.3d at 475 & n.15; *Masters*, 473 F.3d at 436; *Powell*, 119 F.3d at 706; *New York* v. *Reebok Int'l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996) (any "distribution 'would be consumed in the costs of its own administration'").

Requiring the combination of a low (but adequate) settlement value and a large and indeterminate class will reserve *cy pres* relief for unusual cases like this one. Petitioners' approach to feasibility, by contrast, foreordains a categorical bar on *cy pres*, which would deprive litigants of the ability to compromise the class actions that most warrant early and efficient resolution.

1. *Direct payments are most often infeasible when actual injury is modest and intangible, class members are not easily identified, and administrative costs of distribution are high.*

A class-action settlement must be "adequate." Fed. R. Civ. P. 23(e)(2). In most cases, the adequacy criterion alone will foreclose a *cy pres*-only settlement, because the minimum amount required to make the settlement adequate will be large enough to permit direct distribution to a meaningful percentage of the class. But a very small settlement relative to the size of the class may be adequate, although cash payments are not feasible, if plaintiffs have low-injury claims, the merits of their case are weak, the law is unsettled, class certification faces

legal hurdles, or the case presents some combination of those factors. Tellingly, petitioners have not challenged the adequacy of the $5.3 million in potentially distributable funds in this case despite the estimated class size of 129 million. See Pet. Br. 41; Pet. C.A. Br. 8 (petitioners "didn't claim that the [case] necessarily needed to settle for more money").

a. While this Court's decision in *Spokeo*, 136 S. Ct. 1540, has helped weed out pure no-injury claims at the pleadings stage, some lower courts erroneously permit claims based on speculative injuries that present only a questionable "likelihood actually to harm" the plaintiff. *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1117 (9th Cir. 2017), cert. denied, 138 S. Ct. 931 (2018). Under a correct view of the law, there may well be bars to litigating such claims, or certifying them as class actions. So long as they are permitted to proceed, however, it must be possible to dispose of them on appropriate terms. Yet a minimal and indistinct injury that happens to survive dismissal on standing grounds is still minimal and indistinct, so that a modest amount of compensation, if any, may be "adequate" to compromise the claim under Rule 23(e).

b. Some courts have held that Rule 23 does not impose an "ascertainability" requirement independent of the express manageability criterion set forth in Rule 23(b)(3). See, *e.g.*, *Briseno* v. *ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), cert. denied, 138 S. Ct. 313 (2017).[10] Although we believe that view is

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[10] Petitioners suggest (Br. 35) that the availability of *cy pres* relief drove the Ninth Circuit's rejection of an ascertainability requirement in *Briseno*. The court briefly mentioned *cy pres* remedies in rejecting due process concerns about adequate notice to class members, but rested its holding on a desire to

erroneous, unless and until this Court corrects it some unascertainable classes will continue to be certified. Yet payment to a meaningful percentage of the class is less likely to be feasible when there is no ready way to identify the persons to be paid. That is why "[c]y pres recovery is * * * ideal for circumstances in which it is difficult or impossible to identify the persons to whom damages should be assigned or distributed." *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997); see also *Masters*, 473 F.3d at 435-36.

In particular, the administrative expense of distributing funds to class members increases dramatically when the identity and location of class members are unknown.[11] Any distribution of proceeds to sprawling settlement classes of unidentifiable individuals either has to take any claimant's assertions at face value or include a prohibitively expensive verification process. And then the claims administrator would have to process class members' payment information and pay them—each step a costly undertaking. Even where the class in the aggregate is harmed by a defendant's alleged conduct, "identifying the actual people who suffered injury and issuing them a check is often so expensive that administrative costs swallow the entire recovery." Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 675, 683 (2010). This

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foster "[c]lass actions involving inexpensive consumer goods," 844 F.3d at 1128, along with the lack of an express reference to ascertainability in Rule 23, *id.* at 1125-26.

[11] An individual can run a Google search without logging into a Google account. Google also does not have addresses or similar identifying information for many Google account-holders. See SER152.

means that funds will go to claims administrators rather than class members.

c. The combination of low settlement value and high administrative costs required to make direct payments infeasible belies petitioners' hyperbolic assertion that "*almost every consumer-class action settlement*" could be *cy pres*-only. Pet. Br. 50-51. Petitioners rely on cases involving known class members, much larger settlement funds per class member, or both. For example, the Eighth Circuit in the *BankAmerica Corp. Securities Litigation* ordered further cash distribution solely to "lists of NationsBank class members who received and cashed prior distribution checks," so that the "potentially burdensome expense" of tracking down "class members whose checks were returned undelivered * * * need not be incurred." 775 F.3d 1060, 1064 (8th Cir. 2015). Similarly, in the revised settlement approved on remand from *Baby Products*, "[t]he parties used the Babies 'R' Us * * * purchase records to identify more than 1.1 million class members and their purchase and contact information." *McDonough* v. *Toys R Us, Inc.*, 80 F. Supp. 3d 626, 636 (E.D. Pa. 2015).

Petitioners approach absurdity when they suggest (Br. 50-51) that a *cy pres*-only distribution could be approved for the $115 million Anthem data breach settlement or the $135 million fund in *Sullivan*, based on an assumed 100% claims rate. Most relevant here, *Sullivan* upheld a $10 minimum threshold for distribution, recognizing that administrative costs would consume smaller distributions: "'*de minimis* thresholds for payable claims are beneficial to the class as a whole since they save the settlement fund from being depleted by

the administrative costs associated with claims unlikely to exceed those costs.'" 667 F.3d at 328 (quoting *In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007)); see also, *e.g.*, *In re Wells Fargo Securities Litig.*, 991 F. Supp. 1193, 1196 & n.1 (N.D. Cal. 1998) (noting administrative costs of "approximately $5.50 per claimant" to distribute funds to a small, identified class of "2,619 claimants," which included "the cost of updating mailing lists and answering questions from claimants"); *Cicelski* v. *Sears, Roebuck & Co.*, 348 N.W.2d 685, 688 (Mich. Ct. App. 1984) (average recovery of $4.50 per claimant exceeded many times over by projected per-claimant administrative and notice costs).

At those rates, the fund here would be consumed entirely by administrative expenses even if less than 1% of the class submitted claims.

2. *Petitioners' definition of feasibility would categorically ban* cy pres *settlements and harm class members.*

Petitioners do not dispute that the courts of appeals have generally limited *cy pres* remedies to circumstances where a cash distribution of all or part of a settlement fund would not be feasible. See p. 31, *supra*. The ALI Principles section that petitioners cite recognizes that direct distribution is appropriate only "*[i]f* individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable." ALI Principles, *supra*, § 3.07(a) (emphasis added).

Yet petitioners propose a definition of feasibility that precludes *cy pres* relief. According to petitioners,

cy pres awards are not fair and reasonable "if it is feasible to distribute cash to *any* absent class members" (Pet. Br. 49)—presumably even one.

a. *A class may be better served by noncash benefits than by tiny payments to a sliver of class members.*

Petitioners cannot coherently explain why the class as a whole is better served by small payments to a minuscule portion of the class than by a well-tailored *cy pres* award that benefits many more class members. Paradoxically, petitioners bank on "the typically low claims rate in consumer and privacy class-action settlements" to make the distribution math work. Pet. Br. 44. Under their counterintuitive approach, a settlement is fair and adequate only on the assumption that the vast majority of class members will not benefit from the settlement at all, even though they are identically situated to the tiny fraction that would collect small payouts.

That only a tiny percentage of self-selected class members could possibly receive payments, however, weighs in favor of *cy pres* relief, not against it. For example, petitioners celebrate (Br. 44) a privacy settlement providing cash to 0.14% of the class. *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016). They similarly laud (Br. 42) one district court's exercise of discretion to distribute a small amount of money ($15) to 0.4% of class members. *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 2d 939 (N.D. Cal. 2013), aff'd *sub nom. Fraley* v. *Batman*, 638 F. App'x 594 (9th Cir. 2016), cert. denied *sub nom. K.D.* v. *Facebook, Inc.*, 137 S. Ct. 68 (2016).

Petitioners cannot explain why these courts' exercises of discretion are per se preferable to a targeted *cy pres* award that could redress the alleged intangible injuries of many more class members. At some point, the proportion of class members receiving direct payments becomes so small that it is at least as "fair" and "reasonable" under Rule 23(e) to approve a *cy pres* distribution tailored to the issues in the case. *Cy pres* relief is more likely to provide a benefit to the class as a whole than petitioners' scheme, which leaves the overwhelming majority of class members with nothing at all. The response by class members to this settlement confirms the class's satisfaction with the settlement; despite a large-scale notice campaign, only one-in-ten-million class members opted out of the settlement.

Petitioners argue that settlement fund proceeds are the property of the class members. Pet. Br. 33. That is true but irrelevant. That the negotiated settlement belongs to the class proves nothing about how the class representatives, who owe fiduciary duties to the entire class, ought to distribute the proceeds.

Rather than grapple with the problem of claims-administration costs, petitioners suggest a "random lottery distribution to a percentage of claiming class members" (Br. 44) of whatever might be left after the administrative costs of soliciting claims, conducting the lottery, and paying the winners. But the benefits of appropriate *cy pres* relief surely are preferable to transforming federal courts into casinos. As the government notes, "[p]etitioners do not explain why a truly random distribution of settlement funds would be 'reasonable' under Federal Rule of Civil Procedure 23(e)(2) or why it would necessarily result

in greater relief to the class as a whole than a properly tailored *cy pres* award." Gov't Br. 27 n.2. Indeed, this two-stage claims process would likely divert all or almost all of a *cy pres*-worthy settlement fund to the claims administrator.

b. *Superiority should not rest on the size of the settlement amount.*

Finally, petitioners argue that, if a settlement fund cannot feasibly be distributed, courts should simply deny certification of the settlement class for failure to satisfy Rule 23(b)(3)'s superiority requirement. Pet. Br. 52-54. Their theory is that, because the benefits of a *cy pres* remedy will inure to a class member regardless of whether she remains in the class, every class member would be better off by opting out and pursuing an individual claim. *Ibid.* The argument is too clever by half: It ignores that there would be no *cy pres* remedy in the absence of sufficient class participation. Too many opt-outs would lead a court to reject the settlement. See *Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (requiring district courts to consider "the reaction of the class members to the proposed settlement" in evaluating a settlement proposal under predecessor to Rule 23(e), and finding opt-out rate of less than 0.1% corroborated fairness of settlement).

The argument is overbroad as well, as any injunctive relief that affects a defendant's general conduct—including the disclosures Google agreed to make here (JA94)—inevitably benefits nonmembers of a class as well as class members.

And petitioners' proposal has the practical effect of thwarting settlement (or substantially

overinflating the settlement value of) the low-value, large-class cases for which *cy pres* relief is most appropriate. Defendants would be forced to overpay to settle low-value class actions just to cover the claims administration costs. Indeed, administrative costs that reach several dollars per payment (see pp. 33-35, *supra*) could be many times the amount paid to class members as compensation.

We would welcome a legal rule barring class certification of *de minimis* claims when the per-class-member damages are less than the cost to pay them, particularly if the determination could be made, and the case dismissed, early in the litigation. And the same goes for an early evaluation of the merits and magnitude of injury as a factor in the superiority requirement at class certification. But effectively foreclosing settlements that assign low values to low-value claims makes no sense. It would undermine both judicial economy and economic efficiency to bar the door to settlement, and thus force litigation through class certification (if not to judgment) before these low-value cases could be resolved.

3. *Statutory damages, not* cy pres *settlements, provide incentives to bring low-value claims.*

Petitioners hypothesize that the availability of *cy pres* settlements "incentiviz[es] low-merit class actions" and "extortionate suits." Pet. Br. 35-36, 41. Statutory damages like the $1,000 per violation potentially available here under the Stored Communications Act, 18 U.S.C. 2707(c), provide strong incentives to bring the minimal injury actions that are candidates for a *cy pres* remedy. "What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple

mathematics: these suits multiply a minimum * * * statutory award * * * by the number of individuals in a nationwide or statewide class." Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

Although class members under statutes such as the SCA, the Telephone Consumer Protection Act (TCPA), and the Fair Credit Reporting Act (FCRA) often sustain minimal actual injuries, statutory damages multiplied by classes numbering in the millions can produce astronomical potential liability. See, *e.g.*, *Trans Union LLC* v. *FTC*, 536 U.S. 915, 915 (2002) (Kennedy, J., dissenting from denial of certiorari) ("[b]ecause the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion"); *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708, 710 (9th Cir. 2010) (reversing denial of class certification of FCRA claim seeking $290 million although the plaintiff "did not allege any actual harm," because the court found that outcome comported with legislative intent); *Beaudry* v. *TeleCheck Services, Inc.*, 579 F.3d 702, 703-04 (6th Cir. 2009) (FCRA, total liability in the billions); *Murray* v. *GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) (FCRA, $1.2 billion); *Golan* v. *Veritas Entertainment, LLC*, 2017 WL 3923162, at *4 (E.D. Mo. Sept. 7, 2017) (TCPA, $1.6 billion).

Cy pres settlements provide a necessary means to compromise risks of this magnitude when other factors—such as little actual injury, weak merits, unsettled law, legal hurdles to class certification—

combine to give the claims a low overall value per class member.

4. *Permitting* cy pres *settlements allows efficient resolution of low-value cases under the uncertainties of actual class-action practice.*

In maintaining that the availability of *cy pres* settlements incentivizes the filing of low-value class actions, petitioners seem to assume that defendants can count on defeating those actions at an early stage. See Pet. Br. 52-54.

That is not the world that class-action defendants inhabit. See Chamber of Commerce Br. 11-15 (collecting examples of courts circumventing commonality and predominance and presuming classwide injury). The uncertainties of lower court class certification jurisprudence may permit unascertainable classes asserting *de minimis* injury under individualized circumstances to progress to class certification and beyond. See *ibid.*; see also pp. 32-33, *supra*. And the aggregation of thousands or millions of individualized low-value claims, however erroneous, imposes settlement pressure even on defendants who, like Google, vigorously contest meritless lawsuits.

Although "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring), this Court's grant of certiorari in *Tyson Foods* reflected the circuits' differing approaches to the question "whether a class may be certified if it contains 'members who were not injured and have no legal right to any damages." *Id.* at 1049 (Court op.)

(quoting petition and noting that petitioner abandoned argument); see Chamber of Commerce Br. 6-11, 14-15.

Moreover, defendants cannot count on the courts of appeals to correct an erroneous class certification decision. Less than 25 percent of Rule 23(f) petitions are granted. Balser et al., *Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource*, Bureau of National Affairs (Mar. 16, 2017), https://bit.ly/2KvePFW. The grant rate in the Ninth Circuit is even lower—19%. Beisner et al., *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014), https://bit.ly/2ngUfQC.

Error and uncertainty in the class certification jurisprudence of the lower federal courts are not the only source of low-value, large-class lawsuits where the costs of making cash payments may far outweigh the payments themselves. The same issue would arise if a class asserted a sound legal theory and an economic injury—but one, say, of 40 cents per class member. If the class members had accounts with the defendant, payment might be inexpensive and thus feasible. But if the action arose in an industry where customers or users were unknown to the defendant, the cost of collecting and verifying identity and payment information, and making the payments, would exceed the actual injury many times over.

Under these circumstances, rather than curtailing low-value, large-class lawsuits, eliminating *cy pres* would drive up their settlement value, because settlement funds would have to be large enough to be distributable—especially in light of the administrative costs of directly distributing small amounts of money to a class whose members

could not be identified until the claims process. Without a *cy pres* option, a class-action defendant either would have to pay these increased amounts, or litigate through class certification, summary judgment, or both—at every turn spending vast amounts of attorneys' fees and risking an adverse legal ruling. Petitioners' scheme would shift more money to claims administrators and away from *any* benefit to the class.

On the other side of the ledger, no plaintiffs' lawyers will be discouraged by a legal rule impeding defendants from efficiently compromising these cases. The allure of a class-wide payday is too great; plaintiffs' counsel don't file lawsuits that they assess at the outset as unlikely to pay off. Driving up the costs of settlement will only give plaintiffs more leverage to extract excessive settlements.

5. *Both lower courts correctly found that it was not feasible to distribute the settlement fund in this case.*

Petitioners do not seriously dispute that it would be infeasible to distribute the concededly adequate settlement fund in this case to more than a tiny subset of the class members. Instead, they attack a caricature of the decision below, claiming that it adopted a new rule that "it is not considered 'feasible' to provide any compensation to class members when it would be infeasible to compensate *all of them*." Pet. Br. 49. But the Ninth Circuit said no such thing. It pointed out the "4 cents in recovery" per class member to highlight the "dramatic" "gap" between the settlement fund and the size of the class. Pet. App. 9. And it upheld the district court's finding "that the cost of verifying and 'sending out very small payments to millions of class members would exceed

the total monetary benefit obtained by the class.'" *Ibid.*[12]

Petitioners simply disagree with the factual finding of both lower courts that the $5.3 million settlement fund was not feasibly distributable, given the large and indeterminate class. This Court's "convention" is to "not overturn a finding of fact accepted by two lower courts." *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2544 (2015) (collecting cases).

In any event, petitioners do not meaningfully dispute the district court's finding that the identity of class members could not be readily determined: "This case is somewhat unique in that the size and nature of the class renders it nearly impossible to determine exactly who may qualify as a class member." JA98. In contrast with an employee or subscriber class, in which putative class members can be readily identified from a defendant's records, here it would not be possible for Google to direct payment to those who used Google Search.

Instead, members would have to identify themselves in a claims process, with notice and distribution costs that would inevitably swallow up the settlement fund, leaving little to nothing for class members.

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[12] The government similarly accuses the court below of doing "little more than dividing the available settlement funds by the total number of class members." Gov't Br. 28. As we explain, the Ninth Circuit in fact appropriately upheld the district court's considered finding that paying out the settlement fund was not feasible.

The district court expressly considered this point as well, finding that any claims process, which would necessarily involve "proofs of claim," "would impose a significant burden to distribute, review and then verify." JA95-96. The court further found that, given these circumstances, "the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class." JA96. And that imbalance of costs and benefits remains even if the "millions of class members" receiving payments amount to far less than the full 129 million. This finding is appropriate in light of the district court's experience and the cases noting high claims administration costs in similar circumstances. See pp. 33-35, *supra*.

Petitioners have offered no contrary evidence that would cast any doubt on the district court's findings. See Pet. App. 58. Instead, they assert that if the claims rate is tiny enough, then direct distribution to at least a handful of class members must be possible. But for the reasons discussed above (at 36-38), that cannot be the standard: If direct distributions work only by excluding the overwhelming majority of class members, then a *cy pres* alternative is better.

Finally, the district court's findings are especially appropriate in light of the absence of concrete injury and the questionable merit of the claims in this case. As the district court held, plaintiffs alleged no actual injury or risk of any such injury in the future. JA26-27. Specifically, plaintiffs could not allege any facts showing that they suffered (or imminently would suffer) any actual harm resulting from the inclusion of their search queries

as part of a referrer header sent to the destination webpages they selected from Google's search results page. They alleged neither economic loss nor other injury of any kind. And they did not allege that a single person was even identified, let alone linked with any private information, by any recipient of a referrer header or anyone else.

As the government points out (Br. 11-15), under current law, plaintiffs' Article III standing is doubtful at best. At the time of the settlement, this Court had not yet decided *Spokeo*, which abrogated Ninth Circuit precedent finding standing whenever a violation of a federal statute was alleged. The last district court opinion in this case (JA23-31) suggests that the case would have been dismissed had *Spokeo* been controlling law; our obligation to support the settlement constrains our ability to discuss this matter further. Most pertinent here is that parties should be able to compromise standing disputes when the answer is not clear under governing law at the time of the settlement. "The policy favoring compromise of disputed claims is clearest, perhaps, where a claim is surrendered at a time when it is uncertain whether it is valid." Restatement (Second) of Contracts § 74 cmt. b.

The district court further recognized the "significant and potentially case-ending weakness in the SCA claim brought about by the Ninth Circuit's decision in *Zynga Privacy Litigation*." Pet. App. 58-59.

Under these circumstances, petitioners' concerns about undercompensation of class members are hypothetical. Any distributable award to a minuscule percentage of the class would have been a windfall. And even if that windfall were authorized by

Congress' creation of a statutory damages remedy and the resulting potential exposure to defendants, petitioners' suggestion that the parties "share that windfall with the class" (Pet. Br. 41) obscures their actual proposal, which is to distribute the windfall solely to a tiny percentage of self- or arbitrarily selected class members and leave the rest of the class with no benefit at all. The lower courts were right to reject petitioners' proposition that Rule 23(e) demands that result.

B. Recipients of *cy pres* funds must commit in detail to use distributed funds in a way that will benefit the class or substantial portions of it.

Every court of appeals to consider the issue has required a nexus between *cy pres* recipients and the class members' asserted injury. See, *e.g.*, *In re Lupron Marketing & Sales Practices Litig.*, 677 F.3d 21, 31-34, 38 (1st Cir. 2012) (recipients' "interests reasonably approximate those being pursued by the class") (quotation marks omitted); *Pharmaceutical Price Litigation*, 588 F.3d at 33-36 (1st Cir.) (*cy pres* funds should be "used for a charitable purpose related to the class plaintiffs' injury"); *Baby Products*, 708 F.3d at 172-73 (3d Cir.) ("used for a purpose related to the class injury"); *Klier*, 658 F.3d at 471 (5th Cir.) (fund recipient must have "a sufficient nexus to the underlying substantive objectives of the class suit"); *Mirfasihi* v. *Fleet Mortgage Corp.*, 551 F.3d 682, 684 (7th Cir. 2008) (*cy pres* distribution in privacy class action went to group "concerned with consumer privacy"); *Powell*, 119 F.3d at 707 (8th Cir.) (approving *cy pres* distribution that was "tailored * * * to reflect the parties' original intention"). To ensure that class

members benefit from *cy pres* relief, this Court should require more than a mere nexus between the general focus of a *cy pres* recipient and the concerns raised in litigation. Rather, recipients should describe in detail what they will do with the class members' money, so that the district court can evaluate whether class members in fact will benefit.

As the court of appeals in this case observed, petitioners "do not dispute that the nexus requirement is satisfied here." Pet. App. 12. While petitioners falsely imply that both the district court and the court of appeals simply rubber-stamped the parties' selection of recipients (Pet. Br. 12-15)—a contention that the Ninth Circuit described as "unfair and untrue" (Pet. App. 12)—they cannot deny that two courts have now concluded that this distribution of *cy pres* funds will provide a benefit to the class members.

Indeed, this case provides a model for a procedure that ensures compliance with an enhanced nexus requirement for *cy pres* fund recipients that focuses on benefits to class members. Petitioners do not dispute that the recipients of the *cy pres* proceeds in this case are established educational or public interest organizations with a demonstrated track record of addressing Internet privacy issues like those that gave rise to the class claims. Nor do petitioners dispute that each recipient provided a detailed proposal for the use of the *cy pres* distribution—published on the class-notice website—that the district court reviewed and compared to "an

application for a grant." JA124; see also JA53-81; pp. 7-8, *supra*.[13]

As befits the nationwide scope of the class, the six *cy pres* recipients are geographically diverse. And they proposed to tackle Internet privacy issues—especially inadvertent disclosure by consumers—from a variety of directions. Compare, *e.g.*, JA57 (Carnegie Mellon technical proposal for the "design of specific interfaces and tools that improve privacy"), with JA68-71 (AARP proposal to improve online fraud-prevention for the elderly), and JA58-61 (Stanford proposal for (1) improving mobile privacy notices; (2) analyzing online privacy legislation; (3) improving a Cookie Clearinghouse; and (4) hosting educational events about online privacy practices).

When, as here, the procedure for selecting *cy pres* fund recipients is tailored to ensure that the funds will be used to address the concerns raised by the class claims, it is simply untrue that the settlement "fail[s] to redress class members' alleged injuries." Pet. Br. 33.[14] Although the class members do not

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[13] Petitioners suggest in passing that *cy pres* impermissibly "involve[s] judges in the legislative task of grant-making." Pet. Br. 17. But that argument makes no sense in the context of the settlement of private litigation: grant-making is a legislative task only when funded by taxpayers.

[14] Petitioners make far too much out of Judge Posner's colorful statement that "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else." Pet. Br. 33 (quoting *Mirfasihi* v. *Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004)). That is true only if the recipient or funded project is not linked to the class and the issues in the litigation. The nexus requirement reflects the consistent recognition that a well-tailored *cy pres* award provides an "indirect class benefit." *BankAmerica*, 775 F.3d at 1067 (quotation marks omitted); accord, *e.g.*, *Lupron*, 677 F.3d at 33 n.7.

receive a financial payment, they did not allege a financial injury. And the *cy pres* fund recipients have submitted detailed proposals for projects that will benefit class members by addressing the very concerns raised by the class claims and have a proven track record of work in the relevant field.

Cy pres awards can fund activities that provide clearly traceable benefits to the class, such as advocacy for public or private policy changes favorable to the class, or research that may lead to changes in policy or business practices.[15] And a *cy pres* award can fund consumer education or other services related to the allegations in the suit. The AARP's proposal to educate a million elderly Internet users about protecting their personal information and avoiding fraud (see JA68-71) would surely benefit more class members than a trivial payment to a fraction of that number.

If the distribution of individual payments to class members is infeasible, funding appropriately tailored services is the next best remedy and provides a benefit to the class. There is no dispute among the parties here that courts should reject *cy pres* settlements, like the examples petitioners highlight (Br. 33-35), that stray from this next best use.

Finally, because this procedure naturally directs funds to established institutions with proven track records, and requires those institutions to provide a

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[15] See, *e.g.*, *Vecchione* v. *Wohlgemuth*, 80 F.R.D. 32, 46 (E.D. Pa. 1978) (approving *cy pres* distribution to finance a "pilot program testing the feasibility of an agency system" (in lieu of a guardianship system) that could benefit the class of mentally ill patients by providing the basis for a policy shift at the state level).

detailed explanation of how they will use the funds, it avoids the Chief Justice's concerns about *cy pres* settlements in which the defendant agrees to create a new entity in which it "would play a major role" and that "necessarily lack[s] a proven track record of promoting the objectives behind the lawsuit." *Marek*, 571 U.S. at 1003.

C. Recipients of *cy pres* funds must be sufficiently independent from the parties, their counsel, and the court.

Just as class representatives and their counsel must not have conflicts of interest that interfere with their fiduciary responsibilities to absent class members, see, *e.g.*, *Kline* v. *Wolf*, 702 F.2d 400, 403 (2d Cir. 1983) (citing *Cohen*, 337 U.S. at 549-50), *cy pres* recipients must be sufficiently independent from the settling parties and the court that their delivery of services to benefit the class will not be compromised. See, *e.g.*, *Lupron*, 677 F.3d at 36-37 (citing ALI Principles, *supra*, § 3.07). Even under the approach advanced by petitioners, a "prior affiliation" between the selected institution and one of the parties, counsel, or the court must be so "significant" that it "would raise substantial questions about whether the selection of the recipient was made on the merits." Pet. Br. 55-56 (quoting ALI Principles, *supra*, § 3.07 cmt. b).

These concerns are largely addressed through a process—like that used here—that requires a detailed description of the recipient's intended use of the funds, favors institutions with a proven track record of addressing issues in the relevant field, and includes judicial review of the institutions selected by the parties.

In addition, the parties, not the judge, should select the *cy pres* recipients. See *Lupron*, 677 F.3d at 38. That easily resolves petitioners' hypothetical concerns over "the appearance or reality of judicial conflicts of interest," Pet. Br. 37, concerns that (like so many others) are not present here. Moreover, a contrary, judge-driven approach to *cy pres* selection risks running afoul of this Court's holding that district courts' authority under Rule 23(e) "to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans* v. *Jeff D.*, 475 U.S. 717, 726 (1986); cf. *Klier*, 658 F.3d at 475-46 & n.18 (rejecting district court's *sua sponte* redirection of settlement funds to *cy pres*).

Meaningful sources of potential conflicts should be disclosed to the district court—such as each recipient's disclosure here of Google's prior donations (Pet. App. 17)—but the relationship should not operate as a bar to finding that the settlement is "fair, adequate, and reasonable" if the selected institutions will use the *cy pres* funds in a way that provides a benefit to the class.

Although there is no reasonable appearance of a conflict here, the "appearance of conflict" standard that petitioners endorse (Br. 55-56) would affirmatively harm the interest of class members because it would arbitrarily divert funds away from some of the most qualified institutions.

1. That the attorneys or the parties have made donations to an organization in the past should not alone rule out consideration of that organization for the distribution of *cy pres* funds. If the organization submits a detailed explanation of how it will use the

funds to provide a benefit to the class and can demonstrate, to the parties and the court, that it is able to use awarded funds independently and follow through on its plan, then the interests of the class are protected. Established institutions, like those selected here, with a long track record of following through on proposals and remaining independent of donors are more likely to meet this standard.

Petitioners imagine (Br. 32-33) a worst-case scenario in which the defendant simply reallocates funds it had been providing to an organization for one purpose so that the organization now funds programs designed to benefit class members. But a fair, adequate, and reasonable settlement could still result if the institution demonstrates its ability to remain independent, and the newly funded programs provide a benefit to the class distinct from the party's prior donations. Petitioners imply that this possibility should be viewed with suspicion, if not outrage, because it is too easy on the defendant. But that is of no moment in a case seeking compensation where the only question is whether the settlement provides a satisfactory remedy for the class. Indeed, to the extent that a defendant might view such a reallocation of funds as an easy solution, this could only *increase* the amount of money that the defendant is willing to allocate to programs that advance the interest of class members. That is good for the class.

2. Similarly, for at least two reasons, petitioners are wrong to suggest that a *cy pres* settlement is suspect if it distributes funds to an organization that the defendant has supported or that has endorsed positions favorable to the defendant. Pet. Br. 31-33. First, established nonprofit organizations have

mechanisms for ensuring independence from donors and the parties, and district courts are capable of reviewing the policies and track records of proposed fund recipients. Second, no evidence supports petitioners' belief that an institution cannot advance the interests of the class unless it is ideologically opposed to the defendant.

In all events, petitioners' overblown rhetoric about donations to "preferred allies" (Pet. Br. 19) ignores the available evidence. As the court below detailed, "some of the recipient organizations have challenged Google's Internet privacy policies in the past." Pet. App. 16. Most notably, the Stanford Center for Internet and Society and the World Privacy Forum—two of the recipients here—pressed a Federal Trade Commission complaint against Google. See Pet. App. 16 & n.7 (collecting media accounts).

More generally, a settlement does not involve a determination that the defendant's conduct was improper. The measure of a fair, adequate, and reasonable *cy pres* settlement is not whether the fund recipient will oppose the defendant, but whether it will address the concerns raised by the class claims.

3. Finally, petitioners focus heavily on the *alma mater* relationship between some *cy pres* recipients and counsel for the parties. *E.g.*, Pet. Br. 1, 29, 54-56. But it should come as no surprise that the academic institutions at the forefront of Internet privacy issues also graduate in the aggregate thousands of attorneys each year, some of whom go on to practice class-action litigation. Petitioners "have never disputed that class counsel have no ongoing or recent relationships with their *alma maters* and have no

affiliations with the specific research centers." Pet. App. 19. Instead, they insist that "counsel's receipt of a degree from one of these schools taints the settlement"—a position the Ninth Circuit rightly concluded "can't be entertained with a straight face." *Ibid.* And while it appears to raise petitioners' pique that an attorney may derive personal satisfaction from a *cy pres* award to his or her *alma mater* (Pet. Br. 29-30), the attorney's feelings are irrelevant to the interests of the class if the class is benefited by institution's use of the funds. The inflexibility of petitioners' proposed rule would deprive class members of the services of organizations that are best suited to advance their interests.

D. Any concerns with misaligned incentives can be addressed by providing guidance on attorneys' fees.

A *cy pres* award that satisfies each of the three conditions above avoids the abuses petitioners lament. But if this Court remains concerned about misaligned incentives of class counsel, it should provide additional guidance to the lower courts about awards of attorneys' fees in class actions.[16] The analysis of attorneys' fees in class settlements required by new Rule 23(e)(2)(C)(iii) provides an opportunity for this Court to offer that guidance.

Petitioners' proposal to value *cy pres* "at zero" or at a "heavily discounted" rate (Pet. Br. 56-57), however, would materially impede settlements in the

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[16] Any reduction in an award of attorneys' fees will not affect Google's obligations under the settlement or the validity of the settlement itself. See, *e.g.*, Pet. App. 92-93. Nor would a change in fees affect the feasibility of distribution to class members; this is not a close case.

rare cases where *cy pres* relief is most appropriate. And it ignores the benefits to the class from a properly tailored *cy pres* award. Benefits are benefits, whether cash or noncash.

Moreover, the skewed incentives arising from class-action attorneys' fees awards are endemic to class actions generally. Any holding that constrains class-action attorneys' fees should apply to all class actions, not *cy pres* settlements in isolation.

Rather than carve out a separate scheme for attorneys' fees in *cy pres* cases, more meaningful reforms would tie fee awards to a lodestar value of the hourly services rendered rather than automatically awarding 25% to 40% of multi-million-dollar recoveries irrespective of the amount of legal work the plaintiffs' attorneys had performed. The hourly lodestar measure is the presumptive basis for attorneys' fees under the civil rights laws. See *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 546, 553-54, 556 (2010) ("reject[ing] the suggestion that it is appropriate to grant performance enhancements on the ground that departures from hourly billing are becoming more common"). And a lodestar-based fee, with any appropriate multiplier, would provide a sufficient incentive to bring meritorious cases. See *id.* at 552.

Limits of this kind are appropriate for the additional reason that, unlike individual plaintiffs, absent class members have no opportunity to negotiate a fee agreement giving up large portions of their potential benefit from the lawsuit. Awarding lodestar fees—with multipliers based on risk, difficulty, and results (both aggregate and per class member)—would produce more just fee awards while reducing incentives to file meritless class actions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2018

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-961

THEODORE H. FRANK, *et al.*,

Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' JOINT MOTION FOR DIVIDED ARGUMENT

Pursuant to Rule 28.4 of the Rules of this Court, respondent Paloma Gaos, individually and on behalf of all others similarly situated (the "class respondents"), and respondent Google LLC respectfully move for divided argument in this case. Respondents propose that, of the total argument time allotted to respondents, approximately half be allotted to class respondents and half be allotted to respondent Google. As a result, granting this motion will not require the Court to enlarge the total amount of time for argument. All parties consent.

This case concerns the circumstances in which Federal Rule of Civil Procedure 23 permits "*cy pres*" distributions of class-action settlement proceeds—*i.e.*, distributions of settlement funds to third parties to perform work that benefits class members. Gaos

brought a putative class action against Google, alleging that Google's disclosure of users' search terms to third parties through HTML "referrer headers," without user consent, violated the Stored Communications Act, 18 U.S.C. §§2701, *et seq.* After years of litigation and extensive negotiations, the parties entered a settlement agreement. Under that agreement, Google was obligated to make new disclosures to inform users of Google's referrer-header practices to ensure that such data was shared with user consent.

Google also agreed to pay $8.5 million. The class, however, was extraordinarily large—estimated at over 100 million persons—compared to the settlement amount. The district court found that distribution of funds to class members was not feasible, as administration and distribution costs would dwarf any sums distributed. The parties agreed that the funds would be distributed to six organizations working in the field of internet privacy that could use the money to remedy the types of practices that prompted the lawsuit. Five class members, including the petitioners here, objected to the settlement; the petitioners did not object to the amount of the settlement, but only to its distribution. After a hearing, the district court certified a settlement class under Rule 23(b)(3), and found that the settlement was "fair, reasonable, and adequate" for purposes of Rule 23(e). The court of appeals affirmed. This Court granted certiorari to review that decision.

Respondents believe that the Court would best be assisted by hearing from both respondents—the plaintiff class and the defendant Google—at oral argument. The plaintiff class and defendant Google do share an interest in defending the settlement they agreed to below. But they are opposing parties in this litigation. They are represented by separate counsel; Jeffrey Lamken of MoloLamken LLP would argue for the class re-

spondents, while Donald Falk of Mayer Brown LLP would argue for Google. And, importantly, they have different—and in some instances opposing—perspectives and interests.

For example, Google is almost always a defendant in class-action litigation; its position reflects defense perspectives. See, *e.g.*, Google Br. 31 (emphasizing the utility of *cy pres* settlements because they allow defendants to efficiently dispose of certain cases). By contrast, the class brings a plaintiff's perspective. See, *e.g.*, Class Br. 26 (emphasizing benefits to plaintiff class compared to alternatives, as well as value of deterring misconduct). Similarly, Google is better positioned to address some of petitioners' contentions (*e.g.*, that defendants use *cy pres* to "benefit themselves," Pet. Br. 30-33), while other contentions are more appropriately addressed by the class respondents (*e.g.*, that "class counsel" use *cy pres* "to self-deal at the expense of their clients," *id.* at 20-21); compare also *id.* at 32-33 (challenging Google's connection to *cy pres* recipients), with *id.* at 54-56 (challenging class counsel's connections to *cy pres* recipients).

Most important, the interests of the plaintiff class and defendant Google appear to diverge dramatically on some issues. Attorney's fees is one example. Contrast Google Br. 55 (suggesting Court can address attorney's fee issues and could remand the fee award for reduction), with Class Br. 40 (urging that fee issues were waived below and are beyond the question presented). Critically, their positions on class-member standing, an issue raised by the United States (U.S. Br. 13-15), are divergent as well. Google deems the class members' standing "doubtful at best," but states that its "obligation to support the settlement constrains [its] ability to discuss this matter further." Google Br. 46. The

class respondents, by contrast, are prepared to defend class members' standing as necessary. Class Br. 54-56. Divided argument will allow the Court to explore these and other issues with counsel for the party best positioned to address them, while also affording the Court the differing perspectives that plaintiffs and defendants offer.

Accordingly, respondents respectfully request that the motion for divided argument be granted. This Court has granted similar motions in the past. See, *e.g.*, *Adoptive Couple* v. *Baby Girl*, 569 U.S. 902 (2013); *FCC* v. *Fox Television Stations, Inc.*, No. 10-1293, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/10-1293.htm (Order dated Nov. 22, 2011); *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 558 U.S. 1010 (2009). If the Solicitor General is granted 5 minutes of respondents' argument time, respondents propose dividing the remaining 25 minutes so that 13 minutes are allocated to Mr. Lamken as counsel for the plaintiff class, and 12 minutes are allocated to Mr. Falk as counsel for defendant Google (or any other allocation of time the Court deems appropriate). Otherwise, they propose dividing the time for respondents evenly. Petitioners have consented to this motion. The United States, amicus curiae, has no objection either.

Respectfully submitted.

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September 5, 2018

No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners.

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET. AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF FORMER PROFESSOR ROY A. KATRIEL FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE* AND FOR DIVIDED ARGUMENT

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Former Professor Roy A. Katriel respectfully seeks leave to participate in oral argument under Rule 28.7, as *amicus curiae* in support of neither party, for 10 minutes (or such other time as the Court deems proper) in addition to the time allocated to the parties. Granting this motion would materially assist the Court by providing adversary presentation of a significant jurisdictional issue that the parties have not addressed and on which they are likely to agree. Both petitioners and respondents oppose the relief requested.

1. As described in *amicus'* brief, there is a significant question whether this Court has Article III jurisdiction to hear this case.[1] Petitioners rely only on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), to assert that "[a]s class members who objected to the settlement, petitioners have standing to appeal the final judgment." Pet. Br. at 3 (citing *Devlin*). *Devlin*, however, does not support petitioners' appellate standing. Unlike this Rule 23(b)(3) case, *Devlin* involved an appeal of a mandatory class settlement certified and approved under Federal Rule of Civil Procedure 23(b)(1), and in which absent class members were not provided an opportunity to opt out of the proposed settlement. *Devlin* underscored the significance of this feature, noting that "in light of the fact that petitioner had no ability to opt out of the settlement, *see* Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds

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[1] In opposing *amicus'* request for leave to participate in oral argument, counsel for petitioners maintained that *amicus'* brief was misrepresented to be in support of neither party when, in fact, it supports respondents. This is not so. *Amicus* takes no position on the question presented in the petition-to what extent may *cy pres* class settlements be approved under Federal Rule of Civil Procedure 23. *Amicus'* sole interest is in the federal courts' appellate jurisdiction under Article III of the Constitution.

unacceptable and that a reviewing court might find legally inadequate." *Devlin*, 536 U.S. at 10–11. Here, however, the binding effect of the class settlement on petitioners results not from the mandatory terms of Rule 23(b)(1) (as in *Devlin*), but from petitioners' election to remain in a proposed settlement after reviewing its terms and being given a choice to remain in the settlement or avoid it. Petitioners' independent election to remain in the proposed settlement presented for approval to the district court cuts off the requisite causation element of Article III standing. Just last term, this Court held that appellate courts lack jurisdiction to review claims of individual putative class plaintiffs who voluntarily dismissed their case after their class certification motion was denied. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Justice Thomas' concurring opinion reasoned that when the *Baker* plaintiffs voluntarily dismissed their claims before the district court, "they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties thus were no longer adverse to each other on any claims, and the Court of Appeals could not "affect the[ir] rights" in any legally cognizable manner." *Id.*, at 1717 (Thomas, J., concurring). The same reasoning applies to petitioners' attempt to appeal the judgment to which they consented by electing to remain in the Rule 23(b)(3) settlement class. Whether consent to the underlying judgment is manifested by filing a notice of voluntary dismissal (as in *Baker*) or by failing to exclude oneself from a proposed Rule 23(b)(3) settlement class (as here) should not matter. The Article III appellate standing inquiry is the same. In each instance, the party who

consented to the entry of judgment lacks Article III standing to appeal because entry of the judgment that binds that party is traceable to that party's own action.

2. This Court must address this threshold jurisdictional question of appellate standing under Article III before proceeding to the merits of the petition. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). When the Court addresses that threshold Article III question, it will likely find the parties in agreement. Petitioners invoked *Devlin* before both the Ninth Circuit and this Court to support their Article III standing to appeal the district court's approval of the class settlement. *See In re Google Referrer Header Privacy Litig.*, No. 15-15858, 2015 WL 5211307, at *1 (9th Cir. Sept. 4, 2015) (objector-appellants' opening Ninth Circuit brief); Pet. Br. at 3. Neither respondent challenged petitioners' reliance on *Devlin* or addressed the arguments raised in *amicus'* brief.[2]

3. This Court has never addressed whether *Devlin* extends to objectors who had an opportunity to opt out of a proposed class settlement but elected to remain in the settlement class. Federal courts of appeal that have addressed the elements of Article III standing have allowed for the possibility that *Devlin* may not apply to Rule 23(b)(3) or other non-mandatory settlement classes where an opportunity to opt out exists. *See, e.g., In re AAL High Yield Bond Fund, L.L.P. v. Deloitte & Touche,, L.L.P.,*

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[2] The Solicitor General raises a separate question whether, following *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1548 (2016), plaintiffs satisfied the injury-in-fact requirement of Article III standing to maintain their action before the district court. *See* Brief for the United States as *Amicus Curiae* Supporting Neither Party, at 11-15. That question, which is addressed by respondents' briefs, deals with the separate issue of the plaintiffs' standing to maintain their action before the district court, as opposed to the question of the appellate standing of objectors who seek to appeal the approval of a Rule 23(b)(3) class settlement they elected to join.

361 F.3d 1305, 1310, n.7 (11th Cir. 2004) (noting that the inability to opt out from the Rule 23(b)(1) settlement class is a "feature of *Devlin* [that] has led at least one court to believe that it applies only to mandatory class actions"); *In re General American Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002) ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin's* holding applies to opt-out class actions certified under Rule 23(b)(3)."). Other federal courts of appeal have expressed the opposite view, although their reasoning has been grounded mainly on whether objectors are to be accorded "party" status as opposed to analyzing whether objectors who voluntarily join a class settlement meet all the requirements of Article III standing. *See, e.g., Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) (objector to a Rule 23(b)(3) class settlement had standing to appeal under *Devlin* because such an objector "is nonetheless a 'party' for the purpose of appealing the district court's approval of the . . . class action settlement"); *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 572 (9th Cir. 2004) (reasoning that *Devlin* extends appellate standing even to objectors to a Rule 23(b)(3) class because "the *Devlin* Court made clear that objectors should be considered parties"). Highlighting the disagreement among the federal courts of appeal, the Seventh Circuit has even summarily noted without analysis that any argument against extending *Devlin* to objectors seeking to appeal a Rule 23(b)(3) class settlement is "frivolous." *See Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014).

4. The Court has regularly appointed an *amicus* to argue in support of a significant jurisdictional position that neither party advances. *See, e.g., United States*

v. Windsor, 133 S. Ct. 2675, 2685 (2013); *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 155-56 (2013); *NFIB v. Sebelius*, 567 U.S. 519, 543-46 (2012); *Kucana v. Holder*, 558 U.S. 233, 243-49 (2010); *Forney v. Apfel*, 524 U.S. 266, 268, 272 (1998); *Cheng Fan Kwok v. INS*, 392 U.S. 206, 207-08, 210 n.9 (1968). More broadly, the Court has also granted leave to private *amici* to participate in oral argument when doing so promises to enhance this Court's consideration of the issues. *See, e.g.*, *Dalmazzi v. United States*, 138 S. Ct. 576 (2018); *Pacific Bell. Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 447 (2009); *Alabama v. Shelton*, 535 U.S. 654, 660-61 (2002); *Hohn v. United States*, 524 U.S. 236, 240-41 (1998).

Amicus understands that leave is rarely granted, as the Court can usually rely on the parties' presentation of the issues. Here, however, the parties agree on, and fail to present, a vital jurisdictional question, with implications for the correct interpretation of Article III in the recurring context of appeals of Rule 23(b)(3) class settlements. *Amicus* respectfully submits that, under these circumstances, the Court would benefit from adversarial oral argument.

Dated: September 3, 2018

Respectfully submitted,

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No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' OPPOSITION TO ROY A. KATRIEL'S MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE* AND FOR DIVIDED ARGUMENT

As Supreme Court Rule 21.4 permits, Petitioners Theodore H. Frank and Melissa Ann Holyoak oppose the motion of Roy A. Katriel for leave to participate in oral argument as *amicus curiae* and for divided argument. Katriel's *amicus* brief in fact supports the respondents, but his idiosyncratic argument to deny class-action-settlement objectors appellate standing was not advanced by either respondent because it is frivolous. As such, Katriel's participation would not assist the Court.

1. Katriel asserts that he is "*amicus curiae* in support of neither party." But he seeks to argue that no objector to a Rule 23(b)(3) settlement has constitutional standing to appeal a district court's approval of a class-action settlement overruling his or her objection. This unprecedented position would preclude appellate judicial

review of any opt-out class-action settlement, and is thus actually in support of respondents and their settlement. Petitioners therefore object to any designation of Katriel as arguing "in support of neither party." Katriel's brief cover calls himself a "former professor," but his argument would support his current work as a class-action litigator, where he has previously sought, by artificially depressing the number of claims and capping payouts to individual class members, to divert millions of dollars of his clients' money to *cy pres* for another *amicus*, the American Bar Association, through *cy pres*. *Park v. Thomson Corp.*, No. 05-cv-2931, 2008 WL 4684232, at *1–*2 (S.D.N.Y. Oct. 22, 2008). While the *Park* district court rejected Katriel's breach of fiduciary duty to his class clients, the Ninth Circuit's standard in this case would affirm a district court's decision to disregard "possible" alternatives that actually pay the class. Pet. App. 9.

2. If Katriel's position, which no appellate court has adopted, had even far-fetched merit, respondents would have every incentive to raise the argument and shield their settlement from this Court's review. *E.g.*, Gaos Merits Br. 54–56 (seeking dismissal of writ as improvidently granted). But in nearly 30,000 words, respondents ignore it. For good reason. Katriel's argument is "frivolous." *Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014) (Posner, J.); *Poertner v. Gillette Co.*, 618 Fed. Appx. 624, 627–28 (11th Cir. 2015). Katriel's *amicus* brief mentions neither *Eubank* nor *Poertner*, and he only belatedly acknowledges *Eubank* in his motion after Petitioners pointed out his *amicus* brief's omissions in informing him that they would oppose his motion for oral argument.

3. The Katriel *amicus* brief and motion have similar glaring omissions when they imagine a non-existent circuit split on the applicability of *Devlin v. Scardelletti*, 536 U.S. 1 (2002), to Rule 23(b)(3) actions. Katriel Br. 21–22; Katriel Mot. ¶ 3. In reality, every federal court of appeals to rule on the question has applied *Devlin* to (b)(3) actions. *Eubank*, 753 F.3d at 729; *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 39–40 (1st Cir. 2009); *Fidel v. Farley*, 534 F.3d 508, 512–13 (6th Cir. 2008); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 572–73 (9th Cir. 2004); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1257 (10th Cir. 2004); *cf. also Farber v. Crestwood Midstream Partners L.P.*, 863 F.3d 410 (5th Cir. 2017) (narrowing scope of *Devlin* to reject jurisdiction over appeal of objector who objected to Rule 23(b)(3) settlement late, while assuming court would have had jurisdiction over a timely objection). And, contrary to Katriel's claims, the Eighth and Eleventh Circuits have not hesitated to find jurisdiction to rule on the appeals of settlement approvals by Rule 23(b)(3) objectors in more recent decisions a decade after their dicta musing about the scope of *Devlin*. *E.g.*, *Poertner*, *supra*; *compare also In re Target Data Breach Liab. Litig.*, 847 F.3d 608 (8th Cir. 2017) *with In re Target Data Breach Liab. Litig.*, No. 15-3915 (8th Cir. Jan. 26, 2016) (dismissing appeal upon finding that appellant was not a class member). There is no split among the federal circuit courts of appeal.

4. These courts hew faithfully to *Devlin*. While *Devlin* mentioned a mandatory class as a "particular[]" reason to permit appellate standing, it was only one of several reasons given by the Court for its ruling, and the others are equally

applicable to (b)(3) actions. *Devlin*, 536 U.S. at 11, 6–14. Devlin's animating principle is that absent class members have a justiciable stake by virtue of having their claims released as part of the settlement. *Id.* at 6–7. Regardless of whether class members are given the opportunity to opt out, releases in mandatory and non-mandatory settlements operate the same way, binding class members, extinguishing their rights of action. Releasing such claims notwithstanding a class member's disapproval, as expressed through objection, constitutes an injury-in-fact. "It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Id.* at 10. Objector appeals simply "do[] not implicate" any concerns of Article III standing. *Id.* at 6; *accord In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 555 (7th Cir. 2017) (Sykes, J.).

5. Indeed, even before *Devlin*, no appellate court ever hinted at Katriel's position that intervention would not save the appellate standing of an objector; not even the *Devlin* dissenters suggested that. "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *In re Navigant Consulting, Inc., Sec. Litig.*, 275 F.3d 616, 620 (7th Cir. 2001) (Easterbrook, J.).

6. Katriel's theory that objectors have engaged in a "voluntary election" to participate in a settlement and thus have no injury is simply a misstatement of law. Rule 23 is an opt-out device, unlike, for example, the collective action mechanism of the Fair Labor and Standards Act (29 U.S.C. § 216(b)), so no such election exists.

Class members are joined without any voluntary action. Inaction in response to an opt-out opportunity does not equate to consent. *Oxford Health Plans LLC, v. Sutter*, 569 U.S. 564, 574–75 (2013) (Alito, J., concurring).

7. Moreover, even if Katriel's characterization of a Rule 23(b)(3) objector as voluntarily electing to participate in a settlement were accurate, it would not necessarily deprive the objector of standing under this Court's precedents. Katriel's *amicus* brief neglects to discuss the unanimous *Havens Realty v. Coleman*, 455 U.S. 363 (1982). *See generally* 13A Charles A. Wright, et. al, *Federal Practice and Procedure* § 3531.5 (2018) (discussing doctrine of "self-inflicted" injuries).

8. Katriel's argument further contradicts without discussing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985), which holds that "minimal procedural due process protection" requires that absent class members must have "an opportunity to be heard" in objection to a settlement in *addition* to the opportunity to opt out. But under Katriel's theory, class-member objectors to an opt-out settlement have no Article III standing to challenge it because of their "voluntary election" not to opt out, and thus there would never be "an opportunity to be heard." To state the proposition is to refute it.

9. Katriel's question of Article III standing of objectors, if presented conventionally to the Court in a petition for a writ of *certiorari*, would have no chance of success, even if it were more forthright than Katriel's briefing has been to date. Supreme Court Rule 10. The natural conclusion is that there is no need to hold argument in a *different* case on the collateral question when Katriel would have no

chance of getting a hearing if the question were squarely presented in a *certiorari* petition. And it certainly does not present the "exceptional circumstance" permitting such an argument to come over the objection of all of the parties to the case. Supreme Court Rule 28.7.

10. The two sets of respondents have moved to divide argument time; in addition, the solicitor general seeks divided argument to argue on behalf of neither side. Petitioner has consented to these requests. It would not be helpful to the Court to have a fifth arguing attorney, whose *amicus* brief fails to mention, much less discuss or grapple with, the most relevant precedents; and who seeks to argue an idiosyncratic position no party in this case, no court, no dissenting Supreme Court justice, and no academic law-review article has ever taken.

For these reasons, Katriel's motion should be denied.

September 7, 2018

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IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents do not deny that *cy pres* is an inferior form of relief for class members (Google Br. 30; Gaos Br. 31) and one of many ways class attorneys can capture the lion's share of settlement proceeds. Affirmance here would encourage future litigants to shortchange class members with this inferior relief. The Ninth Circuit's idiosyncratic "feasibility" standard permits even $100 million class distributions to go instead entirely to pet charities. Pet. Br. 50–51. Faced with these indefensible consequences, respondents instead attempt to relitigate the certiorari grant or argue that the Court lacks authority to clarify standards to police class-action abuses. The Court does.

Rule 23(e) requires settlements to be "fair" and "reasonable." That provides textual basis for petitioners' proportionality rule: a settlement that compromises a class's claims, but seeks to pay class attorneys an amount disproportionate to the actual and direct class benefit, is not fair or reasonable under Rule 23(e). Pet. Br. 39. Respondents conflate "adequacy" with these other two Rule 23(e) requirements, but never dispute that class-action settlements incentivize illusory class relief to maximize attorneys' fees and minimize defendants' expenses. *Id.* at 22–28. Some appellate courts interpret Rule 23(e) to require economically realistic settlement review that sees through fictional relief, aligning class attorneys' incentives with the class's interests. Others do not, allowing attorneys to capture the majority of settlement value. *Id.* at 27. There is no reason to prefer the latter view to the former, especially when both respondents concede class attorneys' fiduciary duty to the class.

Gaos derides (Br. 2) petitioners' brief as "dissertation" and "anecdotes" but petitioners are simply giving examples of how settling parties undisputedly respond to differing incentives when legal rules do or do not protect absent class members. Gaos and *amici* point (*e.g.*, Gaos Br. 44) to petitioners' previous victories against abusive *cy pres* to argue the status quo works. But Gaos concludes that such previous success justifies an affirmance here that would both reject the grounds petitioners won on and preclude future successful objections. This is both ironic and self-refuting. Respondents never gainsay *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), though the Ninth Circuit's rule (and Gaos's proposed extension of *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980)) would have required affirmance in *Pearson*. Why shouldn't, as a matter of policy, this Court agree with *Pearson* and interpret Rule 23's text to require protection of absent class members? Crickets.

Gaos submits (Br. 22–23, 40, 49, 54) that "petitioners never claim[] that" plaintiffs' counsel here "s[old] their clients out" in an "adequate" settlement. This is wrong: selling out the class can occur even where the total settlement value is adequate, if class attorneys have not *fairly* allocated the sums between the class, third parties, and themselves. This happened in other cases petitioners discuss—and it happened here. Pet. Br. 33–34, 40, 42 (describing *In re Citigroup Sec. Litig.*, 199 F. Supp. 3d 845 (S.D.N.Y. 2016);[1] *Pearson*, 772 F.3d 778; and *In re Baby Prods.*

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[1] Gaos insinuates (Br. 47) that objector Frank was unwilling to prosecute his *Citigroup* appeal. Not so. After Frank filed his opening brief in Appeal No. 16-2850, class counsel confessed error and stipulated to vacate the appealed ruling. *In re Citigroup Sec. Litig.*, 2017 WL 3842601, at *2 (S.D.N.Y. Sept. 1, 2017).

Antitrust Litig., 708 F.3d 163 (3d Cir. 2013)). Class counsel negotiated a greater-than-lodestar $2.1 million for themselves, and nothing—*gornisht!*—for absent class members. They justify that allocation with illusory relief that treats class members worse than opt-outs, including funneling money to class counsels' *alma maters*. The record contains no evidence that it is infeasible to offer direct relief to class members and distribute the settlement fund to those class members that would submit a claim for relief. Pet. Br. 10–11, 52; Pet. App. 120–123.

Such self-dealing need not come from "collusion." *Compare* U.S. Br. 19–20 *with* Pet. Br. 27–28. It is a natural result of the perverse incentives *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), created and the Ninth Circuit re-affirmed here. Class attorneys' undisputed ability to structure a settlement to maximize their own fees at the class's expense makes this a question of Rule 23(e) settlement *fairness*, not merely one of Rule 23(h) reasonable fees. *Accord* U.S. Br. 29. Gaos conflates the two questions and treats their inquiries as identical when they are not because Rule 23(e) fairness should look at the *allocation* of a compromised claim. Pet. Br. 20–28. Class counsel here *compromised* the class's claims for no direct payment except to themselves and the named plaintiffs. That disproportionate allocation is fundamentally unfair and unreasonable under Rule 23(e), even if the underlying lawsuit is so weak that the settlement's total amount is "adequate." Pet. Br. 41.

Petitioners' proposed proportionality rule cuts the Gordian knot, appropriately aligns class attorneys' interests with the class's, and prevents the whack-a-mole evasion that a narrower clarification of Rule 23 limiting *cy pres* settlements would occasion (Pet. Br.

48). This Court should interpret Rule 23(e) to adopt it.

ARGUMENT

I. A proportionality rule is essential to give Rule 23(e)'s "fair" and "reasonable" requirements meaning.

A. This Court should resolve the circuit split over the meaning of "fair" and "reasonable" "with the interests of absent class members in close view."

1. Petitioners' proposed proportionality rule is not "atextual" (Gaos Br. 3; Google Br. 24–27): Rule 23(e)(2) requires settlements to be "fair" and "reasonable," *beyond* the "adequate" requirement that respondents repeatedly emphasize. Such "broadly-framed" "generality" in language "leave[s] the courts ... free to perform their historic role of formulating more definite standards within the general mandate." Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislatures Who Won't*, 63 COLUM. L. REV. 787, 792 (1963).

Broad language in Rule 23 has not prevented this Court from pronouncing what the law is without additional congressional guidance. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–65 (2011) (Rule 23(b)(2) "final injunctive relief" that is "appropriate respecting the class as a whole"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (Rule 23(a)(4) "adequate representation"); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) (Rule 23(d)'s "appropriate orders"). Rule 23 should be "applied with the interests of absent class members in close view." *Amchem*, 521 U.S. at 629. The Court can provide the clarification petitioners seek.

2. Google finds it "telling[]" (Br. 25) that amendments to Rule 23 have not curtailed *cy pres*. But the Rules Committee's forbearance contemplates the Judiciary's continued engagement in expounding Rule 23. It also reflected concern that a procedural rule authorizing *any cy pres* could violate the Rules Enabling Act. Civil Rules Advisory Committee, Report to the Standing Committee 25–26 (Dec. 11, 2015). And contrary to respondents' assertions, failed legislative proposals are not a basis to assume the Court cannot interpret a legal provision. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187–88 (1994). "Congressional inaction lacks persuasive significance in most circumstances." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (cleaned up). Thus, when confronted with the Sherman Act's similarly broad language, *State Oil Co. v. Khan* unanimously adopted the rule that made the most economic sense—even though "Congress ha[d] not reacted legislatively" to a decades-old precedent getting it wrong. 522 U.S. 3, 19 (1997).[2]

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[2] What is atextual is Gaos's use of ellipses to extrapolate *Amgen* to all class-action litigation when *Amgen* merely rejected an additional inquiry in class *certification* requirements for the heavily legislated area of *securities* litigation. *Compare Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 478 (2013) *with* Gaos Br. 24. Congress has not legislated extensively in the *cy pres* arena, and where it has, contrary to Gaos's claims, it expressed disapproval. For example, 28 U.S.C. § 1712(e) permits coupon distribution to third-party charities—but precludes courts awarding fees for that *cy pres*. *Compare* Gaos Br. 29. There is no reason to read Congress's silence as *authorizing* anything-goes *cy pres* resolution in the non-coupon context, as opposed to forbidding it without the legislative authorization

Here, unlike *Khan*, there are not even *stare decisis* hurdles obstructing the economically-superior proportionality rule.

3. Gaos suggests (Br. 25–26, 28) that Rule 23(e) language provides nothing more than an *ad hoc* discretionary balancing test. But a "trial court has wide discretion when, but only when, it calls the game by the right rules." *Fox v. Vice*, 563 U.S. 826, 839 (2011). To require simply that settlements be "fair" and "reasonable" under Rule 23(e) is, without further guidance from this Court, to "restate th[e] question"; "such an empty and amorphous test" would simply "leave to each and every trial court not only the implementation, but also the invention, of the applicable legal standard." *Id.* at 835–36. This Court has every reason to announce a uniform rule of construction for evaluating settlements that would deter their abuse. Contrary to respondents' assertions that existing jurisprudence satisfactorily protects class members, "current case law on the criteria for evaluating settlements is in disarray." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05 cmt. (a) (2010); *see generally* Pet. Br. 24, 27 (discussing circuit splits); Pet. 16–22 (same). And "[n]o matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997); *accord Marshall v. Deutsche Post DHL*, 2015 WL 5560541, at *1 (E.D.N.Y. Sept. 21,

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present in many state statutes. *See also* discussion at U.S. Br. 30–31.

2015). Only bright-line rules can reliably prevent abuse.[3]

Petitioners'—and the Seventh Circuit's—reading of "fair" and "reasonable" is fair and reasonable, consistent with the 2018 amendments to Rule 23(e)(2), and would resolve this case. Without a proportionality rule, many decisions have left class attorneys free to negotiate self-dealing settlements that champion their own interests ahead of the class's; respondents do not dispute that an affirmance here gives class attorneys a loophole to ensure payment to themselves with nothing to the class. *Compare* Pet. Br. 36 (discussing possibility of restructuring *Subway* settlement as *cy pres*) *with* Gaos Br. 44 (acknowledging *Subway* correctly reversed settlement approval).[4] That is not "micromanagement" of fees (Gaos Br. 54), but resolving a circuit split in favor of requiring enforcement of class attorneys' fiduciary duties, as *Amchem* commands.

4. Gaos (but not Google) asserts (Br. 24) the proportionality rule is "not properly before this Court." But a petitioner "generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Petitioners

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[3] Gaos accuses (Br. 43) petitioners of unfair attacks on the Judiciary, but Gaos simply quotes petitioners quoting the Eighth Circuit. Pet. Br. 49.

[4] Gaos incorrectly characterizes (Br. 44) *Subway* as a reversal of an "inadequate" settlement, though Frank, the appellant in that case, made the same proportionality arguments there that petitioners make here. *In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 556–57 (7th Cir. 2017); Pet. Br. 16; Opening Br. at 12, *Subway*, No. 16-1652 (7th Cir. May 3, 2016).

repeatedly argued that courts need to consider proportionality and prioritize direct relief in considering settlement fairness. Ninth Cir. Opening Br. 24–28; Ninth Cir. Reply Br. 9; Pet. App. 123–24; J.A. 118–19. Petitioners have consistently raised the claim that courts should discount attorneys' fees in *cy pres* settlements. Ninth Cir. Opening Br. 40–43; Ninth Cir. Reply Br. 22–23; Pet. App. 134–39. And the courts below both ruled upon it. Pet. App. 21–23, 60. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330–31 (2010) (cleaned up); *accord Yee*, 503 U.S. at 534. The purely legal issue of fees in *cy pres* settlements is "fairly included" in the question presented: "in what circumstances" is a *cy pres* settlement appropriate? The petition expressly argued this issue regarding the circuit split. *E.g.*, Pet. 21. And, as discussed in the next section, the *allocation* of settlement proceeds between the class, attorneys, and third parties is a fundamental Rule 23(e) issue best resolved with the proportionality rule. Pet. Br. 20–28.

B. The proportionality rule makes the most economic and policy sense.

1. As petitioners showed, the proportionality rule enhances class recovery in—rather than "encumbers"—reasonably colorable class-action litigation. *Compare* Pet. Br. 41–43 *with* Gaos Br. 24. Only meritless class actions might be "encumbered." That's a feature, not a bug. When discussing the need to encourage class actions, Gaos asserts (Br. 27) *ipse dixit* that "low-quality lawsuits most often result in costly investment for no return" and thus no further steps are needed. That does not explain how or why Gaos settled here

for an infinitesimal fraction of the statutory damages asserted (with none of it going to absent class members), yet collected a multiple of lodestar for fees. Such settlements that satisfy the class attorneys and leave the class with nothing are "untenable":

> [I]f the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny? If, however, the chance of success is materially greater than 1% ... then the failure to afford effectual relief to [absent] class member[s] makes the deal look like a sellout.

Murray v. GMAC Mortg. Corp., 434 F.3d 948, 952 (7th Cir. 2006) (Easterbrook, J.).

Amicus AAJ protests (Br. 8) that such suits provide deterrence, but the opposite is true. Meritless strike suits impose costs on the innocent, thereby reducing the marginal cost, and thus deterrence, of punishment for wrongdoing. George J. Stigler, *The Optimum Enforcement of Laws*, ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 55, 57 (1974).

2. Google suggests (Br. 43) that defendants must "efficiently compromis[e]" weak cases. But this Court has refused to allow efficiency concerns to override absent class members' rights, even when confronting the "elephantine mass of asbestos cases" that "defies customary judicial administration." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). The most "efficient" compromise (and one with full deterrent effect) would be to bribe class counsel to waive the class's claims, but courts obviously do not permit that. Pet. Br. 22. Nor should courts allow form-over-substance *cy pres* and other illusory relief as a "disguise for concealing its real character": the

economic approximation of a bribe, just with slightly greater transaction costs. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935); *see also Pearson*, 772 F.3d at 786–87.

It is not merely statutory damages that encourage meritless suits, as Google posits (Br. 39–40); the possibility of settling meritless claims with illusory relief for class members creates the same incentives. Meritless challenges over sandwiches, merger disclosures, or diapers needed no statutory-damages threat to generate lucrative fees. Pet. Br. 24, 36, 41 (discussing *Subway*; *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016); and *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013)). Respondents do not dispute that the Ninth Circuit's rule would permit abusive suits and settlements—like those thrown out in those three cases—to be profitable by converting to *cy-pres*-only settlements. Defendants there made the same arguments defending paying Danegeld that Google does now, but their predictions of endless litigation were falsified. Pet. Br. 43.

Indeed, that Google insists it would be harder for a defendant to agree to settle a case without *cy pres* proves petitioners' point that the *cy pres* is often an illusory expense to defendants. Pet. Br. 30–33. Why does Google prefer donating to organizations that largely promote its interests, rather than sending equivalent cash to class members? The question answers itself: the latter is an actual cost to Google, and the former is a shift in accounting labels of promotional business expenditures. And if Gaos and *amici* actually care about deterrence (Gaos Br. 33), rather than fees, the difference should matter to them too.

Google's argument also serves to refute Gaos's assertion (Br. 46) that class attorneys have no reason to prefer *cy pres* to class recovery. If a defendant prefers $5 million of *cy pres* to, say, paying class members $3 million, class counsel will also prefer *cy pres*, because it justifies a higher fee request under the Ninth Circuit's rule: quintessential imaginary relief to rationalize a large attorneys' fee. And this is before the nonpecuniary reasons for class attorneys to prefer *cy pres*. Pet. Br. 28–30; U.S. Br. 20. Even Gaos's argument implicitly acknowledges that affirmance would make class attorneys indifferent to their clients' recovery.

3. Google complains (Br. 47) that a claims process would reward "a tiny percentage of self- or arbitrarily selected class members and leave the rest of the class with no benefit at all," but that argument proves too much. As respondents never dispute, that description covers *every* claims-made settlement in consumer class actions; the median claims rate leaves over 99% of the class uncompensated. Pet. Br. 26–27, 50–51. But a claims process provides the possibility of direct recovery to *all* class members. That most class members are indifferent to small sums of recovery (*Pearson*, 772 F.3d at 782) does not imply, as Google asserts, that it is unfair for other class members to recover. *Compare* Google Br. 23–24, 36–37 *with* Pet. Br. 45.

Google's concern rationalizes even nine-digit all-*cy-pres* consumer settlements. The $115 million Anthem settlement had a claims rate under 2% despite direct notice. Pet. Br. 50. Google's claim (Br. 34) that petitioners' cases "involv[e] known class members, much larger settlement funds per class member, or both" is irrelevant under the Ninth Circuit's holding that

settlements of $1.80/class member are "*de minimis*" and "infeasible" to distribute. Pet. App. 9; *see also* pp. 23–24 below. Parties regularly distribute settlement funds smaller than the $8.5 million here to large indeterminate classes whose claimants self-identify. *E.g.*, *In re Packaged Ice Antitrust Litig.*, 322 F.R.D. 276, 291 (E.D. Mich. 2017) ($2 million net-fund distribution to "millions" of consumers). Even if one accepts Gaos's incorrect characterization that *cy pres* is "rare,"[5] an affirmance here will surely change that, given the incentives to prefer *cy pres* to class distribution. Pet. Br. 28–30.

Google thinks (Br. 46–47) $8 payments to 600,000 class members (in exchange for waiving millions of $10,000 statutory-damages claims) would constitute "windfalls," but *it was Google that decided to settle for $8.5 million*. Google had full control over whether to hold out for a more favorable settlement. Settlements, by definition, are compromises falling between a take-nothing judgment and the complaint's demand. Google has no response for the perverse incentive created by a rule that says class attorneys need not share settlement proceeds so long as the underlying lawsuit is weak. Pet. Br. 41. Under Google's formulation, *Subway*, *Walgreen*, and *Pampers* are wrongly decided, because those suits were even weaker than the one here. Google never mentions those cases, much less justifies the discrepancy.

4. Respondents discuss (Google Br. 33–34; Gaos Br. 32) the administrative costs of giving money to the class (as does Section II.A.2 below), but ignore the

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[5] *Compare* Gaos Br. 1 *with* Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 653 (2010).

inefficiencies and third-party administrative costs of *cy pres*. Preparing "detailed grant-like proposals" (Google Br. 2) is not costless, and the numerous charities that lost the tournament for respondents' favor also incurred that expense. (Respondents append the extra-record proposals of the successful grantees, but did not submit to any court the unsuccessful proposals for comparison, or disclose which recipients Google vetoed or why.)

And the deadweight loss is not just in the transactions costs of participating in the grant-making beauty contest. Take recipient AARP, which spends over $1.5 billion annually. AARP Form 990, Line 18 (2016). It proposed funding education about online fraud. J.A. 68. There are two possibilities: either AARP did not believe that such a program was the best use of its copious funds (in which case the program is a sub-optimal expenditure artificially created only to qualify for *cy pres*) or AARP would have funded such a program independently (in which case the *cy pres* is superfluous and merely transferring wealth to an organization far richer than most class members). Cash is fungible: in the latter case, AARP will use *cy pres* to fund something *other* than the targeted program, which would have existed anyway.

5. Gaos argues (Br. 26) against a straw-man when it suggests petitioners' proportionality rule precludes injunctive-relief settlements. It doesn't. Pet. Br. 41 n.4. The injunction *here* is worthless because

- it only requires Google to continue a practice it was concededly doing prior to settlement approval (Dkt. 66 at 4);[6]

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[6] Google has independent incentive for the disclosures, because they create a colorable defense of "authorization" to future alleged

- "Google's allegedly unlawful practice will not change as a result of this case" (Pet. App. 49); and
- most importantly, by benefiting only "future users" (Pet. App. 50), the injunction provides no marginal benefit to class members that opt-outs and other non-class-members do not receive. (The settlement class comprises only past users. Pet. App. 73.)

The injunctive relief is therefore not consideration for the waiver of the class's retrospective claims, and every absent class member would have been better off opting out. Pet. Br. 53. Gaos protests (Br. 27 n.4) that class attorneys accede to terms that effectively preclude them from advising class members to opt out, but that only confirms the breach of fiduciary duty. Gaos does not claim the Ninth Circuit found the injunction relevant in affirming settlement approval; it didn't.

6. Several *amici* argue for *cy pres* to legal-aid organizations as promoting the interests of class members in "access to justice." Even if every class member had an interest in "access to justice" (*but see* Pet. Br. 33–34 (*Citigroup* example)),[7] every class member has a

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Stored Communications Act violations. 18 U.S.C. § 2701(c)(2). Gaos does not dispute that federal law precludes awarding fees under a "catalyst" theory. Pet. Br. 47. The district court found the weakness of the injunction "weigh[ed] against a finding of fairness." J.A. 94.

[7] *Citigroup* is also an example of *cy pres* requiring class members to subsidize speech they disagree with. 199 F. Supp. 3d at 853. While petitioners do not seek a First Amendment decision, another reason to prefer petitioners' Rule 23(e) interpretation is to avoid these constitutional disputes.

perhaps greater interest in curing cancer or the national defense. What's the limiting principle, other than that lawyers know more lawyers socially than medical researchers or veterans? What is the argument for permitting this in the class-action context but still criminalizing as embezzlement the same diversion to legal aid when an attorney's client is a decadent hedonist or a tobacco executive?

C. The Ninth Circuit's decision is ahistorical.

1. Google assumes (Br. 16–21) that because class actions have equitable roots and *cy pres* is an equitable doctrine in the trust context, *cy pres* in class actions is likewise legitimate. But context matters. If a *cy pres* approach were acceptable whenever a modern lawsuit can point to equitable roots, history would be familiar with *cy pres* decrees in the framing of injunctions, or orders of specific performance, or as a common feature of constructive trust, or subrogation, or reformation. But in five volumes of POMEROY'S EQUITY JURISPRUDENCE (5th ed. 1941), *cy pres* doctrine is limited to a single, narrow application of charitable trusts, and then only to those charitable trusts where the donor's intent has been frustrated. 4 *id.* §§ 1027, 1027a. *See generally* U.S. Br. 16–17.

Class actions did not employ *cy pres* when the device transitioned from equity to law. "[W]hile the doctrine of *cy pres* has a venerable history in its original format, use of a venerable label cannot hide the practice's radical nature in the class action context." Redish, 62 FLA. L. REV. at 630. Indeed, until 1912's Equity Rule 38, class proceedings did not even bind absentees. *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363–64 (1921); *West v. Randall*, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820) (Story, J.) (noting need to reopen

cases if absent individuals objected). None of these suits used *cy pres* the way contemporary settlements do.

Google cites (Br. 20–21) *In re Hotel Telephone Charges*, but that case eschewed the proposed *cy pres* remedy, and rejected class certification. 500 F.2d 86, 91–92 (9th Cir. 1974); Pet. App. 132. Class-action *cy pres*'s earliest use likewise agrees that *cy pres* will "certainly not ... benefit those on whose behalf the action was brought." *Miller v. Steinbach*, 1974 WL 350, at *2 (S.D.N.Y. Jan. 3, 1974).

2. This ahistoricity is significant because tension between Rule 23 and the Rules Enabling Act "is best kept within tolerable limits by keeping" Rule 23 "close to the practice preceding its adoption." *Ortiz*, 527 U.S. at 845; *accord, e.g., Wal-Mart*, 564 U.S. at 361 ("in determining [Rule 23's] meaning we have previously looked to the historical models on which the Rule was based"). Indeed, Google reprises (Br. 18) reasoning *Ortiz* repudiated: inferring "[f]rom the historical fact that rule 23(b)(1)(B) originated in courts of equity" the erroneous conclusion that "*all* actions certified under rule 23(b)(1)(B) are equitable and thus immune" from considerations of law. *In re Asbestos Litig.*, 90 F.3d 963, 1003 (5th Cir. 1996) (Smith, J., dissenting), *rev'd sub nom. Ortiz*, 527 U.S. 815.

Outside the class context, the same considerations apply; the Court has refused to allow expansions of equitable remedies beyond those traditionally available. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319–24 (1999) (Rule 65 injunction power). Although equity is flexible, "in the federal system, at least, that flexibility is confined with the broad boundaries of traditional equitable

relief." *Id.* at 322. Class-action *cy pres* is another invocation "not of flexibility, but of omnipotence." *Id*

3. Google argues (Br. 25–26) the opposite: *limiting* courts' discretion under Rule 23 is what violates the Rules Enabling Act, because individual parties can settle in exchange for charitable contributions. If Google were correct, Rule 23 could not forbid a district court from permitting attorneys to take the entire settlement fund; after all, individual parties can voluntarily settle that way.[8] Class-action settlements are not just "ordinary" contracts (Google Br. 26–27; Gaos Br. 27–28) because they affect "the interests of unnamed class members who by definition are not present during the negotiations." *Pampers*, 724 F.3d at 715. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986), is not to the contrary. *Firefighters* dealt solely with the limits of 42 U.S.C. § 2000e-5(g), not Rule 23(e), in a case in which the petitioners refused an invitation "to raise any substantive claims." *Id.* at 530; *accord id.* at 530–531A (O'Connor, J., concurring).

Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 339 (1980), cited by Google (Br. 21), notes class actions are an "evolutionary response to ... unremedied" injuries but in no way supports *cy pres*. Indeed, *Roper* acknowledges the "obvious" "potential for misuse of the class action mechanism" including turning "persons other than class members [into] the

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[8] Gaos implies (Br. 26) the 2001 Advisory Committee Minutes contemplate this (and thus permit the lesser wrong of *cy pres*), but the Committee never considered, much less approved, a voluntary dismissal that pays the attorneys without paying the class; the scenario discussed was a certified Rule 23(b)(2) action mooted by defendants' voluntary action. Civil Rules Advisory Comm., Meeting Minutes 24–25 (Apr. 23–24, 2001).

chief beneficiaries." *Id.* *Cy pres* is evolution *away* from providing "aggrieved persons" with "effective redress." *Cf. id.* Such "abuses" should be remedied "with re-examination of Rule 23." *Id.*

Even if courts are to use equitable principles, the result is indeterminate. Courts could just as well apply the equitable doctrine of constructive trusts, given that "in the eyes of equity" class members are the "true owners" of class settlement proceeds. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). And it is inequitable for a fiduciary to self-deal at the expense of his clients. Equity provides no basis to reject the proportionality rule and ignore the conflict-of-interest problem.

4. The appellate cases respondents cite (Gaos Br. 31–32; Google Br. 19–20) simply do not support what the Ninth Circuit does here. True, no other court goes as far as the Fifth and Seventh Circuits (Pet. 17–22), but other decisions do not loose *cy pres* like the decision below.

Most importantly, *Hughes v. Kore of Indiana Enterprise, Inc.*, has nothing to do with Rule 23(e). 731 F.3d 672 (7th Cir. 2013). *Hughes* involved a federal statute setting defendant's maximum liability to the class at $10,000, so the defendant immediately conceded the case and did not oppose plaintiff's Rule 23(f) appeal. *Id.* at 674. Petitioners do not require a claims process for a $10,000 fund. But *Hughes* involved no compromise whatsoever: class counsel obtained the maximum possible, while only compromises trigger petitioners' proposed proportionality rule. *Hughes*'s sole holding in an *ex parte* case was that the district court did "not provide adequate

grounds" in decertifying the class and remanded to redecide the certification decision. *Id.* at 678. One year later, the same circuit decided *Pearson*, precluding using *cy pres* to inflate settlement value, holding that the plaintiffs should have distributed $1.1 million of *cy pres* to 12 million class members, and imposing the proportionality rule petitioners seek here. Pet. Br. 40.

In *In re Pharmaceutical Industry Average Wholesale Price Litigation*, a claims process paid claimants double damages, plus treble damages in a staggered plan, before any money went to *cy pres*. It expressly refused to reach the question of an all-*cy-pres* settlement. 588 F.3d 24, 34 (1st Cir. 2009). *Klier* similarly restricted residual *cy pres* to the scenario when claimants had received up to the amount of their liquidated damages claims. 658 F.3d at 475.

Baby Products left open the use of *cy pres* case-by-case, but its approach dramatically contradicts the Ninth Circuit's. *Compare* 708 F.3d at 178 *with* Pet. App. 9–10; *see also* Pet. 19–20; Pet. Br. 42, 51–52. As here, the $35.5 million fund in *Baby Products* was adequate—but the "*allocation*" was "troubling." 708 F.3d at 169 (emphasis added). The class received only $3 million, when they should be the "foremost beneficiaries." *Id.* at 179.[9] So too here, with an even larger disproportion.

New York v. Reebok International Ltd., 96 F.3d 44 (2d Cir. 1996), was a *parens patriae* case, not a class

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[9] *Baby Products* also demonstrates why Google's proposed lodestar rule (Br. 55–56) conflates the Rule 23(e) and (h) inquiries and is insufficient to protect absent class members. *Baby Products* class counsel proposed to get several times the class's actual recovery, but its proposed award was substantially below lodestar. 708 F.3d at 177.

action that waived absent class members' claims with concomitant fiduciary duties.

5. *Boeing* says nothing about proportionality under Rule 23(e). *Boeing* was a fee dispute after a *litigated judgment*. 444 U.S. at 476 n.4. It does not speak to a Rule 23(e) objection that a settlement is unfairly slanted toward class counsel; nor does it implicate *Pearson*'s requirement that courts determine compromised settlement value by actual benefit to the class. *Pearson*, 772 F.3d at 782 (distinguishing *Boeing*); *contra Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 282–83 (6th Cir. 2016); *see generally* Pet. Br. 25–28. Similarly, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), was a litigated, rather than compromised, victory. Perhaps Gaos could rationalize her fee award if she had litigated and won such a feeble result (*but see* Pet. Br. 46–47), but she cannot settle for full payment for her attorneys and nothing for the class. By the truncated logic of a *cy pres* award, it is sufficient that a defendant is being mulcted for the benefit of attorneys and worthy bystanders. If equity jurisprudence ever contemplated such a result, it would reject it out of hand.

While petitioners question *Boeing*'s soundness (*cf. International Precious Metals Corp. v. Waters*, 530 U.S. 1223 (2000) (O'Connor, J., respecting denial of certiorari) (raising concerns)), *Boeing* is not relevant here.

II. The Court should reject the Ninth Circuit's holdings, which create perverse incentives.

A. "Feasible" means "feasible."

1. Respondents seek (Google Br. 30–31; Gaos Br. 31–32) to relitigate the certiorari grant by arguing

that the Ninth Circuit applied the same "feasibility" standard other courts use. This is wrong. *See* Reply in Support of Pet. 4–7. While the Ninth Circuit used the word "feasible," it meant something other than feasible. It declared that its "review of the district court's settlement approval is not predicated simply on whether there may be 'possible' alternatives" that directly paid class members, even acknowledging "other conceivable methods of distribution." Pet. App. 9–10 & n.2. But if there is a possible alternative means of distribution that is feasible, then distribution *is* "feasible."

For example, *Pearson* involved $1.13 million residual *cy pres* and a 12-million-member class. 772 F.3d at 784. It is certainly infeasible to distribute eight cents to *each* unidentified class member, but it *was* feasible to distribute the residual to claimants through a reasonable claims process. *Id.* (*Pearson* also complained that parties improperly throttled the claims process to reduce the claims rate. *Id.* at 783. Respondents' eliminating the claims process is maximally restrictive. Residual *cy pres* settlement provisions create the incentive to reduce the number of claimants to benefit attorneys' pet causes; only a proportionality rule like *Pearson*'s avoids this problem.) In *In re Bank of America Corp. Securities Litigation*, the district court made similar erroneous legal holdings that further distribution to the class were unnecessary as "costly and difficult." 775 F.3d 1060, 1065 (8th Cir. 2015). While the Eighth Circuit reversed the legal error, the Ninth Circuit held a district court has the discretion to "declin[e] to adopt" a feasible means of distribution to the class. Pet. App. 10 n.2. This is a *legal* error, and not, as respondents claim, a factual finding.

2. Perhaps recognizing that they cannot defend the Ninth Circuit's standard given the conceded fiduciary duty to class members, respondents and *amici* for the first time try to argue facts that a claims process is too expensive to be feasible. They reach that conclusion with suppositions that are neither in the record nor supported by courts' Internet-age experience. Moreover, respondents incorrectly claim that the district court considered the possibility of a low claims rate, when it expressly spoke only of the "significant burden to distribute" to "this many people"—the entire class. Pet. App. 47; J.A. 95–96 (requiring claims from "one hundred million individuals" "would impose a significant burden to distribute"); *see also* Pet. App. 9 ("4 cents in recovery");[10] U.S. Br. 27–28.

Again, the only record evidence was petitioners' showing that there was no reason to expect a claims rate in a Google settlement *without* direct notice to be higher than in the *Fraley v. Facebook* settlement *with* direct notice to a larger class of 150 million. 966 F. Supp. 2d 939 (N.D. Cal. 2013); Pet. Br. 42; Pet. App. 120–23. (Remarkably, Gaos (Br. 44) cites *Fraley* as an example of the court system working to reject an inappropriate all-*cy-pres* settlement, but fails to explain the difference in cases.)

Gaos hypothesizes (Br. 51) a 2% claims rate with no record support or explanation why the claims rate would be five times greater than *Fraley*'s. Google, citing decades-old cases without economies of scale distributing to 2,619 claimants, asserts (Br. 35) that the costs of notice and administration in a claims-

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[10] Gaos uses ellipses to distort the district court's findings. *Compare* Gaos Br. 18 *with* Pet. App. 47. The district court's "millions" refers to the entire class, not a subset.

made settlement here would be $4.50-$5.50/claimant (as compared to the $1,000,000 it spent in the all-*cy pres* settlement that paid no one (Pet. App. 41)), but *Fraley* and other cases bely these newly contrived figures.

Fraley, which had direct notice to 150,000,000 class members and a claims process that paid $9 million to 600,000 class members, Pet. Br. 42, had notice and administration costs of only $1,017,397.66. Declaration of Robert Arns, *Fraley*, No. 11-cv-01726, Dkt. 464 ¶ 5 (N.D. Cal. May 9, 2017).[11] A memory-chip antitrust settlement, with publication notice to 175.5 million class members, spent $1.05 million to distribute $188 million to 445,000 claimants; a nationwide milk antitrust settlement spent $1.5 million to distribute $35 million to 3.8 million claimants. Further Submission, *In re Lithium Ion-Batteries Antitrust Litig.*, No. 4:13-md-2420, Dkt. 1988 (N.D. Cal. Oct. 16, 2017) (documenting these and other large-settlement claim rates and administrative costs). These antitrust classes were every bit as "indeterminate" (Google

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[11] *Fraley* plaintiffs perhaps encouraged efficient settlement administration after the court refused to award fees for any funds depleted by the administrator. 2013 WL 4516806, at *2 (N.D. Cal. Aug. 26, 2013). Class counsel here, by contrast, collected a 25% fee on every dollar whether cash went to the settlement administrator, *cy pres*, or the class. Pet. App. 40, 54. *Redman* recognizes this perverse incentive, but some circuits do not—yet another reason to prefer petitioners' proposed rule basing settlement fees on actual class benefit. *Compare Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014) *with, e.g., In re Life Time Fitness, Inc. TCPA Litig.*, 847 F.3d 619, 623 (8th Cir. 2017).

Respondents could have had costless notice on Google's homepage, and instead paid for "an elaborate advertising campaign." J.A. 45.

Br. 44) and reliant upon claimant self-identification as the class here. *See also, e.g., In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *2–*4 (N.D. Cal. Aug. 25, 2016) ($655,500 to distribute $5.9 million fund to claimants in 30-million-member class, even after auditing and rejecting over 30% of claims as fraudulent). All four of these settlements, and many more, are "non-distributable" under the Ninth Circuit's decision and respondents' arguments. Given that the class is one of *Google users*, there's no reason (in the record or otherwise) a claims and payment process couldn't be done electronically at relatively low expense. The leading empirical study finds it feasible to distribute *paper* checks once they are over "around $1–$2." Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. 767, 791 (2015).

B. The appearance of impropriety precludes the *cy pres* recipients here.

Google acknowledges (Br. 52) that "[m]eaningful sources of potential conflicts should be disclosed to the district court," but that did not happen here.

Gaos argues (Br. 52) that the Ninth Circuit already applied petitioners' proposed standard, but it did not: it required a showing of "fraud or collusion," which does not adequately protect against self-dealing. Pet. Br. 55–56.

Google asserts (Br. 52–54) the appearance-of-impropriety standard would hurt class members, but provides no legal basis for that claim. The district court acknowledged the "potential for a conflict of interest," Pet. App. 59, and that should be legally enough to reject this settlement.

III. The Court has jurisdiction.

The United States suggests (Br. 13–15) that named plaintiffs may not have alleged an "injury in fact" sufficient to give them Article III standing. For an injury to suffice, it must be, among other things, "concrete." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016).

An injury need not be "tangible" to be "concrete." *Spokeo*, 136 S. Ct. at 1549–50. An intangible injury more likely constitutes a "concrete" harm if it is closely related "to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549. If an analogous common-law injury exists, lower courts have uniformly read *Spokeo* to permit statutory allegations to go forward. *E.g.*, *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 638–39 (3d Cir. 2017); *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279–80 (11th Cir. 2017); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017); *Matera v. Google Inc.*, 2016 WL 5339806, at *10 (N.D. Cal. Sept. 23, 2016).

Regardless of the named plaintiffs' claims' factual or legal merit, the injuries *alleged* share sufficient similarity with common-law privacy injuries to qualify as concrete. Named plaintiff Anthony Italiano alleges he used Google's search engine to query his name together with terms relating to his marriage's dissolution, and Google transmitted the queries' contents to third parties. Complaint, Dkt. 39 ¶¶ 90–96. Italiano's alleged injuries parallel interests protected by the common-law tort of public disclosure of private facts. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. b (1977) ("family quarrels"). Whether or not Gaos is a cognizable lead plaintiff, Italiano is, and that "is sufficient to satisfy Article III's case-or-

controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). No one disputes the Rule 23(a)(2) and (3) findings that Italiano's claims are "typical" of class members, who have "suffered the same injury." J.A. 87–89; Pet. App. 35–36.

Plaintiffs' alleged injury need not "exactly track[] the common law." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017). Congress and state legislatures have a measure of leeway to expand upon and "elevate" the preexisting common-law interests. *Spokeo*, 136 S. Ct. at 1549.

The government maintains (Br. 14) that plaintiffs have not identified consequential injury from Google's use of referrer headers. But "with privacy torts, improper dissemination of information can itself constitute a cognizable injury." *Horizon Healthcare*, 846 F.3d at 638–39. "Many traditional remedies for private-rights causes of action ... are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

There is jurisdictional standing under *Spokeo*.

Gaos's argument (Br. 54) for dismissal of the writ as improvidently granted is incorrect; the cases she relies on involved situations when a lower court found lack of standing and the petitioner failed to challenge that in the petition. So even if the Court expanded *Spokeo* to create newfound jurisdictional doubt, the government's suggestion of remand is correct. When an appeals court determines a trial court has no jurisdiction, it should vacate "all district court pronouncements on the merits ... to ensure against preclusion."

13B Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 3531.15 (3d ed. 2018). *E.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997).

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK, ET AL., PETITIONERS

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

The United States respectfully submits this brief in response to the Court's order of November 6, 2018, which directed the parties and the Solicitor General to address "whether any named plaintiff has standing such that the federal courts have Article III jurisdiction over this dispute." In the government's view, none of the named plaintiffs has Article III standing.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

SUMMARY OF ARGUMENT

The Court granted certiorari in this case to review the approval of a class-action settlement involving *cy pres* distributions. As the government contended in its merits-stage amicus brief, the district court could not have approved the settlement unless it had jurisdiction,

which required that at least one of the named plaintiffs had Article III standing.

In contending that they have standing, the named plaintiffs appear to allege two distinct injuries arising from alleged violations of the Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.* First, they allege that the disclosure of their search terms itself inflicted a harm, even though the disclosures did not identify them as the individuals who performed the searches. Second, they appear to allege that the disclosures created a risk of harm by enabling third parties to "reidentify" them and connect them to particular searches.

Neither of those alleged harms constitutes an injury in fact sufficient for Article III standing. In *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), this Court explained that determining whether an alleged statutory violation creates an Article III injury requires evaluating both the judgment of Congress and history. Here, Congress has not conveyed any express judgment that litigants in the named plaintiffs' position should be allowed to sue. The SCA simply states any "person aggrieved" by a knowing violation of the statute may recover in a civil action, 18 U.S.C. 2707(a)—a general statement that incorporates but does not seek to expand the range of plaintiffs permitted to sue under Article III.

Likewise, history does not suggest that the named plaintiffs' first alleged harm would have provided the basis for a lawsuit at common law. Nothing in the common law suggests that disclosures of the kind forbidden by the SCA categorically create concrete harms. And the harms plaintiffs actually allege are distinct from the closest common-law analog—the tort of public disclosure of private facts—in multiple significant ways.

Plaintiffs' second alleged harm is closer to an injury that would have been recognized at common law. But plaintiffs' allegations of potential "reidentification" are too speculative to satisfy the standing requirement. The Court should accordingly vacate the judgment below and remand with directions to dismiss for lack of jurisdiction. In the alternative, in keeping with the principle that this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court should vacate and remand for the lower courts to address the standing question in the first instance.

ARGUMENT

NONE OF THE NAMED PLAINTIFFS HAS ARTICLE III STANDING

A. The Need To Demonstrate Article III Standing

This dispute arises from consolidated class actions brought against respondent Google, Inc., alleging violations of the SCA and related state-law claims. See Pet. App. 3. In the putative class action brought by named plaintiff Paloma Gaos, the district court dismissed the state-law claims for lack of Article III standing but allowed the SCA claim to proceed. J.A. 26-31. Gaos amended the complaint to add named plaintiff Anthony Italiano, and the district court consolidated a putative class action asserting similar claims filed by named plaintiff Gabriel Priyev. J.A. 82, 84-85.

The parties entered into a settlement agreement that consisted primarily of *cy pres* relief. Pet. App. 5. After a hearing to address petitioners' objections, the district court overruled the objections, certified the class, approved the settlement, and awarded attorney's fees. *Id.* at 34-60. The court entered a "final judgment" that dismissed the case with prejudice and imposed the

settlement as "binding" on the parties, with "*res judicata* and preclusive effect." *Id.* at 64-65. The court stated that it had "appropriate subject matter jurisdiction" and would "continue to have jurisdiction over," *inter alia*, the "implementation, enforcement, and administration" of the settlement. *Id.* at 63, 65-66.

Approving that settlement required Article III jurisdiction. See U.S. Merits Amicus Br. 11-15. In ordinary non-class litigation, parties can settle disputes on their own terms, and plaintiffs can voluntarily dismiss their claims "without a court order." Fed. R. Civ. P. 41(a)(1)(A). But in a class action, the "claims, issues, or defenses of a certified class * * * may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). The court-approval requirement reflects the distinctive nature of class-action settlements, which release "the claims of absent class members," even though those class members are "not themselves part of the settlement negotiations." 4 William B. Rubenstein, *Newberg on Class Actions* § 13:1, at 273 (5th ed. 2014). The court-approval requirement also makes class-action settlements different from non-class settlements as a jurisdictional matter. Because an approved class-action "settlement takes the form of a judgment of the court," the court can only approve such a settlement if it has "Article III power." *Robertson* v. *Allied Solutions, LLC*, 902 F.3d 690, 698 (7th Cir. 2018).

Here, determining whether the district court had Article III power requires determining whether the plaintiffs had Article III standing. In a class action, there must "be a named plaintiff who has" Article III standing "at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23." *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975).

Thus, as the Court's supplemental briefing order suggests, if no named plaintiff had standing in the district court, the suit should be dismissed.[1]

B. The Named Plaintiffs' Allegations

1. Plaintiffs' alleged statutory violation

Plaintiffs allege that Google violated the SCA, a federal statute that includes several provisions regarding disclosure of electronic communications. See 18 U.S.C. 2701-2703. Section 2703 authorizes the government to "require the disclosure" of certain communications or records if it satisfies a statutory standard. 18 U.S.C. 2703(a); see, *e.g.*, *Carpenter* v. *United States*, 138 S. Ct. 2206, 2221 (2018); *United States* v. *Microsoft Corp.*, 138 S. Ct. 1186, 1187 (2018) (per curiam). The SCA provision at issue here, Section 2702, prohibits certain information service providers (ISPs) from voluntarily disclosing "to any person or entity the contents of" a "communication" stored, carried, or maintained by the ISP. 18 U.S.C. 2702(a)(1)-(2); see *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1103-1105 (9th Cir. 2014).

Section 2707(a) creates a private right of action that, as relevant here, entitles any "person aggrieved" by a knowing violation of the SCA to "recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." 18 U.S.C. 2707(a). "[A]ppropriate relief" includes

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[1] As the government explained in its merits-stage amicus brief (at 22-25), the requirement that a court have Article III jurisdiction to enter a class-action settlement also means that the relief sought must "redress the alleged injury" that gave rise to the suit. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998); see *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

equitable or declaratory relief, damages, and attorney's fees. 18 U.S.C. 2707(b). In a damages action, a court may award "the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. 2707(c).

Plaintiffs allege that, when they perform a Google search and click on a link to a new website, Google transmits their search terms to the destination website through a "referrer header." Consolidated Compl. (Compl.) ¶¶ 57-58; see *Zynga*, 750 F.3d at 1101-1103 (discussing referrer headers). That transmission, plaintiffs allege, constitutes a knowing disclosure of the "contents of" a "communication" in violation of the SCA. 18 U.S.C. 2702(a)(1)-(2); see Compl. ¶¶ 136-137.

2. Plaintiffs' alleged harms

Although there is some ambiguity on this point, see Oral Arg. Tr. 30, the named plaintiffs appear to assert two related harms resulting from Google's alleged SCA violation: the disclosure of their search terms absent any information identifying plaintiffs as the users who conducted the searches, and the risk that those disclosures will be used to "reidentify" plaintiffs and connect them to particular searches, see *id.* at 69-70.

First, the named plaintiffs allege that the disclosure of their search terms itself inflicted a harm, even if they were not identified as the persons who had performed the searches. Compl. ¶¶ 104, 111, 116. Specifically, Gaos alleges that she "conducted numerous searches, including 'vanity searches' for her actual name and the names of her family members." Compl. ¶ 101. Priyev alleges that he "conducted numerous searches, including searches for financial and health information."

Compl. ¶ 115. Italiano alleges that he "conducted numerous searches," including searches for his name and his home address, "bankruptcy," "foreclosure proceedings," "short sale proceedings," "Facebook," the name of his then soon-to-be ex-wife, and "forensic accounting." Compl. ¶ 107. All three named plaintiffs allege that they "suffered actual harm in the form of Google's unauthorized and unlawful dissemination of" those "search queries, which sometimes contained sensitive personal information, to third parties." Compl. ¶¶ 104, 111, 118. Italiano alleges that "many of his searches related directly or indirectly to his divorce proceedings—exactly the sort of personal, confidential searches that he did not want disclosed to third parties without his knowledge or consent." Compl. ¶ 108.

Second, the named plaintiffs also appear to allege that the disclosure of their search terms inflicted a separate harm by creating a risk that third parties would "reidentify" them and connect them to particular searches. See Oral Arg. Tr. 28-32, 38-39, 43-44, 69. The complaint contains allegations about the "science of reidentification," a "relatively new area of study in the computer science." Compl. ¶¶ 83, 92; see Compl. ¶¶ 83-91. Drawing largely from a law-review article, Compl. ¶ 83 & n.55, plaintiffs allege that "reidentification creates and amplifies privacy harms" by allowing third parties to "connect[] the dots of 'anonymous' data and trac[e] it back to a specific individual," Compl. ¶ 84. Plaintiffs do not, however, allege that their searches actually led to reidentification.

C. The Standing Inquiry After *Spokeo*

1. To invoke a federal court's jurisdiction, a party must establish "three elements" of standing: (1) an "injury in fact" (2) caused by the defendant's conduct and

(3) redressable by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see *id.* at 561. The central question here is whether any harm the named plaintiffs allegedly suffered constitutes an "injury in fact." *Id.* at 560. To establish injury in fact, a plaintiff must show "an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent, not conjectural or hypothetical.'" *Ibid.* (citations and internal quotation marks omitted).

In many cases, the injury-in-fact inquiry is straightforward, as when a plaintiff alleges that that he has suffered economic loss or another well-recognized form of harm as a result of the defendant's violation of the law. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262-263 (1977). In other cases, however, plaintiffs allege that the injury in fact is the legal violation itself. The Court has explained that an Article III injury "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (citation and internal quotation marks omitted). At the same time, the Court has stated that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009); see *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

The Court addressed those twin principles in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016). There, a plaintiff alleged a violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, which requires con-

sumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. 15 U.S.C. 1681e(b). The FCRA also includes a civil-liability provision stating that "[a]ny person who willfully fails to comply with any requirement imposed" by the statute "with respect to any consumer is liable to that consumer," for specified damages. 15 U.S.C. 1681n(a). The plaintiff in *Spokeo* alleged that a consumer reporting agency had disseminated inaccurate information about him. See 136 S. Ct. at 1546. The Ninth Circuit held that he had alleged a sufficiently "'concrete and particularized'" injury because "the violation of a statutory right is usually a sufficient injury in fact to confer standing." *Robins* v. *Spokeo, Inc.*, 742 F.3d 409, 412 (2014) (citation omitted).

This Court vacated that decision, clarifying that a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. The Court explained that the Ninth Circuit had failed to account for the requirement that "an injury in fact must be both concrete *and* particularized." *Id.* at 1548. Although the *Spokeo* plaintiff may have alleged a particularized injury, the Court emphasized that "Article III standing requires a *concrete* injury even in the context of a statutory violation." *Id.* at 1549 (emphasis added).

The Court explained that a concrete injury "must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548. A concrete injury, however, need not be tangible. *Id.* at 1549. "In determining whether an intangible harm constitutes injury in fact," the Court explained, "both history and the judgment of Congress

play important roles." *Ibid.* As to history, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Ibid.* "In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Ibid.*

In applying those principles, the Court explained that "the risk of real harm" can in some circumstances "satisfy the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549. Thus, plaintiffs alleging certain statutory violations can establish a concrete injury without alleging "any *additional* harm." *Ibid.* For example, the common law "has long permitted" recovery for libel and slander *per se* without any additional showing of harm. *Ibid.* The Court concluded, however, that the FCRA violations alleged in *Spokeo* did not *categorically* constitute concrete injuries. Rather, the Court determined, some FCRA violations "may result in no harm" and no "material risk of harm." *Id.* at 1550. For example, the Court explained that it "is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Ibid.*

2. Like the Ninth Circuit's initial decision in *Spokeo*, the district court's standing decision here relied entirely on the allegation of a statutory violation to create an Article III injury. J.A. 27. The named plaintiffs continue to rely on the statutory violation itself, as opposed to any economic or other additional harm, to create the injury in fact required for Article III standing. See Class Resps. Br. 56; Oral Arg. Tr. 68-70. Determining whether any of the named plaintiffs had standing thus requires analyzing whether any of their asserted harms

constitutes an Article III injury under the principles articulated in *Spokeo*.

D. The Disclosure Of Plaintiffs' Search Queries Without Any Identifying Information Does Not Constitute A Concrete Harm

The named plaintiffs' first asserted harm—Google's disclosure of their search terms without any information identifying them as the users who performed the searches—does not create a concrete injury under *Spokeo*. Unlike in *Spokeo*, Congress has not expressed a judgment that persons suffering the harm plaintiffs allege should have a right to sue. Nor does plaintiffs' alleged harm have "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. The alleged disclosure of plaintiffs' search terms alone therefore does not create Article III standing.

1. Congress has not expressed a judgment that the harm alleged by the named plaintiffs constitutes a concrete injury

Spokeo explained that the "judgment of Congress" plays an important role in determining whether an alleged injury is concrete. 136 S. Ct. at 1549. The statute at issue in *Spokeo* provided that a person who committed a knowing violation "*with respect to any consumer* is liable to *that consumer*." 15 U.S.C. 1681n(a) (emphases added). That statement conveyed Congress's judgment that a statutory violation with respect to particular persons—"consumer[s]," as defined by the FCRA, 15 U.S.C. 1692a(3)—constituted an injury sufficient to justify a suit. Such an express congressional judgment

is "instructive" in determining whether the alleged statutory violation is sufficiently "concrete" to satisfy Article III. *Spokeo*, 136 S. Ct. at 1549; see U.S. Amicus Br. at 25, *Spokeo*, *supra* (No. 13-1339) (U.S. *Spokeo* Br.) ("By providing that '[a]ny person who willfully fails to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to *that consumer*,' 15 U.S.C. 1681n(a) (emphasis added), the statute requires a concrete and particularized link between the plaintiff and the alleged violation.") (brackets in original).

The statute at issue in *First American Financial Corp.* v. *Edwards*, 567 U.S. 756 (2012) (per curiam), in which this Court considered but ultimately dismissed as improvidently granted a question similar to the one it resolved in *Spokeo*, also conveyed an express congressional judgment. *Id.* at 757. *Edwards* involved a provision of the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, that made a statutory violator "liable to the *person or persons charged for the settlement service* involved," 12 U.S.C. 2607(d)(2) (emphasis added). That provision indicated Congress's express judgment that a particular class of plaintiffs—persons charged for settlement services—had suffered an injury sufficient to justify suit. See U.S. Amicus Br. at 21-24, *Edwards*, *supra* (No. 10-708).

By contrast, the SCA provision at issue in this case contains no such express congressional judgment about particular injuries that give rise to suit. The SCA's private right-of-action provision simply states (in relevant part) that any "person aggrieved by any" knowing violation of the statute "may, in a civil action, recover from the person or entity * * * which engaged in that violation." 18 U.S.C. 2707(a). As this Court has explained, a statutory reference to any "person aggrieved" reflects

Congress's intent to allow suit by plaintiffs with Article III standing that are within the statute's zone of interest. See *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 177-178 (2011); *Federal Election Comm'n* v. *Akins*, 524 U.S. 11, 19-20 (1998). Such a statement does not, however, express a judgment about which particular injuries are sufficiently concrete to satisfy Article III. The statute here—and the inferences that can be drawn from it in analyzing standing—thus differ significantly from those at issue in *Spokeo* and *Edwards*. See U.S. *Spokeo* Br. at 33 n.6 (citing numerous statutes under which damages may be awarded without a separate showing of harm, but not including the SCA).[2]

Moreover, nothing in the SCA's text or history indicates that Congress sought to allow a suit for injuries arising from disclosures of the kind plaintiffs allege. The SCA bars an ISP from disclosing "the contents of" a "communication," 18 U.S.C. 2702(a)(1)-(2), and defines "contents" to "include[] any information concerning the substance, purport, or meaning of that communication," 18 U.S.C. 2510(8); see 18 U.S.C. 2711(1). Search terms

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[2] The Court in *Akins* concluded that the plaintiffs in that case, who had filed a complaint with the Federal Election Commission (FEC) pursuant to express statutory authorization, had adequately alleged an Article III injury based on their failure "to obtain information which [they alleged] must be publicly disclosed pursuant to a statute"—the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* (1994). 524 U.S. at 21. The statutory right of action at issue in *Akins* applied to a "party aggrieved by an order of the [FEC] dismissing a complaint filed by such party," *id.* at 19 (citation omitted), as the FEC had done with the plaintiffs' complaint. The SCA right-of-action provision includes no similarly specific language, and the SCA creates no affirmative right "to obtain information which must be publicly disclosed." *Id.* at 21. To the contrary, the SCA protects *against* the public disclosure of information.

embedded in referrer headers are not naturally considered "contents of" a "communication." 18 U.S.C. 2702(a)(1)-(2). Indeed, the Ninth Circuit has held that referrer headers containing a "user's Facebook ID and the address of the webpage from which the user's * * * request to view another webpage was sent" do not constitute "contents" of a communication, but rather "function[] like an 'address,'" which is distinct from "contents." *Zynga*, 750 F.3d at 1107 (citation omitted). Although the scope of the SCA's liability provisions is distinct from the question of Article III standing, it nevertheless provides insight into the kind of injuries for which Congress sought to allow suit. See, *e.g.*, *Warth*, 422 U.S. at 500 ("Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted.") (citation omitted). Here, there is no basis to infer that Congress sought to allow suit for injuries arising from the disclosure of referrer headers.

2. The harm alleged by the named plaintiffs would not provide a basis for a suit at common law

In addition to considering any judgment expressed by Congress about whether an alleged injury creates a basis for Article III standing, *Spokeo* instructs courts "to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." 136 S. Ct. at 1549.

According to most authorities, the common law recognizes four privacy torts: intrusion upon seclusion, appropriation, false light, and public disclosure of private facts. Restatement (Second) of Torts § 652A(2) (1977) (Restatement); see *id.* § 652A cmt. b; William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960) (Prosser); see

also *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 489 (1975). Of those torts, the closest analog to the SCA is the tort of public disclosure of private facts, which allows recovery for "giv[ing] publicity to a matter concerning the private life of another" that "would be highly offensive to a reasonable person" and is "not of legitimate concern to the public." Restatement § 652D; see Merits Reply Br. 25-26 (drawing this analogy); Oral Arg. Tr. 16, 28 (same). Indeed, Gaos sought recovery for public disclosure of private facts under state law earlier in the litigation. See J.A. 18, 25. Ultimately, however, the named plaintiffs' alleged harm does not have a "close relationship" to the harms that provided "a basis for a lawsuit" for the common-law tort of public disclosure of private facts. *Spokeo*, 136 S. Ct. at 1549; see J.A. 27 (dismissing state-law claim for public disclosure of private facts for lack of standing).[3]

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[3] None of the other three recognized privacy torts involves injuries analogous to those alleged here. Intrusion upon seclusion involves an unauthorized and "highly offensive" invasion into "the solitude or seclusion of another." Restatement § 652B; see, *e.g.*, *Noble* v. *Sears, Roebuck & Co.*, 109 Cal. Rptr. 269, 271 (Cal. Ct. App. 1973) (entry into hospital room by deception). The voluntary disclosures prohibited by the SCA do not involve "prying" or resemble an invasion. Prosser 390. Likewise, plaintiffs' injuries do not resemble those arising from the tort of appropriation, which involves "us[ing] or benefit[ing] [from] the name or likeness of another." Restatement § 652C; see, *e.g.*, *Flake* v. *Greensboro News Co.*, 195 S.E. 55, 61 (N.C. 1938) (unauthorized use of plaintiff's photograph in a bread advertisement). Disclosing communications does not involve using or benefiting from a name or likeness. The tort of false light is similarly inapposite. It prohibits knowingly "giv[ing] publicity to a matter concerning another that places the other before the public in a false light," and that "would be highly offensive." Restatement § 652E. The SCA's disclosure prohibitions, however, do not involve falsity.

a. As this Court explained in *Spokeo*, the common law has "long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." 136 S. Ct. at 1549. For example, the common law allowed recovery for torts like libel and slander *per se* even if a victim did "not allege any *additional* harm" beyond the legal violation. *Ibid.* That history, however, does not aid the named plaintiffs here. Unlike libel and slander *per se*, the tort of public disclosure of private facts has not traditionally permitted recovery absent a showing of harm beyond the legal violation. See Restatement § 652H (authorizing damages for a plaintiff's "harm to his interest in privacy," "mental distress," or "special damage" resulting from the tort). Indeed, this Court has described "the doctrine of presumed damages in the common law of defamation *per se*" as "'an oddity of tort law'" because "'it allows recovery of purportedly compensatory damages without evidence of actual loss.'" *Carey* v. *Piphus*, 435 U.S. 247, 262 (1978) (citation omitted). Just as *Spokeo* ultimately concluded that the FCRA violations at issue there did not *categorically* give rise to concrete injury, see 136 S. Ct. at 1550, the SCA violations alleged here do not categorically give rise to concrete injury. The named plaintiffs accordingly must show some additional harm of the kind that permitted recovery for public disclosure of private facts.

b. The named plaintiffs cannot show the specific kind of harm that would have permitted recovery for public disclosure of private facts. That is true for at least four independent reasons.

First, and most significantly, plaintiffs do not allege that Google's disclosure of their search terms would allow anyone to identify *them* as the users who conducted the searches. Indeed, plaintiffs acknowledge that in

most cases "the information contained in disclosed search queries does not directly identify the Google user." Compl. ¶ 4. Numerous authorities recognize that the harm contemplated by the tort of public disclosure of private facts requires "some reasonable grounds for concluding that *it is the plaintiff* whose privacy ha[d] been invaded." 1 Arthur B. Hanson, *Libel and Related Torts* ¶ 254, at 204 (1969) (emphasis added); see, *e.g.*, *Rawls* v. *Conde Nast Publ'ns, Inc.*, 446 F.2d 313, 318 (5th Cir. 1971) ("[T]he absence of public identification of the plaintiff * * * precludes recovery."). As Prosser explained, "there is no liability for the publication of a picture of [a plaintiff's] hand, leg and foot, his dwelling house, his automobile, or his dog, *with nothing to indicate whose they are.*" Prosser 404-405 (emphasis added; footnotes omitted). Likewise, there could be no injury at common law for the publication of search terms "with nothing to indicate whose they are." *Id.* at 405.

Second, and relatedly, the injuries plaintiffs allege would not "be highly offensive to a reasonable person," which is the harm contemplated by the common law. Restatement § 652D. Plaintiffs allege only that a website operator would be able to determine that *someone* conducted the searches they allege. But it cannot be highly offensive to reveal that *someone* searched for plaintiffs' names, Compl. ¶¶ 101, 107, 115, or for "financial and health information," Compl. ¶ 115. Even with respect to Italiano's more specific allegations, it is unclear how a reasonable person could be highly offended by disclosure to a single website operator that *someone* searched for his name and "bankruptcy" or "foreclosure proceedings." Compl. ¶ 107. Such disclosures are far less offensive than the injuries that give rise to suits for public disclosure of private facts at common law. See, *e.g.*,

York v. *Story*, 324 F.2d 450, 451 (9th Cir. 1963) (nude photographs), cert. denied, 376 U.S. 939 (1964); *Bazemore* v. *Savannah Hosp.*, 155 S.E. 194, 195 (Ga. 1930) (photographs of child with birth defects); *Barber* v. *Time, Inc.*, 159 S.W.2d 291, 293 (Mo. 1942) (article and photograph depicting hospitalization for eating disorder).

Third, plaintiffs' alleged injuries do not arise from the "publicity" of their private information, as the common-law tort of public disclosure of private facts required. Restatement § 652D. The Restatement provides that "it is not an invasion of the right of privacy * * * to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." *Id.* cmt. a; accord Prosser 393-394. But plaintiffs allege only that Google disclosed their search terms to the operators of the destination websites, Compl. ¶¶ 104, 111, 116, not that the terms were disclosed *publicly*. Plaintiffs' asserted injury is thus qualitatively different than the traditional harm giving rising to a common-law suit for public disclosure of private facts. See, *e.g.*, *Brents* v. *Morgan*, 299 S.W. 967, 968 (Ky. Ct. App. 1927) (publicly posting a large sign detailing a particular customer's debts); Restatement § 652D cmt. a (discussing a "publication in a newspaper or a magazine, * * * or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience").

Fourth, plaintiffs' alleged harms do not concern their "private life," as the injuries underlying the common-law tort of public disclosure of private facts did. Restatement § 652D. The Restatement provides that "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." *Id.* cmt. b. Plaintiffs' search terms all

appear to reference "already public" information, *ibid.*, such as their names and family members' names, Italiano's soon-to-be-ex-wife's name, public proceedings such as foreclosures and bankruptcy, and the occupation of forensic accounting, Compl. ¶¶ 101, 107, 115. Plaintiffs' alleged injuries thus differ from those contemplated by the common law.[4]

* * * * *

In sum, plaintiffs' principal alleged harm—the disclosure of their search terms without information identifying them as the users conducting the searches—does not create Article III standing. Congress has not conveyed any express judgment that such an alleged injury should provide a basis to sue. See *Spokeo*, 136 S. Ct. at 1549. There is no historical or other evidence that violations of the SCA categorically create Article III harm in the way that torts such as libel or slander *per se* traditionally have. See *ibid.* And plaintiffs fail to show a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," because the harms underlying the closest common-law analog differ in significant ways from the harm alleged here. *Ibid.*

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[4] Different putative plaintiffs might be able to allege searches that do concern their private life. Cf. Oral Art. Tr. 21-22. But their asserted harms would likely still differ from the common-law analog in the other significant ways explained above. Moreover, absent a showing that large numbers of class members conducted similar searches, it seems unlikely that any set of named plaintiffs could satisfy the commonality, typicality, and predominance requirements of Rule 23 for a class approaching the size of the one at issue here. Fed. R. Civ. P. 23(a)(2)-(3) and (b)(3); see Pet. App. 5 (noting that the class includes "approximately 129 million people who used Google Search").

E. Plaintiffs' Allegations About Potential Reidentification Are Too Speculative To Create Standing

In addition to the allegations of harm from the disclosure of their search terms alone, the named plaintiffs' complaint also contains general allegations about the "science of reidentification." Compl. ¶ 92; see Compl. ¶¶ 83-91. Those allegations could be read to allege injuries based not only on the disclosures themselves but also on the risk that third parties will use the disclosed information to connect plaintiffs to their search terms.

To the extent plaintiffs make the latter allegation, their asserted injuries come closer to those recognized at common law. Such an allegation, if plausible, would cure a significant defect in their primary theory—the failure to allege that *their* privacy had been invaded. See pp. 16-17, *supra*. Plaintiffs' asserted injuries would still be removed from those recognized by the common law, because their search terms do not appear to be either "highly offensive," publicly disclosed, or related to their private lives in the ways the common-law tort of public disclosure of private facts required. Restatement § 652D; see pp. 17-19, *supra*. And Congress has not made an express judgment that any of plaintiffs' asserted harms constitute injuries justifying a suit. See pp. 11-14, *supra*. But the standing question would be closer, especially because *Spokeo* does not require exact correspondence between a plaintiff's asserted injuries and those recognized at common law. See 136 S. Ct. at 1549.

This Court need not resolve whether plaintiffs' reidentification-based theory would create standing, however, because plaintiffs' allegations about reidentification are too speculative. This Court reiterated in *Spokeo* that an Article III injury must not only be "concrete and particularized," but must also be "actual or

imminent, not conjectural or hypothetical." 136 S. Ct. at 1548 (quoting *Defenders*, 504 U.S. at 560). And the Court has repeatedly explained that plaintiffs lack standing if their allegations are overly "speculative." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

Plaintiffs' allegations about reidentification are highly speculative. Other than a general description of the "science of reidentification," Compl. ¶ 92, which they admit is largely drawn from a law review article, Compl. ¶ 83 & n.55, plaintiffs make no allegations suggesting that their searches exposed them to possible reidentification. They do not allege, for example, that they visited the same websites repeatedly, thereby providing multiple pieces of information from which a website operator could reconstruct their identities. Nor do they suggest that their "vanity searches" of their own names would create a higher risk of reidentification. Compl. ¶ 101. A destination website operator would have no reason to suspect, for example, that a Google user who searched for "Anthony Italiano" and "bankruptcy" was Italiano himself, rather than, say, a creditor or prospective lender. Compl. ¶¶ 105, 107.

In any event, even if some different set of plaintiffs could potentially demonstrate a non-speculative prospect of reidentification and resulting harms, the named plaintiffs here have not done so. If the Court elects to resolve the standing question, it should conclude that the named plaintiffs lack standing, and that the lower courts accordingly lacked jurisdiction over the case.

CONCLUSION

In the government's view, none of the named plaintiffs has Article III standing. The Court should vacate the judgment below and remand with directions to dismiss for lack of jurisdiction. In the alternative, the Court should vacate and remand for the lower courts to address the standing question in the first instance.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 2702(a) provides:

Voluntary disclosure of customer communications or records

(a) PROHIBITIONS.—Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall

not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

2. 18 U.S.C. 2707(a)-(c) provides:

Civil action

(a) CAUSE OF ACTION.—Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In a civil action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) DAMAGES.—The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than

the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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PETITIONERS' SUPPLEMENTAL BRIEF

As Supreme Court Rule 25.6 permits, petitioners submit this supplemental brief to discuss an intervening decision not available in time to be included in a brief. Petitioners and respondents disagree about the meaning and effect of the Ninth Circuit's approach to *cy pres*. *E.g.*, Pet. Reply Br. 11–12, 20–21. *In re EasySaver Rewards Litig.*, – F.3d –, 2018 WL 4763174 (9th Cir. Oct. 3, 2018), demonstrates that the Ninth Circuit's permissive approach to *cy pres* has exactly the pernicious effects petitioners predicted.

EasySaver involves the settlement of a 2009 class action against Provide Commerce, Inc., an online business that sells flowers, chocolates, fruit baskets, and similar items. Plaintiffs alleged Provide and affiliated co-defendants fraudulently enrolled 1.3 million class members without consent into a membership rewards program that charged class members' credit cards a monthly membership fee, bilking consumers for tens of millions of dollars. Provide ceased the business practice when Congress outlawed it in 2010. Restore Online Shoppers' Confidence Act, Pub. L. No. 111-345, 124 Stat. 3618, codified at 15 U.S.C. §§ 8401 *ff.*

Before the district court heard a pending motion to dismiss and before the plaintiffs filed any class certification motions, the case settled. The settlement created a $12.5 million fund. Class members who sought refunds after filling out a two-page claim form under penalty of perjury would be entitled to *pro rata* relief up to the amount of their credit-card charges. In addition, each class member would receive a direct distribution of a $20 credit that could be used on Provide's websites. Any residual unclaimed money would go to *cy pres*: three San Diego area universities.

In exchange, class members released all claims to actual, statutory, and punitive damages.

The class attorneys requested $8.9 million in fees and costs, the vast majority of the $12.5 million fund. Class member Brian Perryman, represented by the Center for Class Action Fairness, objected that the settlement was designed to create the illusion of relief to maximize disproportionate attorneys' fees at the expense of the class:

- because the $20 credits expired in a year; could not be used in the weeks before Valentine's Day, Mother's Day, and Christmas; and could not be used in conjunction with regularly available 25%-off discounts offered on the site, class members were exceedingly unlikely to redeem them, making their value to the class likely less than $1 million, yet, contrary to 28 U.S.C. § 1712, the parties were asking the court to value them at face value;[1]
- though every class member was known and would already receive a distribution of a coupon, class members could not receive a cash refund without participating in a claims process, involving two pages of small print and a signature under penalty of perjury, seemingly designed to depress the number of refund claims and maximize the *cy pres*, though it would be feasible to pay the money to class members;[2] and
- though the class was a nationwide class, the *cy pres* was going to endow a chair or professorship or seminar series at three San Diego schools

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[1] *Compare* Pet. Br. 24–25.

[2] *Compare* Pet. Br. 28–29.

> local to the court, class counsel, and the defendant, one of which was the *alma mater* of several of the attorneys on the case. (Provide Commerce had used *cy pres* in a previous class action settlement, *Cox v. Clarus*, No. 11-cv-0729 (S.D. Cal.), to endow a professorship in the name of one of its brands. Nancy Kim, *ProFlowers Distinguished Professor of Internet Studies*, 51 CAL. W. L. REV. 3 (2014).)[3]

Perryman Objection, *EasySaver*, No. 09-cv-02094, Dkt. 258 (S.D. Cal. Dec. 7, 2012); *id.* Dkt. 310 (S.D. Cal. Jul. 2, 2015).

At the fairness hearing, the parties disclosed that only 3000 class members had jumped through the hoops of the settlement's claims process, providing the class with only $225,000 in cash, leaving over $12.2 million residual in the settlement fund for *cy pres* and fees. *EasySaver*, 2018 WL 4763174 at *2. The district court nevertheless approved the settlement and the $8.9 million Rule 23(h) request in full, holding that the Class Action Fairness Act's restrictions on "coupons" did not apply to the "credits" and that the *cy pres* was permissible. *In re EasySaver Rewards Litig.*, 921 F. Supp. 2d 1040 (S.D. Cal. 2013). The Ninth Circuit vacated and remanded to reconsider the question of the definition of "coupon." *In re EasySaver Rewards Litig.*, 599 Fed. Appx. 274 (9th Cir. 2015). The district court, on reassignment to a new judge, once again held that the Class Action Fairness Act's restrictions on "coupons" did not apply to the "credits." *In re EasySaver Rewards Litig.*, 2016 WL 4191048 (S.D. Cal. Aug. 9, 2016).

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[3] *Compare* Pet. Br. 30–34 & n.3.

On the second appeal, the Ninth Circuit recognized that non-cash instruments that expired and had multiple restrictions on their use were "coupons," and struck the fee award for recalculation. *EasySaver*, 2018 WL 4763174 at *3–*8.

Depending on the amount the fees will be reduced, between $3 and $9 million will remain in the settlement fund and divert to the *cy pres* award. The court acknowledged that it would be "technically feasible" to distribute that money to the class members. *EasySaver*, 2018 WL 4763174, at *8. Each of the 1.3 million class members was known (because the defendants necessarily possessed credit card records for them), and there was already a scheduled distribution to every single class member of coupons, thus the class members' distribution could be augmented up to $7 per class member. Nevertheless, the court approved the settlement and *cy pres* as fair because it found such amounts "*de minimis*" under *Lane v. Facebook*, 696 F.3d 811, 821 (9th Cir. 2012).

Similarly, *Lane* and the district court's "broad discretionary power" permitted the national class's money to go to class counsel's *alma mater* to promote the defendant's name in the defendant's and the judge's local community. *Id.* at *9 (quotation and citation omitted).

Thus, contrary to Google's claims (Br. 34), the Ninth Circuit's lenient approach to *cy pres* permits distributions even when feasible, and when "involving known class members" and "much larger settlement funds per class member." Nor does the Ninth Circuit approach confine *cy pres* to cases in which "actual injury is modest and intangible." Google Br. 31–32. *EasySaver* also discredits Gaos's claim (Br. 1) that "*cy pres* distributions are rare." *EasySaver* is a disturbing example of how *cy pres* creates the incentive for a district court to

decide to favor local attorneys and local charities over a national class, "an invitation for wild corruption of the judicial process." Pet. Br. 37–39. Finally, that separate judges in the *EasySaver* district court *twice* signed off on valuing difficult-to-redeem coupons at full face value even in the face of a Congressional prohibition against doing so and adversary presentation from a sophisticated objector exemplifies petitioners' concern (Pet. Reply Br. 6–7) that district courts will not "reliably police the day-to-day interests of absent class members" in the absence of bright-line rules.

In *EasySaver*, the Ninth Circuit's permissive approach allowed the settling parties to use illusory *cy pres* that benefited Provide to camouflage a $225,000 settlement as a $12.5 million settlement—even after the parties had demonstrated the use of other gimmicks (*i.e.*, coupons with absurd restrictions) to exaggerate settlement relief. The result is an unfair wealth transfer of millions of dollars from injured consumers to attorneys that makes a mockery of Rule 23. *Compare* Pet. Reply Br. 11–12. If the Ninth Circuit does not stay the mandate, on remand, *EasySaver* plaintiffs are sure to argue that the lodestar incurred in defending the coupon settlement twice on appeal—which Google suggests (Br. 55–56) as a solution to petitioners' concerns—permits the district court to once again award the full $8.9 million request, and receive forty times what the class actually received. 2018 WL 4763174 at *7. At a minimum, *Google Referrer* would treat the *cy pres* as equivalent to cash and award attorneys over $3.3 million, or over fourteen times what the class actually received. Only petitioners' proposed proportionality rule (Br. 39) can correct the Ninth Circuit's misinterpretation of Rule 23(e) and prevent and deter such abuses.

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v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CLASS RESPONDENTS' RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

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CLASS RESPONDENTS' RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

On October 23, 2018—eight days before argument—petitioners filed a supplemental brief discussing a then 20-day old court of appeals decision, which petitioners' counsel had briefed and argued. According to petitioners, the decision in *In re EasySaver Rewards Litigation*, No. 16-56307 (9th Cir. Oct. 3, 2018), confirms that the court below's "permissive approach to *cy pres* has exactly the pernicious effects" petitioners purport to identify in their brief. Supp. Br. 1. *EasySaver* has no bearing on the issues before this Court.

1. The primary issue in *EasySaver* has no relationship to the question presented in this case. The vast majority of the decision in *EasySaver* addresses an issue of statutory interpretation: whether $20 credits given to class members as part of a settlement agreement constitute "coupons" within the meaning of the Class Action Fairness Act ("CAFA"). See *EasySaver*, slip op. 10-21; 28 U.S.C. § 1712. The settlement in this case does not involve coupons. The Ninth Circuit's interpretation of the CAFA provision at issue in *EasySaver* thus has little to do with this case.

To the extent CAFA is relevant, it demonstrates that Congress is active in this area. For example, the CAFA provision at issue in *EasySaver* shows that, when Congress wishes to establish rules to limit attorney's fee awards in class actions based on the nature of the relief afforded to the class in the settlement, it does so expressly. Class Br. 42; see 28 U.S.C. § 1712(a) ("[T]he portion of any attorney's fee award to class counsel that is attributable to [an] award of the coupons shall be based on the value to class members of the coupons that are redeemed."); see 15 U.S.C. § 77z-1(a)(6) (limiting fees in securities class actions to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). But neither Congress nor the Federal Rules anywhere adopt such a rule for all class actions. "Federal courts * * * lack authority to substitute for Rule 23's" express terms "a standard never adopted." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622 (1997). And even CAFA's fee provisions are of dubious relevance here, as fees are not properly before the Court. Fees are governed by Rule 23(h)—not the fair, reasonable, and adequate standard applicable to settlements under Rule 23(e)—and the settlement in this case ex-

pressly *excludes* the fee amount from its scope, even if no fee is awarded of any sort. See Pet. App. 92-93 ("It is not a condition of this Settlement that any particular amount of attorneys' fees * * * be approved by the Court, or that such fees * * * be approved at all.").

2. Petitioners characterize *EasySaver* as evidence that courts cannot be trusted to "reliably police the day-to-day interests of absent class members in the absence of bright-line rules." Supp. Br. 5 (quotation marks omitted). *EasySaver* shows the opposite. First, *EasySaver* itself was primarily *about* a bright-line rule—that, when determining fees in coupon settlements, courts must categorically exclude the value of coupons that are not redeemed. Slip op. 11; see 28 U.S.C. § 1712(a). Petitioners' complaint is that the bright-line rule was not enforced in district court. Second, the court of appeals did enforce the bright-line rule, unflinchingly. It reversed the district court, holding that the unexercised "credits" at issue qualify as "coupons" and must be excluded from fee calculations. Slip op. 14. Third, and finally, the dispute was primarily about statutory construction—whether particular credits qualify as "coupons" under the statute. The court of appeals' correct conclusion that they are coupons evidences the proper functioning of our judicial process. *Id.* at 14-17. It does not support efforts to characterize district or appellate courts as unwilling to apply governing law in the class-action context.

3. Petitioners assert that *EasySaver* is symptomatic of broader problems with *cy pres* settlements. Petitioners once again conflate complaints about other cases with the issues before the Court in this case. Petitioners complain that the *EasySaver* claims process was "designed to depress the number of refund claims." Supp. Br. 2. But they do not claim any such argument in this

case. Nor does that complaint have any relevance to the propriety of *cy pres*. Petitioners also decry *EasySaver*'s approval of San Diego-based *cy pres* recipients to benefit a nationwide class. *Id.* at 2-3. But petitioners concede that issue is "not present in this case." Pet. Br. 34 n.3. And petitioners criticize the *EasySaver* court for not adopting their "proportionality rule." Supp. Br. 5. But that court had no reason to consider such a rule: It vacated the fee award on other grounds. Slip op. 21.

The only parts of *EasySaver* with conceivable relevance do not aid petitioners. The Ninth Circuit found no abuse of discretion in the district court's rejection of the "bare allegation" that a *cy pres* recipient's selection was tainted because some attorneys for the parties went to school at the institution that received the distribution. Slip op. 25; cf. Supp. Br. 2-3, 4. Petitioners' disagreement with that commonsense reasoning does not get more persuasive with repetition. See Class Br. 52-53 (rebutting *alma mater* argument). District court judges do not need to recuse merely because their *alma mater* is party to a suit before them; that alone does not create an appearance of bias. See, *e.g.*, *Roe* v. *St. Louis Univ.*, 746 F.3d 874, 886 (8th Cir. 2014) ("Alumni connections are not a reasonable basis for questioning a judge's impartiality, even if alumni contribute financially or participate in educational activities."); *Brody* v. *President & Fellows of Harvard Coll.*, 664 F.2d 10, 11 (1st Cir. 1981) (per curiam) ("[A] judge's having attended or graduated from a school, which is a party, without more, is not a reasonable basis for questioning his impartiality."). Besides, in this case, the district court addressed petitioners' concerns about *alma maters*. It took evidence, heard live from counsel, evaluated the detailed proposals, and found "no indication" that supposed loyalty to any

alma mater even "factored into the selection process." Pet. App. 59. *EasySaver* has no bearing on whether such consideration can be reversed as an abuse of discretion.

Petitioners also assail *EasySaver*'s factbound conclusion that *cy pres* distribution of unclaimed residue was permissible based on "the amount each [class member] might receive compared to the administrative costs of distribution." Slip op. 23. But that, too, has little bearing here. The class members in this case are 100 times as numerous as in *EasySaver*; their names and addresses are not already known; and processing millions of claims would require building a claim system to receive them—and verification of each submitted claim. Compare slip. op. 8, 22-23 (noting parties would already be sending coupons to the 1.3 million class members enrolled in the rewards program at issue), with C.A. S.E.R. 152 ¶20 ("names and addresses for Class Members are not readily available"); see Opening Brief of Appellant 47 n.7, *In re EasySaver Rewards Litig.*, No. 16-56307 (9th Cir. May 1, 2017) (acknowledging that the fact that *EasySaver* class members were already identified distinguishes that case from this one); see also Class Br. 50 n.11.[1]

EasySaver thus teaches little of utility for this matter. That is not to say the decision is entirely correct. This Court will have an opportunity to consider that case if petitioners (as counsel there) seek this Court's review. The Court may find the case worthy of review (particularly if it lacks the jurisdictional and vehicle defects that

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[1] In *EasySaver*, there was an additional risk not present here—that claimants who had already received settlement payments would be overcompensated by future distributions. Slip op. 22; *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 35 (1st Cir. 2012) (noting general acceptance of rule against further distributions to fully compensated class members).

plague this case). In the meantime, it is a late-arriving and less-than-fully explored anecdote. It provides no basis for displacing the text of Rules 23(b) and (e) with policy-based proposals that Congress and the Rules Advisory Committee have not vetted or adopted. Class Br. 26, 30, 47.

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners respond to the Court's Order of November 6. A named plaintiff must have individual Article III standing before bringing a class action. *E.g., Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("*NOW*"). Whether any named plaintiffs have demonstrated standing as of this filing depends upon "the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In the current posture, the evidentiary standard should be satisfied with pleadings. Section I, below. Given that plaintiffs' standing was never *factually* (as opposed to facially) controverted below, the best view is that plaintiffs have sufficiently pled standing, because they allege a congressionally recognized injury consistent with those recognized in historical practice. Section II, below. Even if that were not the case, plaintiffs would normally be permitted to make additional factual allegations, or submit adequate evidence to meet any plausible higher evidentiary standard, and should be able to meet such a standard. Section III, below.

ARGUMENT

I. Under *Lujan*, if standing is not factually controverted, plaintiffs must merely sufficiently allege standing to satisfy the standard of proof for standing at the settlement-class-certification stage.

1. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," but as the case progresses, if standing is "controverted," standing must be supported by evidence. *Lujan*, 504 U.S. at 561. For example, "at the

final stage," facts demonstrating standing must be "supported adequately by the evidence adduced at trial." *Id.*

While this Court has not specifically identified the level of evidence needed at the settlement-class-certification stage, the most workable answer under *Lujan* is to require a plaintiff to plead facts showing standing in order to invoke the jurisdiction of the federal courts—the standard already required to initiate a case. There is no need to require more before approving a settlement if the allegations, if true, would be sufficient to show standing and those allegations are not factually controverted.

Lower courts have been even more permissive than this. The Fifth Circuit found standing at the judgment stage based on "allegations in the operative pleading" despite the existence of expert declarations from the defendant disputing standing. *In re Deepwater Horizon*, 739 F.3d 790, 802–03, 805–06 (5th Cir. 2014). It held "it would be improper to look for proof of injuries beyond what the claimants identified in the class definition can allege they have suffered at" the class-certification stage, without distinguishing between litigation-class certification and settlement-class certification. *Id.* at 806 (cleaned up). While the dissent disagreed with the result of the application of that standard, it did not dispute the standard. *Id.* at 824 (Garza, J., dissenting). *In re Insurance Brokerage Antitrust Litigation*, 579 F.3d 241, 264, 275 (3d Cir. 2009), similarly refused to look beyond the allegations in the complaint.

2. But as Judge Clement's dissent from denial of rehearing *en banc* in *Deepwater Horizon* notes,

> There are sound reasons to evaluate Article III standing differently for pre-trial

> and settlement class certifications under Rule 23. Primarily, the settlement certification stage is more advanced in the life cycle of a class action than the pre-trial certification stage. When a settlement class is certified, all is resolved at the point of certification. However, in a pre-trial certification, the class must reach additional waypoints in the litigation—summary judgment, trial on the merits, or ultimately a settlement—to resolve the dispute. Accordingly, *Lujan*'s graduated approach for demonstrating the standing elements compels holding settlement class certifications to a higher standard than pre-trial certifications—the settlement certification stage has progressed further into the "successive stages of the litigation."

756 F.3d 320, 324 (5th Cir. 2014) (cleaned up). A decision on class certification at the settlement stage finally adjudicates the rights of absent class members, so requiring plaintiffs to meet a heavier burden of evidentiary proof makes some intuitive sense. A court would have to resolve factual questions of Rule 23(a) adequacy and typicality before certifying the class, so why not standing? Standing under *Lujan* is more than a "mere pleading requirement[]." 504 U.S. at 561.

One reason to not mechanically demand a "lengthy and costly inquiry that delves too far into the merits of the litigation,"[1] even at the judgment stage, is the implications such a rule would have for other forms of judgment. For example, if a defendant makes

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[1] 13B Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 3531.15 at 330 (3d ed. 2018) ("Wright").

a Rule 68 offer of judgment, must a court hold evidentiary hearings on standing to determine if it has the Article III jurisdiction to enter judgment? Plaintiffs may be unwilling to settle class actions where standing is closely related to the merits if they face the same risk and expense of litigating the factual question that they would if they tried the case. *Cf.* Google Br. 39 (discussing "judicial economy and economic efficiency" of permitting settlements). On the other hand, requiring settling plaintiffs to satisfy a factual showing of standing may usefully discourage bringing low-merit class actions with attenuated claims of standing in the first place.

One can find the solution to balancing these problems in *Lujan*'s language of "*if* controverted." 504 U.S. at 561 (emphasis added), and the way courts handle Rule 12(b)(1) challenges to jurisdiction. Under Rule 12(b)(1), courts distinguish between facial and factual challenges. *E.g., Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56–57 (2d Cir. 2016). If, as here, standing is not factually controverted in the lower courts, there is no need to demand evidence beyond what is alleged in the complaint, "construe[ing] the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). If, on the other hand, an objector makes a plausible factual challenge to the class representatives' standing, or a court suspects collusion by the parties to create jurisdiction, some evidentiary showing and factual finding is required, just as there would be with respect to disputes on other elements of the appropriateness of class certification under Rules 23(a) and (b). *Cf. id.* This intermediate approach avoids the burden of unnecessary litigation where there is no controversy over the underlying facts relating to standing, but protects absent class members' rights if a class

representative seeks to improperly invoke the federal jurisdiction of a court at absent class members' expense. It also deters abusive litigation where plaintiffs cannot legitimately hope to obtain a finding of standing or class-action certification in a fully-litigated case. Here, Google made only a facial Rule 12(b)(1) challenge to the named plaintiffs' standing. Google's Mot. to Dismiss First Am. Compl., Dkt. 29 at 4 n.1, 6–11. No lower court and no class member challenged the factual basis for named plaintiffs' standing. Thus, there is no reason to look beyond the allegations of the complaint as the government suggested at oral argument. *E.g., Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1208–12 (11th Cir. 2018).

3. The Court has been inconsistent regarding the standard required to plead standing. Wright § 3531.15 at 302–07. In one line of cases, the Court states that the plaintiff must "*clearly* ... allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth*, 490 U.S. at 518 (emphasis added); *accord Spokeo Co. v. Robins*, 136 S. Ct. 1540, 1547 (2016). This possibly implies a degree of particularity akin to that in Fed. R. Civ. P. 9(b).

But in other cases, the Court applies "the general liberal standards of notice pleading." Wright § 3531.15 at 305. In that line of cases, general allegations of injury, causation, and redressability suffice at the pleading stage; the burden "is relatively modest." *Bennett v. Spear*, 520 U.S. 154, 167–71 (1997). In *Steel Co. v. Citizens for a Better Environment*, though it did not find standing, the Court said it "must presume that the general allegations in the complaint encompass the specific facts necessary to support

those allegations." 523 U.S. 83, 103 (1998); *accord NOW*, 510 U.S. at 256; *Lujan*, 504 U.S. at 561. *Steel Co.* reaffirmed *Bell v. Hood*, 327 U.S. 678, 682 (1946), in holding that the "absence of a valid (as opposed to arguable) cause of action" did not eliminate jurisdiction. 523 U.S. at 89. *Cf.* Oct. 31 Tr. 18:7–17; *Doe v. Chao*, 540 U.S. 614 (2004).

Even after *Ashcroft v. Iqbal*, a claim is properly pled where the facts alleged allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. 662, 678 (2009). Applying this standard, this Court unanimously held in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46–47 (2011), that a plaintiff could surmount a motion to dismiss and still adequately plead materiality from failure to disclose adverse events without pleading a statistically significant causal relationship between the adverse events and the defendant's product.

If the Court reaffirms the "relatively modest" *Bennett / NOW / Lujan* pleading standard to determine standing, then at least named plaintiff Italiano has standing here because of the complaint's plausible allegations. One can reasonably infer from plaintiffs' complaint that the privacy of the named plaintiffs, and of absent class members, has been compromised by Google's dissemination of their search queries to third parties.

II. Named plaintiffs' allegations of Electronic Communications Privacy Act violations are concrete for Article III standing.

A. Dissemination of plaintiffs' Google searches is closely related to the harm of disclosure of private communications protected at common law and elevated by Congress.

Named plaintiffs pled an injury in fact sufficiently "concrete" to establish Article III standing because they alleged that their private Internet search queries were unlawfully divulged to third parties in violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2510, *et seq*. (The Stored Communications Act is Title II of the ECPA. This brief uses "ECPA" to refer to both to be consistent with the operative complaint, though it makes only Stored Communications Act claims.)

The violation of a statute may be sufficient to constitute injury in fact, even absent allegation of "any *additional* harm beyond the one Congress has identified." *Spokeo*, 136 S. Ct. at 1549 (emphasis in original). When evaluating whether a statutory violation establishes concrete injury, *Spokeo* instructs courts to consider two factors: first, the "historical practice" regarding the intangible harm, and second, Congressional "judgment" regarding such intangible harm. *Id.* Both factors support jurisdiction here.

1. Here, the "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. The dissemination of plaintiffs' private search queries

is in "close relationship" to common-law privacy rights regarding communications.

"The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.... [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them." Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890).

Justice Story found common-law private rights at issue when letters are published without authorization:

> a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit...

Folsom v. Marsh, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841).

Justice Story further detailed the reasoning behind equitable protection available to confidential letters. Such letters contained intimate expressions of the mind "reposed in the bosoms of others under the deepest and most affecting confidence." 2 Joseph Story, *Commentaries on Equity Jurisprudence: as Administered in England and America* § 946 (3d rev., corrected & enlarged ed. 1843) ("Story, *Commentaries*"). Without common-law protection, "every one, in self-defence, [would] write, even to his dearest friends, with the cold and formal severity with which he would write to his wariest opponents, or his most implacable enemies." *Id.*; *see also* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 Geo. L.J.

123, 143 (2007) ("Numerous American cases protected the confidentiality of private letters" and established breach-of-confidence law to provide actionable remedy in equity against unwanted disclosures). Early cases bolster this view. *E.g., Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 485, 491 (Ky. Ct. App. 1867) ("modern common law" provided protection of private letters "by injunction against piracy or intrusion") (citing cases); *Waterhouse v. Spreckels*, 5 Haw. 246, 254 (1884) ("Equity will restrain the unauthorized publication of private letters, on the ground of violation of confidence and injury to the feelings.") (citing *Cooley on Torts* 356–59; *Kerr on Injunctions* 187–89; *Pomeroy's Equity Jurisprudence* § 1358; Story, *Commentaries* §§ 946, 948).[2]

Private letters enjoy a longstanding tradition of protection, and there is no "rational basis for denying to the modern means of communication the same protection that is extended ... to the sealed letter in the mails." *Goldman v. United States*, 316 U.S. 129, 141 (1942) (Fourth Amendment) (Murphy, J., dissenting), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967); *accord* Warren, 4 Harv. L. Rev. at 196 (the right to control one's expressions "is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed").

Similarly, in *Carpenter v. United States*, this Court recognized "the seismic shifts in digital technology" that enable private companies to now gather an "exhaustive chronicle" of sensitive information that

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[2] Although it is unlikely that each of these equitable injunctions would survive on the merits under today's robust First Amendment jurisprudence forbidding prior restraints, that does not undermine the justiciability of the injury recognized in such early cases.

"hold for many Americans the privacies of life." 138 S. Ct. 2206, 2217, 2219 (2018).

As with private letters, Internet search queries reflect users' communications of intimate thoughts and sentiments that deserve the confidentiality protection the common law historically provided. "One's [Internet] search history eerily resembles a metaphorical X-ray photo of one's thoughts, beliefs, fears, and hopes." Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 Utah L. Rev. 1433, 1442 (2008). In August 2006, AOL publicly posted 20 million search queries entered by 658,000 users over a period of three months. Though the data was anonymized, the search queries themselves often suggested the identity of the searcher. Michael Barbaro & Tom Zeller, *A Face Is Exposed for AOL Searcher No. 4417749*, N.Y. Times (Aug. 9, 2006) ("My goodness, it's my whole personal life... I had no idea somebody was looking over my shoulder."); Tene, 2008 Utah L. Rev. at 1443; Second Am. Compl., Dkt. 39 ¶¶ 33–37 ("Compl.").[3] One user's search queries, for example, included "aftermath of incest ... divorce laws in ohio ... anti psychotic drugs." Tene, 2008 Utah L. Rev. at 1443. These queries reveal the same private matters historically protected at common law. Restatement (Second) of Torts § 652D (1977) (observing actionable invasion of privacy for public disclosure of private facts regarding "family quarrels, many unpleasant or disgraceful or humiliat-

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[3] The resulting class action settled for "up to" $5 million. Though this was under $8 per class member, the settlement distributed cash to the class through a claims and arbitration process, with any unclaimed amounts reverting to AOL. *Landwehr v. AOL Inc.*, No. 11-cv-1014 (E.D. Va.) Dkt. 91-1 ¶¶ 12–17 (Dec. 17, 2012). The *Landwehr* court record does not disclose how much cash ended up in the class's hands. *Cf. also* Pet. Br. 25–27.

ing illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget"); Story, *Commentaries* § 946 (privacy protections extend beyond valuable manuscripts to "mere private letters on business, or on family concerns, or on matters of personal friendship").

2. When evaluating whether a statutory violation establishes concrete injury, the second *Spokeo* factor is Congress's "judgment" in "identifying and elevating intangible harms." 136 S. Ct. at 1549. While "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," a "bare procedural violation, divorced from any concrete harm" is not. *Id.* Thus, whether the statute at issue creates a procedural or substantive right is relevant to the concreteness determination.[4]

In *Eichenberger v. ESPN, Inc.*, the Ninth Circuit held that a user of a sports-related news and entertainment application had Article III standing to bring a Video Privacy Protection Act (VPPA) claim against ESPN for sharing information concerning the user's device and his video viewing history without consent. 876 F.3d 979, 984 (9th Cir. 2017). The VPPA "codifies a context-specific extension of the *substantive* right to privacy" that "protects generally a consumer's substantive privacy interest in his or her video-viewing history." *Id.* at 983 (emphasis in original).

The "impetus" of the VPPA was a Washington newspaper that obtained from a video-store clerk, published, and commented upon Judge Robert Bork's videotape-rental records during his Supreme Court

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[4] To some degree, this distinction maps onto that between private and public rights discussed by Justice Thomas's *Spokeo* concurrence. *See* Section II.B below.

nomination hearings. S. Rep. No. 100-599, at 7 (1988); *Eichenberger*, 876 F.3d at 984 n.2. *Eichenberger* found that Congress's judgment reflected the creation of a "substantive provision that protects concrete interests" because "Congress enacted the VPPA 'to extend privacy protection to records that contain information about individuals.'" 876 F.3d at 983 (quoting S. Rep. No. 100-599, at 2). (One can readily imagine a Silicon Valley employee similarly willing to violate his employer's rules and leak the search history of a controversial public figure he dislikes. *Cf.* Maggie Astor, *Rogue Twitter Employee Briefly Shuts Down Trump's Account*, N.Y. Times (Nov. 2, 2017).)

Unlike the Fair Credit Reporting Act ("FCRA") at issue in *Spokeo*, which "outlines *procedural* obligations that *sometimes* protect individual interests, the VPPA identifies a *substantive* right to privacy that suffers *any time* a video service provider discloses otherwise private information" without consent. *Eichenberger*, 876 F.3d at 983–84 (emphasis in original). The VPPA "does not describe a procedure that that video service providers must follow. Rather, it protects generally a consumer's substantive privacy interest in his or her video-viewing history." *Id.* at 983. The same is true with the ECPA.

Congressional judgment supports standing here because the purpose and structure of the ECPA codify a substantive privacy right. In passing the ECPA, Congress sought to ensure privacy protections for electronic communications comparable to those that already existed for physical records. S. Rep. No. 99-541, at 5 (1986); *cf.* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209–13 (2004) (noting contemporaneous uncertainty

about Fourth Amendment protections for Internet records). The ECPA mirrors the common-law interest by allowing disclosure of communications to the intended recipient or to others if necessary, compelled by law, or with the sender's consent, but generally disallowing most disclosures. 18 U.S.C. § 2702(a), (b). It chooses to fortify this interest by, *inter alia*, granting individuals a cause of action for statutory damages against companies that divulge their communications in violation of the Act. 18 U.S.C. § 2707.

Plaintiffs allege that Google violated the ECPA statutory prohibition against "divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." Compl. ¶ 116. Like the VPPA, that provision does not describe a "procedure" but protects a consumer's substantive privacy interest in his or her search query "history." *Eichenberger*, 876 F.3d at 983. Accordingly, just as the Ninth Circuit concluded, "*Spokeo I* and *Spokeo II* are distinguishable from this [ECPA] claim, and Plaintiff need not allege any further harm to have standing." *Id.* at 984; *see also Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1341 (11th Cir. 2017); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 624 (2017).

3. At argument, Justice Breyer expressed skepticism regarding the private nature *vel non* of named plaintiff Italiano's searches:

> What is the private—I mean, what I have here, my law clerk brought it up, is that the search that Mr. Italiano engaged in was his name, that's certainly public, his home address, I imagine that's public, ... and his

> name and the name of his then soon-to-be ex-wife and the words "forensic accounting."

Oct. 31. Tr. 18–19. While the information Italiano *sought* may be public, the search queries themselves reveal his private thoughts and sentiments, a private detailing of a public episode. Italiano's divorce may be a matter of public record, but the dark corners of the marital dissolution are not, let alone his thoughts regarding that event. For example, Italiano's search for "[his name]" + "[his wife's name]" + "forensic accounting" (Compl. ¶¶ 90–96)—the process of investigating hidden or dissipated assets—indicate his feelings about his soon-to-be ex-wife, thoughts regarding the acrimony of his divorce proceedings, and his litigation strategy and considerations. As Justice Kavanaugh recognized, "I don't think anyone would want the disclosure of everything they searched for disclosed to other people. That seems a harm." Oct. 31 Tr. 31:4–7. This is especially true for revelations of the "sacred confidences which subsist between husband and wife" otherwise hidden "from public gaze." *Owen v. State*, 78 Ala. 425, 430 (1885).

But even if one deploys search queries that are entirely innocuous, their unauthorized dissemination still implicates a concrete personal interest. At common law any fixed "production of the mind" constituted a protected interest regardless of the subject matter of the expression. *Grigsby*, 65 Ky. at 485 (citing British and American authorities); *see also* Warren, 4 Harv. L. Rev. at 199 (protection does not "depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression").

Where the content or character of the expression matters, it goes to the merits of one's privacy claim,[5] or the appropriateness of a Rule 23(b) predominance finding for class certification, not to one's standing to bring the action. *Cf. Doe*, 540 U.S. 614 (requiring actual damages to state a claim under the Privacy Act for unlawful dissemination of information, but not for purposes of standing). "[W]hether [plaintiffs] are entitled to the relief that they seek goes to the merits, not to standing." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 151 n.1 (2010). "One must not confuse weakness on the merits with absence of Article III standing." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (cleaned up). *Cf.* Oct. 31 Tr. 18:7–17.

That Italiano's "communication" was to a Google server and not another person makes no difference. Internet search queries are written expressions of users' intimate thoughts and feelings, no less deserving of protection than a diary: "The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public." Warren, 4 Harv. L. Rev. at 199; *see also Sheets v. Salt Lake Cnty.*, 45 F.3d 1383, 1388 n.1 (10th Cir. 1995) (common-law privacy torts would cover public disclosure of private diary). Indeed, Google searches are potentially *more* private or embarrassing than letters or email because they are directed to a machine and not filtered or edited for a human recipient. Further, plaintiffs' alleged injury

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[5] *See, e.g.*, Restatement (Second) of Torts § 652D (requiring plaintiff to show, *inter alia*, that the publication "would be highly offensive to a reasonable person").

need not "exactly track[] the common law," *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1115 (9th Cir. 2017), *cert denied, Spokeo, Inc. v. Robins*, 138 S. Ct. 931 (2018), as Congress may expand and "elevat[e]" the preexisting common-law interests. *Spokeo*, 136 S. Ct. at 1549.

"When people establish a relationship with banks, Internet service providers, phone companies, and other businesses, they are not disclosing their information to the world. They are giving it to a party with implicit (and often explicit) promises that the information will not be disseminated." Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477, 529 (2006); *see also* Tene, 2008 Utah L. Rev. at 1491–92 (positing a private cause of action against search engines for breach of confidence similar to confidentiality customers entrust in "physicians, psychotherapists, lawyers, and bankers"). Similarly, Italiano's Google searches were personal and confidential and he did not want them divulged. Compl. ¶¶ 90–96. Italiano's allegations of harm—dissemination of those private Google searches—closely relate to the common law's deep-rooted tradition of protecting individuals' private communications from breach of confidence.

B. Named plaintiffs allege a private right that satisfies Justice Thomas's *Spokeo* concurrence.

The allegations also meet the requirements of Justice Thomas's concurrence in *Spokeo*. Though *Spokeo* has "led to confusion about how harms involving personal data should be conceptualized,"[6] "Justice

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[6] Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 Tex. L. Rev. 737, 744 (2018).

Thomas's concurrence may be one of the most fruitful things to happen to standing at the Supreme Court in many years." William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197, 198 (2017).

Like the *Spokeo* majority, Thomas's concurrence is attuned to the significant role that common-law tradition and Congressional judgment play in determining "injury-in-fact." *Spokeo*, 136 S. Ct. at 1551–53. But it also emphasizes the distinction between suits vindicating private rights, as in this case, and those vindicating public rights. *Id.* Plaintiffs alleging a violation of public rights (*i.e.*, rights involving duties owed to the whole community *qua* community) must demonstrate their own concrete and particularized injury to proceed in federal court. *Id.* at 1552. Plaintiffs alleging a violation of private rights (*i.e.*, rights involving duties owed to and belonging to individuals) need not demonstrate additional injury beyond infringement of their private right. *Id.*

"Many traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Spokeo*, 136 S. Ct. at 1551. The same is true of legislatively created private rights: "A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." *Id.* at 1553 (citing, *inter alia*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982)).[7]

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[7] Plaintiff Italiano's claim (Compl. ¶¶ 136–140) that Google unjustly enriched itself using class members' search queries also states a justiciable controversy. Claims for unjust enrichment have a deep history in Anglo-American law. *See generally*

It could hardly be otherwise. Take, for example, an employee's right under the Fair Labor Standards Act to time-and-a-half overtime pay. *See* 29 U.S.C. § 207(a)(1). There is no pre-legal concrete harm in receiving one's usual wage for the forty-first hour worked in any given week. But there is no question that an employee who alleges a violation of FLSA's overtime-pay requirement has standing to press his grievance in federal court; the harm is the violation of the employer's congressionally-created legal duty to the employee. More broadly, Justice Thomas's concurrence can explain the well-established doctrine of nominal damages claims. "The very premise of nominal damages is that one cannot show any 'actual injury' apart from the violation of the legal right itself." Baude, 2016 Sup. Ct. Rev. at 217 (quoting *Carey v. Piphus*, 435 U.S. 247, 266 (1978)); *accord Spokeo*, 136 S. Ct. at 1552 (citing *Carey*).

Distinguishing between private and public rights offers a way to reconcile past decisions of this Court. For instance, in *Doe v. Chao*, the Court unanimously agreed the plaintiff had standing to allege a violation of his rights under the Privacy Act when the Department of Labor disclosed his social security

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Restatement (Third) of Restitution and Unjust Enrichment § 1, Comment and Reporter's Note (2011). The injury is the invasion of the plaintiffs' equitable rights caused by Google's allegedly wrongful retention of a benefit. And the injury can be redressed by "imposition of a constructive trust on and restitution of the proceeds." Compl. ¶ 140. No further injury is required; "[i]n the damage action the plaintiff seeks to recover for the harm done to him, whereas in the restitution action he seeks to recover the gain acquired by the defendant through the wrongful act." 1 George E. Palmer, *The Law of Restitution* § 2.1 at 51 (1978); *see generally* Ward Farnsworth, *Restitution: Civil Liability for Unjust Enrichment* (2014).

number, even though the plaintiff had sustained no consequential damages. 540 U.S. 614. Indeed, because plaintiff Doe had not alleged any actual damages, *Doe* found that he failed to state a claim under the Privacy Act despite "injury enough to open the courthouse door." *Id.* at 625.

Doe is not an outlier; Justice Thomas's concurrence harmonizes the general practice of this Court in past cases. "Since *Lujan*, the Court has regularly addressed the merits of claims involving improper dissemination of information about plaintiffs without discussing justiciability [or] exhibit[ing] concern regarding the plaintiffs' 'injury in fact.'" Seth F. Kreimer, *"Spooky Action at a Distance": Intangible Injury in Fact in the Information Age*, 18 U. Pa. J. Const. L. 745, 779 (2016). For example, this Court has adjudicated such disputes involving a Driver's Privacy Protection Act claim in *Maracich v. Spears*, 133 S. Ct. 2191 (2013); a Fair Credit Reporting Act claim in *United States v. Bormes*, 133 S. Ct. 12 (2012); a Family Educational Rights and Privacy Act claim in *Owasso Independent School District v. Falvo ex rel. Pletan*, 534 U.S. 426 (2002); and federal and state wiretapping statutory claims in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Kreimer, 18 U. Pa. J. Const. L. at 779–81 (compiling these among other examples); *see also* Baude, 2016 Sup. Ct. Rev. at 217–20 (observing that injury in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) arose as a result of a statutorily granted right regarding the listing of personal information on a passport, yet the Court was not troubled by an *amicus*'s standing argument). In each of these cases, legislative prerogative to exalt

privacy interests to the status of private legal rights legitimated this Court's exercise of judicial power.[8]

"It is unclear why, in [the area of privacy], Congress should not be allowed to protect interests beyond those protected by the common law, as it has been allowed in other cases." Baude, 2016 Sup. Ct. Rev. at 223. The ECPA vests a private right in persons aggrieved by violations of the Act. *See* 18 U.S.C. § 2707(a); *contrast Spokeo*, 136 S. Ct. at 1554 (Thomas, J., concurring) (hypothesizing a public-rights statute that vests "any and all consumers" with enforcement powers). Just as this private cause of action is a species of property for purposes of the Due Process Clause,[9] it should constitute a legally protected interest for purposes of Article III as well.

Justice Thomas's concurrence has garnered approbation and reliance in the lower courts. *See, e.g., Muransky*, 905 F.3d at 1210 n.4; *Springer v. Cleveland Clinic Employee Health Plan Total Care*, 900 F.3d 284, 290 (6th Cir. 2018) (Thapar, J., concurring); *Robins*, 867 F.3d at 1116; *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 638 n.18 (3d Cir. 2017); *Carlson v. United States*, 837 F.3d 753, 758 (7th Cir. 2016). Adopting its approach will provide a firmer footing for this Court's precedents, and will avoid an "indeterminate" "non-solution" that "leaves courts, litigants, and commentators in considerable doubt"

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[8] Likewise, the distinction between public and private rights explains many "regulatory compliance" cases in which this Court has found plaintiffs to lack standing. Baude, 2016 Sup. Ct. Rev. at 229 (citing *Lujan*; *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Muskrat v. United States*, 219 U.S. 346 (1911); and *Raines v. Byrd*, 521 U.S. 811 (1997)).

[9] *E.g., Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 363 (2011); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

about the fundamental scope of the Judicial Power. Craig Konnoth & Seth Kreimer, *Spelling Out* Spokeo, 165 U. Pa. L. Rev. Online 47, 61 (2016) (cleaned up).

The allegations of the complaint plainly meet the standard set forth in Justice Thomas's concurrence because they allege an injury of a private right created by Congress.

III. The named plaintiffs would normally be entitled to another opportunity to satisfy more stringent burdens of proof of Article III standing.

1. If the Court requires a factual finding or more specific allegations beyond the allegations of the operative complaint, remand nevertheless remains unnecessary. *E.g., Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 718 (2007) (accepting lodged affidavit in similar circumstances). "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. For example, in *McMahon v. Bunn-O-Matic Corp.*, the appellate court determined that the defendant's removal petition was defective, but permitted amendment after oral argument to establish jurisdiction. 150 F.3d 651, 654 (7th Cir. 1998) (Easterbrook, J.). *See also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989).

It is difficult to imagine that plaintiffs could not make this showing if it were required here or on remand. The underlying premise of the operative complaint is that Google transmitted class members' search queries to third parties, who could identify class members through their vanity searches. Compl. ¶¶ 42–83. Google (Oct. 31 Tr. 38:20–39:8) would apparently require the named plaintiff to plead that

third parties had in fact connected the dots and successfully identified class members, but that is implicit in plaintiffs' description of how easy reidentification is. Compl. ¶¶ 35–36, 78. One need not be a hacker; readily available code allows even amateur websites to deduce the identities of some readers who browse the website through the combination of referrer headers from Google and other search engines, IP addresses, and other information transmitted through the Internet browser to the website. *Cf.* Kashmir Hill, *How to Bait and Catch the Anonymous Person Harassing You on the Internet*, Forbes (Sept. 28, 2012) ("Programs like AWStats or Webalizer will keep visitor logs for you that will reveal where your readers are coming from."). An IP address "will narrow the location down and using cross-referencing and further research, it is very much feasible to ... extract a name." *Id.* The process would, one imagines, be even easier for a website making commercial use of cookies and access to cross-referenced databases—or products like Google Analytics. *Cf.* Google, *Cookies and User Identification*, https://developers.google.com/analytics/devguides/collection/analyticsjs/cookies-user-id (retrieved Nov. 26, 2018). Thus, in combination with the IP address, "enough referrer headers" to "figure out" a user (Oct. 31 Tr. 44:7–10) is often as low as one. Finding an expert to testify to this reality should be a trivial hoop-jumping exercise for the plaintiffs.

2. That said, plaintiffs should not get an indefinite "train of opportunities" to establish standing. *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1074 (7th Cir. 1992). If the Court believes an evidentiary showing is required, the class should be required to amend its pleadings promptly. A "court may allow or require a plaintiff to supplement the record to show standing... If, after this opportunity,

the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1269 (2015) (cleaned up) (permitting plaintiffs to make additional showing on remand after Court clarified standing requirements and remanded for other reasons).

CONCLUSION

Given the current procedural posture, the *Bennett/NOW/Lujan* pleading standard should apply. If so, at least named plaintiff Italiano has sufficiently pled concrete injury. But if the Court requires a greater showing than Italiano has made to date, then petitioners believe that plaintiffs will be able to demonstrate standing with 28 U.S.C. § 1653 amendments and affidavits.

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Supreme Court of the United States

THEODORE H. FRANK, ET AL.,

Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CLASS RESPONDENTS' SUPPLEMENTAL BRIEF ON ARTICLE III STANDING

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IN THE

Supreme Court of the United States

NO. 17-961

THEODORE H. FRANK, ET AL.,

Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

CLASS RESPONDENTS' SUPPLEMENTAL BRIEF ON ARTICLE III STANDING

The requirement that plaintiffs have "standing" limits the judicial power to "'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). This case represents such a controversy: A dispute arising from the unauthorized disclosure of communications. Such unauthorized disclosures are themselves injurious. This Nation's courts have long heard cases arising from privacy breaches without proof of "specific harm" beyond the breach itself. *Doe* v. *Chao*, 540 U.S. 614, 621 (2004). English and American courts have entertained actions

arising from unauthorized disclosure of communications in particular—like the Stored Communications Act ("SCA") violations here—for over 275 years, even enjoining disclosures or awarding the wrongdoer's profits, again without claimed injury beyond the disclosure itself. See, *e.g.*, *Folsom* v. *Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841). The Consolidated Complaint ("Complaint"), moreover, alleges that Google's disclosures breached contractual obligations. More than 180 years ago, this Court recognized that plaintiffs can sue—recovering nominal damages—for breach of contract, even if no loss results. See *Wilcox* v. *Ex'rs of Plummer*, 29 U.S. (4 Pet.) 172, 181-182 (1830). The notion that some further injury is required defies tradition and longstanding precedent.

That said, neither the court of appeals nor the district court below addressed whether the Complaint's allegations establish standing under the standard articulated in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016)—for the SCA claim *or* the "other four causes of action" asserted. Oral Arg. Tr. 67. This Court ordinarily is "'a court of final review and not first view.'" *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam). We have found only one court-of-appeals decision applying *Spokeo*'s framework to SCA claims. See *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 272-274 (3d Cir. 2016); p. 17 n.4, *infra*. Nor has there been an opportunity in this Court for full *amicus* participation, despite helpful *amicus* input on similar matters (including *Spokeo* and *First American Financial Corp.* v. *Edwards*, 567 U.S. 756 (2012) (per curiam)). Class Respondents accordingly remain of the view that the Court should refrain from resolving standing here, even if it precludes the Court from addressing the question presented. That question, if important, will recur. A deci-

sion of this Court on standing, by contrast, would be conclusive on important issues—potentially with unanticipated adverse consequences—before most courts of appeals have even been heard.

ARGUMENT

Article III standing requires a plaintiff to demonstrate, among other things, an "injury in fact" that is "'concrete and particularized.'" *Spokeo*, 136 S. Ct. at 1547-1548 (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). In *Spokeo*, this Court confirmed that "intangible harm" can be injury-in-fact where it bears a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1549. Congress, moreover, can "'define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Ibid.* Risks of harm can suffice as well. *Ibid.* But violation of a statute is not necessarily by itself sufficient. Courts instead must consider both "history" and Congress's "judgment" in deciding whether a violation constitutes a constitutionally sufficient injury-in-fact. *Ibid.*

In this case, that history—the traditional practices of English and American courts—should be "well nigh conclusive." *Vt. Agency*, 529 U.S. at 777. The SCA forbids the unauthorized disclosure of "communications." 18 U.S.C. §2702(a)-(b). For centuries, unauthorized disclosure itself has been sufficient injury to sustain an action in court, without proof of further harm. Courts thus have awarded injunctions against disclosure, as well as the wrongdoer's profits—relief that the Complaint demands and the SCA authorizes. Although no extension of traditional principles is required, Congress resolved any doubt through the cause of action it created in the SCA,

which affords relief without regard to actual harm beyond the disclosure itself. See §2707(a)-(c). The other causes of action asserted, including breach of contract and unjust enrichment, have similar pedigrees. Those breaches are likewise sufficient to support Article III standing.[1]

Because this case was resolved "at the pleading stage," standing is evaluated based on the complaint. *Spokeo*, 136 S. Ct. at 1547; see *Lujan*, 504 U.S. at 561. The operative Complaint is therefore reproduced as an Appendix (App., *infra*, 1a-60a). We address the asserted causes of action, and their historical antecedents, in turn.[2]

---

[1] Under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2), federal courts have jurisdiction over class actions with $5 million in controversy if there is minimal diversity—*i.e.*, if any named plaintiff and defendant are diverse. The Complaint alleges every required element under CAFA: It states that Google's citizenship is different from the citizenship of named plaintiffs, App., *infra*, 3a-4a (¶¶ 8-11); and it seeks disgorgement of profits estimated in the tens of billions, App., *infra*, 5a-6a (¶ 17), 55a-56a (¶¶ 152, 158); see Pet. App. 40 ($8.5 million settlement). Although the Complaint does not cite CAFA, no citation is required when a court "readily can recognize the existence of a federal question or diversity of citizenship and the requisite amount in controversy." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1214 (3d ed.). If preferable, the pleadings can be amended under 28 U.S.C. § 1653 now or on remand.

[2] Although we analyze claims individually, history demonstrates that a plaintiff generally need not allege additional harm "to enforce only his personal rights against another private party." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring). "In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded." *Ibid.*; see *Entick* v. *Carrington* (1765) 95 Eng. Rep. 807, 817 (KB); *Ashby* v. *White* (1703) 92 Eng. Rep. 126, 137 (KB); 3 W. Blackstone, *Commentaries on the Laws of England* 23 (1768).

I. Named Plaintiffs Have Article III Standing To Assert Stored Communications Act Claims

The Complaint alleges that Google disclosed the class representatives' communications—search terms they transmitted to Google—to third parties without authorization in violation of the SCA. App., *infra*, 43a-47a (¶¶ 100-118), 50a-53a(¶¶ 130-141). It alleges that Google profited therefrom, "effectively selling" their "search queries." App., *infra*, 34a-35a(¶¶ 78-82), 52a(¶¶ 136, 138). The Complaint thus seeks an injunction, App., *infra*, 53a (¶ 141), 57a-59a(¶¶ 164-171); recovery of wrongful profits, App., *infra*, 53a(¶ 141), 59a; and all forms of damages authorized by law, *ibid.* Even apart from threatened harm, see pp. 18-19, *infra*, the alleged wrongful disclosure of individual communications supports standing here.

"[T]he law has long" recognized that actionable harm ["]res in the invasion of certain legal rights, such as the right "'to obtain information' that Congress ha[s] decided to make public." *Spokeo*, 136 S. Ct. at 1549. The same rule applies to the right to prevent disclosure of private information. *Doe*, 540 U.S. at 621 & n.3. A "privacy tort victim" thus can recover damages without showing "specific harm[s]." *Id.* at 621. As explained below, centuries of law likewise establish that persons whose *communications* are disclosed without authorization "need not allege any *additional* harm beyond" the disclosure itself. *Spokeo*, 136 S. Ct. at 1549.

A. Founding-Era Courts Redressed Unauthorized Disclosures Without Requiring Further Harm

English and American courts have long held that the disclosure of communications without consent is actionable, either as an invasion of "property" or "a breach of private confidence or contract." *Folsom*, 9 F. Cas. at 346. No further showing of harm was required. Courts pre-

sumed the disclosure itself inflicted actionable—indeed irreparable—injury.

1. As early as 1741, English courts heard cases arising from the unauthorized disclosure of communications. See *Pope* v. *Curl* (1741) 26 Eng. Rep. 608, 608 (Ch.). English law recognized that "'every man has a right to keep his own sentiments' and 'a right to judge whether he will make them public.'" D. Seipp, *English Judicial Recognition of a Right to Privacy*, 3 Oxford J. Legal Stud. 325, 338 (1983). Writers of letters had a right to control their communications on "familiar subjects" no less than authors of literary works. *Pope*, 26 Eng. Rep. at 608. It was "ever so clear" that both had a "property" right in, and the right to control dissemination of, their writings. *Gee* v. *Pritchard* (1818) 36 Eng. Rep. 670, 674-675, 677 (Ch.).

English courts regularly restrained the unauthorized publication of letters without asking whether publication would "wound * * * feelings" or have "mischievous effects." *Gee*, 36 Eng. Rep. at 678; see *Thompson* v. *Stanhope* (1774) 27 Eng. Rep. 476, 477 (Ch.); *Pope*, 26 Eng. Rep. at 608. The purpose of disclosure was "immaterial." *Gee*, 36 Eng. Rep. at 675. Courts presumed that "the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

The practice of enjoining disclosure without requiring any "mischievous effect[]" is telling. The longstanding rule is that conduct may be enjoined only if it will otherwise cause "irreparable injury." *Weinberger* v. *Romero-Barcelo*, 465 U.S. 305, 312 (1982). For English courts, unauthorized disclosure of a communication *automatically* provided *irreparable harm*. See R. Eden, *A Treatise on the Law of Injunctions* 190, 200-202 (1822).

2. Early American courts agreed, recognizing that "no doctrine" had been "more fully sustained." *Woolsey* v. *Judd*, 11 How. Pr. 49, 55-56 (N.Y. Super. Ct. 1855); see *Grigsby* v. *Breckinridge*, 65 Ky. 480, 485-486 (1867) (collecting authorities). "The earliest case in this country * * * arose in 1811," *Baker* v. *Libbie*, 97 N.E. 109, 110 (Mass. 1912), in the federal territorial court for the Territory of Orleans, which enjoined an attempt to print a letter with "the sole view of disclosing the writer's secrets and wounding his feelings," *Denis* v. *LeClerc*, 1 Mart. 297, 305-306 (Orleans T. Super. Ct. 1811). The court invoked English cases concerning letters published for "pecuniary benefit." *Id.* at 305. The law, it stated, abhors the "disclosure of the contents of a confidential communication"; the writer retains a "property" interest and the right to control disclosure. *Id.* at 299-302, 309-312.

In 1841, Justice Story enjoined the publication of a collection of George Washington's letters. *Folsom*, 9 F. Cas. 342. Absent "a most unequivocal dedication of private letters * * * either to the public, or to some private person," Justice Story explained, a writer retains "property" in their contents. *Id.* at 345-346. If someone attempts to publish letters, "a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and a fortiori if he attempt to publish them for profit." *Id.* at 346.

For that reason, by 1855, the New York Superior Court did not hesitate to enjoin the publication of a private letter. *Woolsey*, 11 How. Pr. at 53. The plaintiff did not aver the letter "ha[d] any value" or that publication would cause "any injury." *Ibid.*; see *id.* at 56, 77-78. Agreeing with Justice Story, the court ruled that the "unquestionable and unquestioned law" was that the wri-

ter could "forbid publication" of his communication, his "property," without his consent. *Id.* at 53, 55-56, 64-65. It was thus the court's "duty" to prevent injury to that "exclusive property" by enjoining publication. *Id.* at 57-58. That was consistent with the "general rule" that an injunction "can never" issue but to prevent "irreparable" harm. *Id.* at 54. If a writer is to have "an exclusive right of property," that right must "be protected" by "an injunction." *Id.* at 55.

By the mid-19th century, injunctions issued "upon the ground that the writer has a right of property in his letters, and that they can only be used by the receiver for the purposes for which they were written." *Bartlett* v. *Crittenden*, 2 F. Cas. 967, 970 (C.C.D. Ohio 1849). No further harm had to be shown. Courts "act[ed] alone upon the principle of protecting the rights of property, and not upon the grounds that such publications tend * * * to degrade or injure the author." *Roberts* v. *McKee*, 29 Ga. 161, 163 (1859). Injunctions issued on the "naked" allegation that publication was "made without the consent, and contrary to the wishes of the writer." *Woolsey*, 11 How. Pr. at 53.

3. Treatises agreed. Anti-disclosure injunctions were "founded, not on any notion, that the publication of letters would be painful to the feelings of the writer, but upon a civil right of property, which the Court is bound to respect." 2 J. Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 945, at 219 (2d ed. 1839). That also safeguarded "essential" societal interests: If private letters were made the subject of "public display," a person would "write, even to his dearest friends, with the cold and formal severity, with which he would write to his wariest opponents, or his most implacable enemies." *Id.* § 946, at 220-221.

Plaintiffs did not need to show further harm. See Story, *supra*, §§ 945-948, at 219-222. As Eaton Drone explained in 1879, it was "recognized law" that courts would enjoin even a letter's recipient, as well as third parties, from making "any public use of its contents." E. Drone, *Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States Embracing Copyright in Works of Literature and Art, and Playwright in Dramatic and Musical Compositions* 127-128 (1879). Although "[p]ublication" of letters "may cause broken friendship, wounded feelings," etc., it was "well settled" that "the right of the author to restrain unlicensed publication" is based on "the principle of property"—not "considerations of policy or social ethics." *Id.* at 128. "Whatever may be the nature of the letter, its merit, or its value," Drone wrote, "the law gives to the writer the right to determine what use * * * shall be made of its contents." *Id.* at 135.

4. While injunctions were the "usual[ ]" remedy, T. Cooley, *Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 358 (1880), other remedies were available without proof of further harm. For example, complainants were entitled to recover the wrongdoer's profits from wrongful disclosure. See Drone, *supra*, at 134. "The right to an account of profits" was "incident to the right to an injunction." *Stevens* v. *Gladding*, 58 (17 How.) U.S. 447, 455 (1855). Justice Story thus ordered "an account of the profits made by the defendants" from publishing President Washington's letters. *Folsom*, 9 F. Cas. at 349. That remedy serves not to compensate the plaintiff for injury, but "to prevent an unjust enrichment." *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940).

There likewise was "no reasonable doubt" that damages were available for "unauthorized publication." Drone, *supra*, at 132. For intrusion into the exclusive right to publish (or to use an invention), the general rule was that "[e]very violation of a right imports some damage, and if none other be proved, the law allows a nominal damage." *Whittemore* v. *Cutter*, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (Story, Circuit Justice). Thus, the first Congress authorized the award of a fixed sum for any violation of the copyright statute. Copyright Act of 1790, ch. 15, §2, 1 Stat. 124, 125. That statutory-damages award afforded "the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages." *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935).

B. Communications Have Long Been Protected as Confidences Without Proof of Further Harm

English courts extended the legal protections afforded to letters to myriad communications—from lectures, to recipes, to etchings, to manuscripts. See, *e.g.*, *Prince Albert* v. *Strange* (1849) 41 Eng. Rep. 1171, 1178 (Ch.) (etching); *Abernethy* v. *Hutchinson* (1825) 47 Eng. Rep. 1313, 1317-1318 (Ch.) (lectures); *Yovatt* v. *Winyard* (1820) 37 Eng. Rep. 425, 426 (Ch.) (medical recipes); *Duke of Queensberry* v. *Shebbeare* (1758) 28 Eng. Rep. 924, 925 (Ch.) (unpublished manuscript). Those decisions rested on the same "property" interest. *Morison* v. *Moat* (1851) 68 Eng. Rep. 492, 498 (Ch.). But they also invoked interests founded on contract, confidence, and trust. See *ibid.*

In 1825, the Court of Chancery ruled that a student who attended a lecture had an "implied contract" or "trust" obligation not to publish his lecture notes for profit. *Abernethy*, 47 Eng. Rep. at 1316-1318. A person

who acquired a customer's etchings through private employment similarly had a "contract" or "trust" obligation not to betray the customer's "confidence" by sharing them. *Prince Albert*, 41 Eng. Rep. at 1178. No inquiry into harm was required: A "breach of trust, confidence, or contract, would of itself entitle the Plaintiff to an injunction." *Ibid.*; see *Morison*, 68 Eng. Rep. at 500-501.

American courts followed that tradition. See, *e.g.*, *Clague* v. *City Bank*, 8 La. 48, 50 (1835) (customer affairs); *Peabody* v. *Norfolk*, 98 Mass. 452, 459-460 (1868) (manufacturing processes); *Corliss* v. *E.W. Walker Co.*, 57 F. 434, 435-436 (C.C.D. Mass. 1893) (painting and photograph). Even *the recipient's* use of a communication, courts observed, "must be deemed strictly limited * * * to the very occasions expressed or implied." *Bartlett*, 2 F. Cas. at 970. Relief was available "in all cases, where the publication would be a violation of a trust or confidence, founded in contract, or implied from circumstances." 2 Story, *supra*, § 949, at 222 (footnote omitted); see 2 J. High, *Treatise on the Law of Injunctions* § 1013, at 650 (2d ed. 1880). "[I]n breach of confidence cases, the harm" occurred "when the plaintiff's trust in the breaching party" was "violated." *Muransky* v. *Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1209 (11th Cir. 2018).

Those decisions have particular force here. Since at least 1758, see *Duke of Queensberry*, 28 Eng. Rep. at 924, it was recognized that even the recipient of a communication was under an implied obligation to use it only for the "very occasions" for which it was sent—not to profit from further disclosure, *Bartlett*, 2 F. Cas. at 970; see *Morison*, 68 Eng. Rep. at 500-501. Here, the SCA imposes that restriction statutorily, obliging providers of "electronic communications service[s]" to keep the "contents of communications" they receive confidential, and

prohibiting disclosure without consent. 18 U.S.C. § 2702(a)-(b).

Here, moreover, there was an *express promise* to keep the communications at issue confidential. The Complaint alleges that Google's disclosure of search terms violated its Terms of Service. Those terms recognized that users "retain ownership of any intellectual property rights [they] hold in" their "content"—a term defined "broadly" to include "written text and search queries used on Google.com." App., *infra*, 15a(¶35); see *Carpenter* v. *United States*, 138 S. Ct. 2206, 2242 (2018) (Thomas, J., dissenting) (citing Google's Terms of Service as an example of a contract that makes data users' "property"). Google's Terms of Service, moreover, "expressly incorporate" additional guarantees. App., *infra*, 53a(¶143). Google's Privacy Policy, for example, promises that Google will share "personal information" only in "limited circumstances": with user's "consent," with affiliated companies or trusted businesses, and as required by law. App., *infra*, 8a-9a(¶25); see App., *infra*, 10a-12a(¶29). A separate policy guarantees Google "will not disclose * * * information" about "the web pages you visit," "your search queries," and "the results you click," "except in the limited circumstances" (described above) that do not encompass Google's indiscriminate disclosure of search terms to website operators. App., *infra*, 14a-15a(¶¶32-34). Courts have long held that disclosures in violation of express undertakings of confidentiality are themselves actionable without more. See pp. 10-11, *supra*; cf. *Bd. of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 250-251 (1905).

C. The Complaint Alleges the Types of Breaches Courts Have Long Redressed

The Complaint alleges precisely the sorts of breaches—unauthorized disclosure of communications—the law has long made actionable without further allegation of harm.

1. The SCA applies the "high level of protection" the law has always afforded "first class mail" to communications through "telecommunications and computer technolog[ies]." S. Rep. No. 99-541, at 1, 5 (1986). The search terms typed into Google's text box are "communications." App., *infra*, 52a(¶136). They express what the user is looking for—reflecting interests, fears, desires, vanities. (Indeed, as leading privacy experts observe, users "tell the Google search box what they wouldn't tell their own mother, spouse, shrink or priest." App., *infra*, 7a(¶23).)

The Complaint alleges that Google, as recipient of those communications, was not free to disclose them without consent, much less do so for profit. App., *infra*, 8a-16a(¶¶25-37). Yet Google disclosed those communications indiscriminately (to the next website clicked), profiting as a result. App., *infra*, 25a-35a(¶¶56-82). Google thereby invaded the same legal interests—users' "property" in their search terms, App., *infra*, 15a(¶35), and express and implied confidentiality, App., *infra*, 53a-56a(¶¶142-158)—long protected by courts.

The Complaint thus alleges the sort of violation—unauthorized disclosure of communications—that has been actionable for centuries without further harm beyond disclosure itself. Courts would issue injunctions on the "naked" allegation a communication would be disclosed, even if no "mischievous effects" would result. See pp. 6-9, *supra*. Here, the Complaint demanded such injunctive relief to "hold[ ] Google to the terms" of its confidentiality

representations. App., *infra*, 58a(¶170). Courts would award the wrongdoer's profits to prevent unjust enrichment. See p. 9, *supra*. The Complaint seeks "revenues and profits wrongfully obtained" from unauthorized disclosures. App., *infra*, 59a; see App., *infra*, 52a-53a(¶¶138, 141). And courts would award damages, including presumed or nominal damages, for unauthorized disclosures. See p. 10, *supra*. The Complaint seeks that relief too. App., *infra*, 53a(¶141), 59a. The SCA authorizes all that relief—damages, wrongdoers' profits, and injunctions. 18 U.S.C. §2707(a)-(c). And the settlement agreement provided it, including prospective relief mandating changes to Google's representations (to ensure users knowingly agree to its conduct), as well as a monetary payment reflecting profits or damages. See Pet. App. 45-50; Resp. Br. 13-14, 48-49.

It is no answer to suggest that some search terms communicated to Google would not result in embarrassment. But see pp. 18-19, *infra*. The unauthorized interception and disclosure of a letter's contents would still violate the writer's right to control her communications, no matter how pedestrian the content. The law remedies unauthorized disclosures, even by a recipient, whether or not a communication "has any value" or disclosure causes "any injury." *Woolsey*, 11 How. Pr. at 53; see pp. 6-9, *supra*. "[I]nquiries after the health of friends" were still "property" subject to the author's exclusive control. *Pope*, 26 Eng. Rep. at 608. The notion that Article III somehow forecloses actions to redress unauthorized disclosures when the communications consist of search terms defies history.

Legal protection against such invasions into communications, property, and privacy pervades our values. Even an officer's lifting of stereo equipment—to see a serial

number—is sufficient to support the assertion of Fourth Amendment rights. See *Arizona* v. *Hicks*, 480 U.S. 321, 323, 326 (1987). Attaching a tracking device to a car or a listening device to a telephone booth, with no physical, pecuniary, or other harm to the individual, supports the assertion of such rights too. See *United States* v. *Jones*, 565 U.S. 400, 404-405, 410 (2012); *Katz* v. *United States*, 389 U.S. 347, 352 (1967). Similar rules apply to "privacy" interests, derived from traditional protections for letters. See *Harper & Row, Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 554 (1985). "Traditionally, the common law has provided" privacy-tort victims "with a claim for 'general' damages, which for privacy and defamation torts are presumed damages: a monetary award calculated without reference to specific harm." *Doe*, 540 U.S. at 621. Article III does not upend that settled approach by requiring physical, pecuniary, or other harm beyond the invasion itself.

2. This Court thus need not inquire whether Congress has attempted to "'define injuries and articulate chains of causation'" to "'give rise to a case or controversy where none existed before.'" *Spokeo*, 136 S. Ct. at 1549. The historical tradition of providing redress for unauthorized disclosure of communications should be "conclusive." *Vt. Agency*, 529 U.S. at 777. Nonetheless, the SCA's scope—while itself *not* a jurisdictional matter, see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)—reflects the "judgment of Congress" that the unauthorized disclosure of electronic communications itself inflicts actionable harm. *Spokeo*, 136 S. Ct. at 1549.

The SCA prohibits "electronic communication service" providers from "knowingly divulg[ing]" the "contents of a communication" they carry or store, 18 U.S.C. §2702(a), except to "intended recipient[s]" or with "lawful consent,"

§2702(b); see §2702(b)-(c) (other exceptions). The SCA thus does not distinguish by *content*. All content is protected, whether sensitive or banal. Nor does the SCA exempt disclosures if the communication's author is obscured. Congress instead cloaked electronic communications with the legal "sanctity and privacy" enjoyed by letters. 132 Cong. Rec. H4045-H4046 (June 23, 1986).

More telling, §2707 authorizes relief—including monetary recoveries—without "actual damages." That is striking. The Privacy Act, at issue in *Doe*, does the opposite. The Privacy Act imposes liability on the government for "actual damages," and guarantees an award of no "less than the sum of $1,000," but *only* for a "'person entitled to recovery.'" 540 U.S. at 619-620 (quoting 5 U.S.C. §552a(g)(4)(A)). The only substantive recovery authorized, however, was "actual damages." *Ibid.* As a result, *Doe* concluded that Congress had guaranteed the $1,000 minimum "only to plaintiffs who have suffered some actual damages"; only they have the "'entitle[ment] to recovery' necessary to qualify." *Id.* at 627.

In the SCA, Congress again guaranteed a $1,000 minimum for "person[s] entitled to recover," but Congress did *not* limit recovery to "actual damages." 18 U.S.C. §2707(c). The SCA permits a court to "assess as damages * * * *the sum* of the actual damages suffered by the plaintiff *and any profits made by the violator* as a result of the violation." *Ibid.* (emphasis added). Plaintiffs are thus entitled to recover the wrongdoer's profits, which requires "no injury" beyond the violation itself. *Gen. Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 654 (1983); see p. 9, *supra*.[3] And, as persons "entitled to recover,"

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[3] "[P]otential gains"—such as entitlement to recover the wrongdoer's profits, see *Gollust* v. *Mendell*, 501 U.S. 115, 121-122, 125-127

such plaintiffs are guaranteed the statutory $1,000 minimum as well. §2707(c); see *Vista Mktg., LLC* v. *Burkett*, 812 F.3d 954, 971 (11th Cir. 2016) (statutory minimum authorized when "plaintiff shows actual damages or a violator's profits"). Congress also authorized injunctive relief. §2707(b). Those remedies parallel the relief that courts afforded for unauthorized disclosures from before the Framing. And they do not require actual damages.[4]

Congress, moreover, authorized any "subscriber or other person aggrieved by a violation" to sue. §2707(a). That expansive language is a "term of art" that encompasses everyone with standing. *Dir., Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-127 (1995). That surely encompasses individuals traditionally entitled to sue when their communications were disclosed. Moreover, as originally enacted, the SCA provided a cause of action to any "subscriber" or "customer aggrieved by any violation." §2707(a) (1994). That focus on "subscribers" and "customers" left no doubt that potential plaintiffs included the

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(1991)—can confer standing. *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 451 (1989).

[4] For those reasons, the cases Google invoked at argument—*Vista*, 812 F.3d 954, and *Van Alstyne* v. *Electronic Scriptorium, Ltd.*, 560 F.3d 199 (4th Cir. 2009)—do not help its cause. Oral Arg. Tr. 46. They involved persons who were *not entitled* to recovery of any sort, neither damages nor profits. See *Vista*, 812 F.3d at 961-962; *Van Alstyne*, 560 F.3d at 203. Consequently, the SCA did not afford them the statutory minimum either. See *Vista*, 812 F.3d at 964-965; *Van Alstyne*, 560 F.3d at 208. In any event, whether the SCA affords a plaintiff minimum damages is a merits question—not an Article III limitation. See *Steel Co.*, 523 U.S. at 89. An unlawful disclosure of private information can be "enough to open the courthouse door" even if the statute limits remedies. *Doe*, 540 U.S. at 624-625.

communications' senders—those historically aggrieved by wrongful disclosure.

3. Finally, the Complaint alleges that the named plaintiffs' searches created sufficient "risk of real harm." *Spokeo*, 136 S. Ct. at 1549. For example, named plaintiff Anthony Italiano searched for his name, his "soon-to-be ex-wife['s]" name, and "forensic accounting" in a single search, revealing worries and perhaps legal vulnerabilities related to his impending divorce. App., *infra*, 45a(¶¶107-108). He "did not want" those "sensitive" searches "disclosed to third parties." App., *infra*, 45a-46a(¶¶108, 111). Yet those were disclosed to the next website clicked. App., *infra*, 45a(¶¶109-110). Gabriel Privyev searched for "sensitive" information about his "health." App., *infra*, 46a-47a(¶¶115, 118).

The Complaint makes clear that disclosed searches now can be routinely reidentified with users. See App., *infra*, 35a-43a(¶¶83-98). For example, when AOL released supposedly anonymized search terms, "New York Times journalists were able to reidentify individual 'anonymized' AOL search users" by cross-referencing searches. App., *infra*, 21a(¶47). Moreover, "[f]or the vast majority of Google users, the user's IP address is concurrently transmitted along with the search query." App., *infra*, 41a(¶95). An IP address, like a "phone number," allows a website operator to "identif[y] the exact computer being used." *Ibid.* As Google observed, "[o]ther parties can often link IP addresses to [users'] identit[ies]," App., *infra*, 41a-42a(¶96)—a process enhanced by cookies and other ubiquitous tools for tracking internet users, App., *infra*, 42a-43a(¶¶97-98). Google has cited those very privacy risks in refusing to turn over even anonymized search terms to the government. App., *infra*, 17a-20a(¶¶41-44).

Those risks are magnified by the increasing ubiquity of data brokers that aggregate enormous quantities of data from myriad websites. App., *infra*, 38a-39a(¶89). The resulting data libraries are so massive as to permit the identification of users by cross-referencing searches and other data, and even the development of data fingerprints. App., *infra* 37a-40a(¶¶86, 88-91). That exposes users to the "Imminent Threat of Concrete and Particularized Privacy Harm." App., *infra*, 2a(¶4), 40a. At the pleading stage, "all reasonable inferences" must be "drawn in favor of the pleader." 5B C. Wright & A. Miller, *Federal Practice and Procedure* §1357 (3d ed.). The Complaint includes sufficient allegations of threatened harm to support Article III jurisdiction.

II. The Four Other Claims Independently Support Jurisdiction

The named plaintiffs also have standing to assert breach-of-contract and quasi-contract causes of action. See *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring). Those claims—for breach of contract (Count II), breach of covenant of good faith and fair dealing (Count III), breach of implied-in-law contract (Count IV), and unjust enrichment (Count V), see App., *infra*, 53a-56a—are claims "'traditionally amenable to, and resolved by, the judicial process,'" *Vt. Agency*, 529 U.S. at 774, even when a breach results in no loss, *Wilcox*, 29 U.S. (4 Pet.) at 181-182. The notion that Article III excludes the traditional grist of judicial resolution defies credulity.

A. Breach of Contract Is Actionable Here

The Complaint asserts a traditional breach-of-contract claim. It alleges that Google's transmittal of referrer headers violated its Terms of Service (either directly or under California's implied covenant of good faith and fair dealing). App., *infra*, 4a(¶11), 53a-55a(¶¶142-152). Goo-

gle's Privacy Policy promises that Google will share "personal information" only in "limited circumstances" not applicable here: with users' "consent," with affiliated companies or trusted businesses, and as required by law. App., *infra*, 8a-9a(¶25); see App., *infra*, 10a-12a(¶29). Google promises it "will not disclose" information about "the web pages you visit," "your search queries," and "the results you click on"—"except in the limited circumstances described in our main Google Privacy Policy, or with your consent." App., *infra*, 14a-15a(¶¶32-34). The Complaint alleges that Google breached those representations by providing "individual search queries * * * and results containing personal information" "to third-parties and advertisers." App., *infra*, 15a-16a(¶36); see App., *infra*, 25a-35a(¶¶56-82).

The traditional rule for breach-of-contract actions was that the breach was a sufficient basis for suit—a rule applied with rigor for express or implied confidences. See pp. 10-11, *supra*. "[T]here having been a breach of * * * contract, the plaintiff is entitled to recover nominal damages." *Marzetti* v. *Williams* (1830) 109 Eng. Rep. 842, 845 (KB). "[A]ny breach is sufficient to entitle the Plaintiff to nominal damages." *Godefroy* v. *Jay* (1831) 131 Eng. Rep. 159, 162 (CP).

Nearly 190 years ago, this Court recognized that contract breaches were actionable, for nominal damages, absent harm beyond the breach itself. *Wilcox*, 29 U.S. (4 Pet.) at 181-182. Early state courts agreed. See, *e.g.*, *Clinton* v. *Mercer*, 7 N.C. 119, 120 (1819); *Jenkins* v. *Hopkins*, 26 Mass. 543, 555 (1830); *Seat* v. *Moreland*, 26 Tenn. 575, 576 (1847). Under "established practice," if a defendant "broke[] his contract" but "no actual injury" was sustained, nominal damages were awarded. 2 T. Parsons, *The Law of Contracts* 493 (1855).

Thus, a "breach of contract always creates a right of action." *Restatement (First) of Contracts* §328 & cmt. a (1932). "If the breach caused no loss * * *, a small sum * * * will be awarded as nominal damages." *Restatement (Second) of Contracts* §346(2) (1981). California so provides by statute. See Cal. Civ. Code §3360. In appropriate cases, disgorgement remedies are available as well. See *Restatement (Third) of Restitution and Unjust Enrichment* §39 (2011); *Snepp* v. *United States*, 444 U.S. 507, 515-516 (1980) (per curiam) (disgorgement remedy for breach placing "sensitive information at risk"). The breach-of-contract allegations alone support standing.

B. Quasi-Contract Claims Likewise Support Jurisdiction

The named plaintiffs likewise have standing to pursue claims for breach of implied contract and unjust enrichment. App., *infra*, 55a-56a(¶¶153-163). Those counts allege a contract implied at law, App., *infra*, 56a(¶157), and seek the "revenues and profits" Google made from "peddling" users' "search terms or results," App., *infra*, 55a-56a(¶¶156, 163). Quasi-contract claims for profits arising from the unauthorized disclosure of communications have ancient roots. See p. 9, *supra*. Such claims for "unjust enrichment" were "not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

The cases are legion. See, *e.g.*, *Gollust* v. *Mendell*, 501 U.S. 115, 121-122, 125-127 (1991); *Mosser* v. *Darrow*, 341 U.S. 267, 272-274 (1951); *Gen. Motors*, 461 U.S. at 654; *Jackson* v. *Smith*, 254 U.S. 586, 588-589 (1921). Where the plaintiff's rights are violated, unjust enrichment entitles him to sue to recover the wrongdoer's gains. He may do so even if he "has not suffered a corresponding

loss"—or indeed "any loss" at all. *Restatement (First) of Restitution* § 1 cmt. e (1937); see 1 G. Palmer, *The Law of Restitution* § 2.10, at 133 (1978). Even nominal damages can be awarded. See Cal. Civ. Code § 3360. For those actions, too, plaintiffs have standing.

III. The Complaint Establishes Jurisdiction Over The Settlement

The allegations of the Complaint thus establish historically recognized and constitutionally sufficient injuries-in-fact from the unauthorized disclosures for each of the named plaintiffs.[5] Causation-in-fact is not disputed. See *Lujan*, 504 U.S. at 560. And the Complaint leaves no doubt the injuries would "be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). The Complaint prays for precisely the remedies—injunctive relief, an award of the wrongdoer's profits, and damages (as well as statutory sums)—courts have awarded for the wrongful disclosure of communications for centuries. See pp. 6-11, *supra*.

That is "enough to open the courthouse door." *Doe*, 540 U.S. at 625. With power to hear at least one claim for one named representative under Article III, the district court had jurisdiction to review and approve the parties' settlement—the terms of their contractual compromise—as well. See *Rufo* v. *Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 389 (1992); *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986).

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[5] Jurisdiction exists so long as at least one class representative has standing. See Fed. R. Civ. P. 23(a) ("[o]ne or more members of a class may sue or be sued as representative parties"); see also *Horne* v. *Flores*, 557 U.S. 433, 446 (2009); *Sosna* v. *Iowa*, 419 U.S. 393, 400-403 (1975).

CONCLUSION

To the extent the Court addresses standing, rather than remanding or dismissing, the Court should find standing sufficiently alleged.

Respectfully submitted.

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NOVEMBER 2018

APPENDIX

APPENDIX A
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No. 5:10-cv-04809-EJD

In re GOOGLE REFERRER
HEADER PRIVACY LITIGATION

This Document Relates To: All Actions

April 26, 2013

CONSOLIDATED COMPLAINT
CLASS ACTION
JURY TRIAL DEMANDED

Plaintiffs Paloma Gaos, Anthony Italiano, and Gabriel Priyev (collectively "Plaintiffs") bring this suit on behalf of themselves and all others similarly situated, and make the following allegations on information and belief, except as to allegations pertaining to Plaintiffs, which are based on their personal knowledge:

INTRODUCTION

1. Plaintiffs bring this class action complaint against Google Inc. ("Google") for storing and intentionally, systematically and repeatedly divulging its users' search queries and histories to third parties via "Referrer

Headers." This practice adversely impacts billions of searches conducted by millions of consumers.

2. Google, the largest search engine in the United States, has repeatedly touted the numerous ways in which it protects user privacy, particularly with regard to the terms that consumers search for using the company's search engine. Over protests from privacy advocates, however, Google has consistently and intentionally designed its services to ensure that user search queries, which often contain highly-sensitive and personally-identifiable information ("PII"), are routinely transferred to marketers, data brokers, and sold and resold to countless other third parties.

3. The user search queries disclosed to third parties contain, without limitation, users' real names, street addresses, phone numbers, credit card numbers, social security numbers, financial account numbers and more, all of which increases the risk of identity theft. User search queries also contain highly-personal and sensitive issues, such as confidential medical information, racial or ethnic origins, political or religious beliefs or sexuality, which are often tied to the user's personal information.

4. In many instances, the information contained in disclosed search queries does not directly identify the Google user. Through the reidentification (explained below) or deanonymizing of data, however, the information contained in search queries can and, on information and belief, are associated with the actual names of Google users. Computer science academics and privacy experts are calling for the reexamination of privacy concerns in light of the growing practice and power of reidentification.

5. Google has acknowledged that search query information alone may reveal sensitive PII. And Google

has demonstrated that it could easily stop disclosing search query information to third parties, without disrupting the effectiveness of its service to its users, if it wished to do so. But because the real-time transmission of user search queries increases Google's profitability, it chooses not to utilize the demonstrated technology that would prevent the disclosure of its users' PII.

6. Moreover, in October 2011, Google confirmed that it is, in effect, selling individual user search queries to advertisers. In October 2011, Google started proactively scrubbing user search queries from the information it passes on to third parties when some users click on regular, organic search results, but would continue sending search queries to third parties when all users click on paid listings. While this is, in a way, a small win for privacy advocates, it also demonstrates just how valuable the search queries are to Google and others: Google no longer gives away this precious data for free, but will do so when it gets paid for it.

PARTIES

7. Plaintiff Paloma Gaos is a resident of San Francisco County, California. Plaintiff has at all material times been a user of Google's search engine services.

8. Plaintiff Anthony Italiano is a resident of Pasco County, Florida. Plaintiff has at all material times been a registered Google Accounts user and a user of Google's search engine services.

9. Plaintiff Gabriel Priyev is an individual and a citizen of the State of Illinois. Plaintiff has at all material times been a registered Google Accounts user and a user of Google's search engine services, at different times in California and Illinois.

10. Defendant Google Inc. ("Google") is a Delaware corporation that maintains its headquarters in Mountain View, Santa Clara County, California. Google conducts business throughout California and the nation from California. Google makes and implements all relevant decisions, including those at issue in this case, in California. Its Terms of Service and Privacy Policy were decided on and implemented in California.

JURISDICTION AND VENUE

11. This Court has personal jurisdiction over Google because (a) a substantial portion of the wrongdoing alleged in this complaint took place in this state, (b) Google is authorized to do business here, has sufficient minimum contacts with this state, and/or otherwise intentionally avails itself of the markets in this state through the promotion, marketing and sale of products and services in this state, and (c) in its Terms of Service, to which all Google Account holders who use Google Search, including Plaintiffs, must purportedly assent, Google consents to the personal jurisdiction of this Court:

> The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to these terms or the Services. All claims arising out of or relating to these terms or the Services will be litigated exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.

12. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1331, 18 U.S.C. §2702 and 18 U.S.C. §2707. This Court has supplemental jurisdiction over the California state law claims pursuant to 28 U.S.C. §1367.

13. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c). A substantial portion of the events and conduct giving rise to the violations of law complained of herein occurred in this District.

INTRADISTRICT ASSIGNMENT

14. Pursuant to Civil Local Rule 3-2(e), this case shall be assigned to the San Jose Division.

STATEMENT OF FACTS

A. Google's Dominance in Search

15. "Searching" is one of the most basic activities performed in the Internet. Most everyone with access to the Internet uses search engines to find information on the Internet. When using a search engine, users formulate a search query using keywords and phrases reflecting the information sought by the user. The search engine then matches the search query with websites matching the query and provides a list of those matching websites to the user. The user clicks on the link in the resulting list and is redirected to the website containing the sought-after information.

16. Google's core service centers on its proprietary search engine. Google runs millions of servers in data centers around the world and processes over one billions user-generated search requests every day. On information and belief, Google is the most-used search engine in the world and enjoys a market share of over 50% in the United States.

17. Google generates substantial profits from selling advertising. The revenue it generates is derived from offering search technology and from the related sale of advertising displayed on its site and on other sites across the web. On information and belief, nearly 95% of Google's revenue is derived from its advertising pro-

grams, with total advertising revenues estimated at $28 billion in 2010, $36.5 billion in 2011, and $43.7 billion in 2012. Google has implemented various innovations in the online advertising market that helped make it one of the biggest advertising platforms in the world.

18. Google AdWords is Google's main advertising product and source of advertising revenue. The AdWords program allows advertisers to select a list of words that, when entered by users in a search query, trigger their targeted ads. When a user includes words that match an advertiser's selections within a search query, paid advertisements are shown as "sponsored links" on the right side of the search results screen. Accordingly, much of Google's advertising revenue depends directly on the search queries that its users run on Google search.

19. Using technology from its wholly-owned subsidiary DoubleClick, Google can also determine user interests and target advertisements so they are relevant to their context and the user that is viewing them. Google's Analytics product allows website owners to track where and how people use their website, allowing in-depth research to get users to go where you want them to go.

20. Third-party search engine optimization ("SEO") companies help businesses design their websites so that users conducting internet search using search engines like Google get search results containing their business at or near the top of the search results page. SEOs accomplish this task by ensuring that a business's relevant pages are designed to work with Google's search algorithms. Google has a symbiotic relationship with SEOs. Google wants relevant results at the top of their search results page, and SEOs want their customers' relevant webpages to appear at the top of Google's search results. To the extent that SEOs are successful in getting their

clients' relevant pages to appear at or near the top of Google's search results page, users are more likely to return to Google next time they want to search for information on the internet. And the more people use Google for search, the more revenue Google derives from its advertising business.

21. Google Web History is a free service Google provides to users of Google Search. A user's search queries, search results and/or Referrer Headers form a substantial part of what Google's Terms of Service identify or define as the user's "Web History," which Google stores for users by default.

22. Google Analytics is a free service Google provides to those who manage websites. Analytics allows website managers to see detailed search query and search results reports including user Web History information or search terms. Such information provides valuable business intelligence to third-party website owners, particularly those who buy advertising on Google.com or with Google Adwords.

B. Google's Privacy Promises

23. Leading thinkers in the privacy community have long argued that consumers "treat the search [engine] box like their most trusted advisors. They tell the Google search box what they wouldn't tell their own mother, spouse, shrink or priest."[1] Peer reviewed academic studies confirm this fact, particularly regarding the use of search engines to look up sensitive health information.[2]

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[1] Christopher Ketchum & Travis Kelly, The Cloud Panopticon (April 9, 2010), http://www.theinvestigativefund.org/investigations/rightsliberties/1274/the_cloud_panopticon (last visited October 24, 2010).

[2] Gunther Eysenbach and Christian Köhler, How do consumers search for and appraise health information on the world wide web?

24. Google has always recognized that user trust is paramount to its search business success. To that end, Google adopted "Don't be evil" as its motto, and Google states that its Code of Conduct is one of the ways it puts that motto into practice.[3] Google's Code of Conduct recognizes that it is "asking users to trust [it] with their personal information. Preserving that trust requires that each of us respect and protect the privacy of that information. Our security procedures strictly limit access to and use of users' personal information."[4]

25. Because Google's success depends on gaining the trust of its users, Google's Privacy Policy sets forth representations intended to foster the safety and privacy protection offered by Google's search services. As of October 14, 2005, Google's Privacy Policy[5] stated as follows:

> Google only shares personal information with other companies or individuals outside of Google in the following limited circumstances:
>
> - We have your consent. We require opt-in consent for the sharing of any sensitive personal information.
> - We provide such information to our subsidiaries, affiliated companies or other trusted businesses or persons for the purpose of processing personal information on our behalf. We require

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Qualitative study using focus groups, usability tests, and in-depth interviews, BMJ 2002; 324:573, available at http://www.bmj.com/cgi/content/full/324/7337/573.

[3] Google's Code of Conduct, http://investor.google.com/corporate/code-of-conduct.html (last visited April 26, 2012).

[4] *Id.*

[5] Google's October 14, 2005 Privacy Policy, http://www.google.com/intl/en/privacy_archive_2005.html (last visited April 26, 2012).

that these parties agree to process such information based on our instructions and in compliance with this Policy and any other appropriate confidentiality and security measures.

- We have a good faith belief that access, use, preservation or disclosure of such information is reasonably necessary to (a) satisfy any applicable law, regulation, legal process or enforceable governmental request, (b) enforce applicable Terms of Service, including investigation of potential violations thereof, (c) detect, prevent, or otherwise address fraud, security or technical issues, or (d) protect against imminent harm to the rights, property or safety of Google, its users or the public as required or permitted by law.

26. In October 2010, Google defined in its Privacy Center FAQ "Personal information" as "information that [the user] provide[s] to us which personally identifies you, such as your name, email address or billing information, or other data which can be reasonably linked to such information by Google" and "Sensitive Information" as "information we know to be related to confidential medical information, racial or ethnic origins, political or religious beliefs or sexuality and tied to personal information. As of April 2012, Google no longer defines "Personal Information" at all in its Privacy Center FAQ.

27. Google also stated in its October 14, 2005 Privacy Policy that "We may share with third parties certain pieces of *aggregated, non-personal information*, such as the number of users who searched for a particular term, for example, or how many users clicked on a particular advertisement. Such information does not identify you

individually."[6] Google defined "aggregated, non-personal information" as "information that is recorded about users and *collected into groups* so that it no longer reflects or references an individually identifiable user."[7]

28. Google's privacy policy was unchanged until October 3, 2010, when it was revised to exclude any statement about how Google shares search queries with third parties. The representations that Google shares information only in "limited circumstances" remained unchanged.

29. On March 1, 2012, Google implemented a new, singular privacy policy for all Google products.[8] While the new policy has broad implications for how Google shares user data internally, Google makes the following representations regarding how it shares data with third parties:[9]

> **Information we share**
>
> We do not share personal information with companies, organizations and individuals outside of Google unless one of the following circumstances apply:
>
> - **With your consent**
>
> We will share personal information with companies, organizations or individuals outside of Google when we have your consent to do so. We

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[6] Google's October 14, 2005 Privacy Policy, *supra*, n.5 (emphasis supplied).

[7] Google's October 14, 2005 Privacy FAQs, http://web.archive.org/web/20070113102317/www.google.com/intl/en/privacy_faq.html (last visited October 24, 2010) (emphasis supplied).

[8] http://www.google.com/intl/en/policies/privacy/ (last visited April 26, 2012).

[9] *Id.*

require opt-in consent for the sharing of any sensitive personal information.

- **With domain administrators**

  If your Google Account is managed for you by a domain administrator (for example, for Google Apps users) then your domain administrator and resellers who provide user support to your organization will have access to your Google Account information (including your email and other data). Your domain administrator may be able to:

  - view statistics regarding your account, like statistics regarding applications you install.
  - change your account password.
  - suspend or terminate your account access.
  - access or retain information stored as part of your account.
  - receive your account information in order to satisfy applicable law, regulation, legal process or enforceable governmental request.
  - restrict your ability to delete or edit information or privacy settings.

  Please refer to your domain administrator's privacy policy for more information.

- **For external processing**

  We provide personal information to our affiliates or other trusted businesses or persons to process it for us, based on our instructions and in compliance with our Privacy Policy and any other appropriate confidentiality and security measures.

- **For legal reasons**

  We will share personal information with companies, organizations or individuals outside of Google if we have a good-faith belief that access, use, preservation or disclosure of the information is reasonably necessary to:

  - meet any applicable law, regulation, legal process or enforceable governmental request.
  - enforce applicable Terms of Service, including investigation of potential violations.
  - detect, prevent, or otherwise address fraud, security or technical issues.
  - protect against harm to the rights, property or safety of Google, our users or the public as required or permitted by law.

  We may share aggregated, non-personally identifiable information publicly and with our partners – like publishers, advertisers or connected sites. For example, we may share information publicly to show trends about the general use of our services.

  If Google is involved in a merger, acquisition or asset sale, we will continue to ensure the confidentiality of any personal information and give affected users notice before personal information is transferred or becomes subject to a different privacy policy.

30. Google makes similar representations about the privacy of its users' search queries on its video "Privacy Channel" on YouTube. In October 2010, Google showcased a video on its Privacy Channel that starts with the statement "at Google, we make privacy a priority in eve-

rything we do."[10] Google also stated in another privacy video from 2010 that "We don't sell user information to other companies."[11] In a 2011 video on its Privacy Channel called "What is a search log?," Google explains that it keeps logs of user search queries for a short period of time, but does not disclose that it shares those search logs with any third parties.[12]

31. In 2010, Google reiterated its commitment to user privacy to the Federal Trade Commission. In a letter to the FTC, Google wrote that it "supports the passage of a comprehensive federal privacy law that . . . build[s] consumer trust . . . enact[s] penalties to deter bad behavior . . . include[s] uniform data safeguarding standards, data breach notification procedures, and stronger procedural protections relating to third party access to individuals' information."[13] Google also wrote that it "acts every day to promote and expand free expression online and increase global access to information. As new technology empowers individuals with more robust free expression tools and greater access to information, we believe that governments, companies, and individuals must work together to protect the right to online free expression.

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[10] Google's Privacy Principles, http://www.youtube.com/watch?v=5fvL3mNt1g (January 26, 2010) (last visited October 25, 2010) (not available as of April 26, 2012).

[11] Google's Privacy Principles, http://googleblog.blogspot.com/2010/01/googlesprivacyprinciples.html at 1:44 (January 27, 2010, 7:00 p.m.) (last visited October 23, 2010) (not available as of April 26, 2012).

[12] http://www.youtube.com/watch?v=PIdfBUm0CPo&list=UUsB_OLJA28Nc-47BihG2_Ww&index=6&feature=plcp (October 18, 2011) (last visited April 26, 2012).

[13] Google's April 14, 2010 letter to Donald S. Clark, http://www.scribd.com/doc/30196432/FTCRoundtable-Comments-Final (last visited October 24, 2010).

Strong privacy protections must be crafted with attention to the critical role privacy plays in free expression. The ability to access information anonymously or pseudonymously online has enabled people around the world to view and create controversial content without fear of censorship or retribution by repressive regimes or disapproving neighbors . . . If all online behavior were traced to an authenticated identity, the free expression afforded by anonymous web surfing would be jeopardized."[14]

32. At all relevant times, Google has maintained a separate privacy policy for Web History (the "Web History Privacy Policy").

33. Google defines "Web History" and "Personal Information" as follows:

> WEB HISTORY
>
> Personal Information
>
> Web History records information about the web pages you visit and your activity on Google, including your search queries, the results you click on, and the date and time of your searches in order to improve your search experience and display your web activity. Over time, the service may also use additional information about your activity on Google or other information you provide us in order to deliver a more personalized experience.

34. Google has promised that it will use Web History solely for the benefit of the user or with the user's consent. Google promised to Plaintiffs and the Class at relevant times:

> Web History uses the information from your web history or other information you provide us to im-

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[14] *Id.*

> prove your Google search experience, such as improving the quality of your search results and providing recommendations. In addition to enabling the Web History functionality, the information we collect when you use Web History may be shared among all of our services in order to provide you with a seamless experience and to improve the quality of our services. We will not disclose this information to other companies or individuals, except in the limited circumstances described in our main Google Privacy Policy, or with your consent.

35. At relevant times Google's Terms of Service expressly provided that information entered by a user on Google.com, including Plaintiffs' and other Class members' search terms, remain the property of the user: "Google acknowledges and agrees that it obtains no right, title or interest from you (or your licensors) under these Terms in or to any Content that you submit, post, transmit or display on, or through, the Services"[15] Currently, Google's Terms of Service expressly state: "Some of our Services allow you to submit content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours."[16] "Content" is broadly defined and includes and is clearly meant to include written text and search queries used on Google.com.

36. Google's conduct has breached the above-described privacy promises. Contrary to these terms, Google has provided individual search queries, non-aggregated search queries, search queries and results

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[15] http://www.google.com/accounts/TOS (as of November 19, 2010).

[16] http://www.google.com/accounts/TOS (last viewed on March 29, 2013).

containing personal information, Web History including "search queries" or search terms and "results," and Referrer Headers, to third-parties and advertisers, including via Google Analytics, and not for the benefit of the user experience (*i.e.*, not "to provide you with a seamless experience and to improve the quality of our services" as Google's terms have promised). Rather, Google's conduct was designed to enhance Google's profit and position by peddling user Web History and search queries to third-party website owners via Google Analytics reports, in order to market and expand its Google AdWords advertising services for Google's financial gain.

37. In addition, because Web History and search queries or results constitute and/or contain "personal information," Google's provision of such information through Google Analytics breaches its Privacy Policy. Google agreed to share personal information only in the following limited circumstances, none of which applies here: (1) with user consent – opt-in consent is required; (2) to Google "subsidiaries, affiliated companies or other trusted businesses or persons for the purpose of processing personal information on [Google's] behalf"; and (3) as reasonably necessary to follow applicable law and the like.

38. Additionally, though Google compiles Web History by default, Google has represented that users can "choose to stop storing [their] web activity in Web History either temporarily or permanently" and delete or turn off their Web History:

> [D]eleting web history from your Google Account will erase all items from your web history and stop your web history from being recorded in the future.

> You can also remove individual items without deleting all of your web history.[17]

39. Such terms convey that when Web History is deleted, Google no longer holds onto it or uses it, but rather, "erases," "deletes" and "removes" it from its records.

40. Upon information and belief, in violation of these promises, Google continues to store in its files, and transmit to third-parties via Referrer Headers or Google Analytics, Web Histories even after a user has deleted or turned it off.

C. Google Admits Search Queries Contain Sensitive, Personal Data

41. In 2006, the Department of Justice sought to compel Google to produce thousands of users' individual search queries.[18] As set forth in the Government's subpoena, it sought only "anonymized" data, namely, the text of the search string entered by Google users, and not "any additional information that may be associated with such a text string that would identify the person who entered the text string into the search engine, or the computer from which the text string was entered."[19]

42. To its credit, Google fought the government's request. In a declaration submitted to the court describing the kind of personal information that can end up in the

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[17] *E.g.*, http://www.google.com/support/accounts/bin/answer.py?hl=en&answer=54067. See also http://www.google.com/intl/en/privacypolicy.html; http://www.google.com/history/privacyfaq.html?hl=en ("[i]f you remove items [from your Web History], they will be removed from the service . . . .").

[18] *Gonzales* v. *Google*, 234 F.R.D. 674 (N.D. Cal. 2006) (No. 5:06-mc-80006-JW).

[19] *Id.* at 682.

company's search query logs, Matt Cutts, a Senior Staff Engineer who specializes in search optimization issues at Google, stated as follows:[20]

- Google does not publicly disclose the searches [sic] queries entered into its search engine. If users believe that the text of their search queries could become public knowledge, they may be less likely to use the search engine for fear of disclosure of their sensitive or private searches for information or websites.
- There are ways in which a search query alone may reveal personally identifying information. For example, many internet users have experienced the mistake of trying to copy-and-paste text into the search query box, only to find that they have pasted something that they did not intended. Because Google allows very long queries, it is possible that a user may paste a fragment of an email or a document that would tie the query to a specific person. Users could also enter information such as a credit card, a social security number, an unlisted phone number or some other information that can only be tied to one person. Some people search for their credit card or social security number deliberately in order to check for identity theft or to see if any of their personal information is findable on the Web.

43. Similarly, in its Opposition to the Government's Motion to Compel the disclosure of Google users' search queries, the company argued that:

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[20] Declaration of Matt Cutts at 9, *Gonzales* v. *Google*, 234 F.R.D. 674 (N.D. Cal. 2006) (No. 5:06-mc-80006-JW).

- Google users trust that when they enter a search query into a Google search box, not only will they receive back the most relevant results, but that Google will keep private whatever information users communicate absent a compelling reason.[21]
- The privacy and anonymity of the service are major factors in the attraction of users – that is, users trust Google to do right by their personal information and to provide them with the best search results. If users believe that the text of their search queries into Google's search engine may become public knowledge, it only logically follows that they will be less likely to use the service.[22]
- This is no minor fear because search query content can disclose identities and personally identifiable information such as user-initiated searches for their own social security or credit card numbers, or their mistakenly pasted but revealing text."[23]

44. In its order[24] denying the Government's request to discover Google users' search queries, the Court shared Google's concern that disclosing search queries would raise serious privacy issues:

> The Government contends that there are no privacy issues raised by its request for the text of search queries because the mere text of the queries would

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[21] Google's Opposition to the Government's Motion to Compel at 1, *supra*, n.12.

[22] *Id.* at 18.

[23] *Id.*

[24] *Gonzales*, 234 F.R.D. at 687.

> not yield identifiable information. Although the Government has only requested the text strings entered ... basic identifiable information may be found in the text strings when users search for personal information such as their social security numbers or credit card numbers through Google in order to determine whether such information is available on the Internet. The Court is also aware of so-called 'vanity searches,' where a user queries his or her own name perhaps with other information. Google's capacity to handle long complex search strings may prompt users to engage in such searches on Google. Thus, while a user's search query reading '[username] stanford glee club' may not raise serious privacy concerns, a user's search for '[user name] third trimester abortion san jose,' may raise certain privacy issues as of yet unaddressed by the parties' papers. This concern, combined with the prevalence of Internet searches for sexually explicit material—generally not information that anyone wishes to reveal publicly—gives this Court pause as to whether the search queries themselves may constitute potentially sensitive information.

45. Google's awareness of the privacy concerns surrounding search queries was also demonstrated in response to a massive disclosure of user search queries by AOL. In August 2006, AOL released an "anonymized" dataset of 20 million search queries conducted by 658,000 AOL users over a three-month period.[25] That data included search queries revealing names, addresses, local

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[25] Complaint at ¶ 16, *Doe 1* v. *AOL LLC*, 2010 WL 2524494 (N.D. Cal. June 23, 2010) (No. C-06-5866-SBA).

landmarks, medical ailments, credit card numbers and social security numbers.[26]

46. In an article about the incident, the New York Times wrote that the AOL dataset "underscored how much people unintentionally reveal about themselves when they use search engines," and referred to search queries about "depression and medical leave," "fear that spouse contemplates cheating," "child porno," and "how to kill oneself by natural gas."[27]

47. Even more surprising, however, was that the New York Times journalists were able to reidentify individual "anonymized" AOL search users due to the vanity searches they had conducted, and then link other, non-vanity search queries in the dataset to those individuals through the crosssession identifiers (cookies) included in the dataset.[28] One AOL user who was reidentified said she was shocked to learn that AOL had published her search queries: "My goodness, it's my whole personal life. I had no idea somebody was looking over my shoulder."[29]

48. An AOL spokesman, Andrew Weinstein, apologized on behalf of AOL and said he wasn't surprised that the New York Times was able to connect the dots and reidentify "anonymous" users in the dataset: "We acknowledged that there was information that could potentially lead to people being identified . . . "[30]

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[26] *Id.* at ¶ 18.

[27] Michael Barbaro and Tom Zeller Jr., *A Face is Exposed for AOL Searcher No. 4417749*, N.Y. Times, August 9, 2006, available at http://www.nytimes.com/2006/08/09/technology/09aol.html.

[28] *Id.*

[29] *Id.*

[30] *Id.*

49. Soon after the release of the search query data by AOL, Google CEO Eric Schmidt spoke about the AOL privacy breach. He called AOL's release of user search data "a terrible thing" and reassured Google users that their search queries were safe and private:

> Well, [this sort of privacy breach is] obviously a terrible thing. And the data as released was obviously not anonymized enough, and maybe it wasn't such a good idea to release it in the first place. Speaking for Google, we exist by virtue of the trust of our end users. So if we were to make a mistake to release private information that could be used against somebody, especially if it could be used against them in a way that could really hurt them in a physical way or something like that, it would be a terrible thing. We have lots and lots of systems in the company to prevent that.
>
> It's funny that we talk about the company being more transparent. But there are many things inside our company that are important that we don't share with everyone, starting with everyone's queries and all the information that that implies. I've always worried that the query stream was a fertile ground for governments to randomly snoop on people [for example]. We had a case where we were only a secondary party, where the government gave us a subpoena, which was in our view, over-broad. And this over-broad subpoena we fought in federal court – one of the great things about the American system is that you can actually have a judge make an impartial decision. And the judge ruled largely

in our favor. So that's an example of how strongly we take this point.[31]

D. A Brief Primer on "Referrer Headers"

50. Software engineers are generally familiar with the risk of Referrer Header "leakage" of information companies intended to keep confidential and/or are obliged to keep confidential.

51. The HTTP Referrer function is a standard web browser function, provided by standard web browsers since the HTTP 1.0 specification in May 1996.[32] When an internet user visits a web page using their computer or mobile device, every major web browser (*e.g.*, Internet Explorer, Firefox, Chrome, Safari) by default reports the last page that the user viewed before clicking on a link and visiting the current page — that is, the page that "referred" them to the current page. This information is transmitted in the HTTP Referrer Header.

52. The current version of the publicly-available HTTP specification, RFC 2616,[33] provides for HTTP Referrer Headers in its provision 14.36.[34] It is well known that if a site places confidential information, such as a username, in a URL, then the site risks releasing this information whenever a user clicks a link to leave the site. Indeed, the HTTP specification specifically flags this risk; in section 15.1.3, the HTTP specification advises developers of substantially the same problem: "Authors of services which use the HTTP protocol SHOULD NOT

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[31] Conversation with Eric Schmidt hosted by Danny Sullivan, http://www.google.com/press/podium/ses2006.html (last visited April 26, 2012).

[32] http://www.w3.org/Protocols/rfc1945/rfc1945

[33] http://www.w3.org/Protocols/rfc2616/rfc2616.html

[34] http://www.w3.org/Protocols/rfc2616/rfc2616-sec14.html#sec14.36

use GET based forms for the submission of sensitive data, because this will cause this data to be encoded in the REQUESTURI."[25]

53. While the HTTP Referrer function is a standard web browser function, Google ultimately determines whether to send referrer header information to third parties and exercises control over the content of the URL that is referred by this function to the owner of the destination web page.

54. Google's use and provision of Referrer Headers for third-party advertising (and without filtering or deleting user information) appears to go well beyond the intended use of this function pursuant to the internet community Hypertext Transfer Protocol. See internet community Hypertext Transfer Protocol—HTTP /1.1, http://tools.ietf.org/html/rfc2616.

55. The Protocol indicates that Referrer information is for the server's benefit to provide service: in the words of the Hypertext Transfer Protocol for internet functions, "The Referrer request-header allows a server to generate lists of back-links to resources for interest, logging, optimized caching, etc. It also allows obsolete or mistyped links to be traced for maintenance." *Id.* at 14.36. Referrer headers have also been used to provide browsing security. According to the industry Protocol, contrary to Google's practice, "Because the source of a link might be private information or might reveal an otherwise private information source, it is strongly recommended that the user be able to select whether or not the Referrer field is sent." *Id.* at 15.1.3.

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[25] http://www.w3.org/Protocols/rfc2616/rfc2616-sec15.html#sec15.1.3

E. Google Transmits Individual User Search Queries to Third Parties

56. Since the service's launch, and continuing to this day, Google's search engine has included its users' search terms in the URL of the search results page. Thus, for example, a search for "abortion clinics in Indianapolis" would return a page with a URL similar to http://www.google.com/search?q=abortion+clinics+in+Indianapolis.

57. Because the search terms are included in the search results URL, when a Google user clicks on a link from Google's search results page, the owner of the website that the user clicks on will receive from Google the user's search terms in the Referrer Header.

58. Several web analytics services, including SEOs, include and use functionality to automatically parse the search query information from web server logs, or to otherwise collect the search query from the referrer header transmitted by each visitor's web browser. Google's own analytics products provide webmasters with this information at an aggregate level (*e.g.*, revealing how many visitors were drawn by particular search terms).

59. By transmitting user search queries to third parties, Google is also violating its Web History-specific privacy promises as described above.

F. Google's Transmission of User Search Queries is Intentional

60. Because Google's financial success depends on, among other things, the symbiotic relationship it shares with SEOs and the ability for third parties to engage in web analytics, Google has placed a high priority on revealing individual user search queries to third parties. Notwithstanding its repeated representations to the con-

trary in its Privacy Policy and to privacy regulators, Google continues to this day to transmit user search queries.

61. Neither Google's search technology nor the nature of the Internet compels Google to divulge user search queries. Google could easily cease transmission of user search queries to third parties, but chooses not to.

62. On September 6, 2010, a former FTC employee, Christopher Soghoian, filed a complaint with the FTC accusing Google of not adequately protecting the privacy of consumers' search queries. Much of the following information comes from Mr. Soghoian's complaint.[36]

63. Starting approximately in November 2008, Google began to test a new method of delivering search results that uses advanced AJAX (Asynchronous JavaScript and XML) technologies.[37] AJAX is one of the key pillars of the Web 2.0 experience.[38] This pilot was initially deployed in the Netherlands,[39] but in subsequent months, was observed by users in other countries.

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[36] *In the Matter of Google, Inc.*, FTC Complaint, available at http://online.wsj.com/public/resources/documents/FTCcomplaint100710.pdf.

[37] Jesse James Garrett, *Ajax: A New Approach to Web Applications* (February 18, 2005), http://www.adaptivepath.com/ideas/essays/archives/000385.php ("Ajax isn't a technology. It's really several technologies, each flourishing in its own right, coming together in powerful new ways").

[38] Tim O'Reilly, *What Is Web 2.0 Design Patterns and Business Models for the Next Generation of Software* (September 30, 2005), http://oreilly.com/web2/archive/what-is-web-20.html ("AJAX is also a key component of Web 2.0 applications such as Flickr, now part of Yahoo!, 37signals' applications basecamp and backpack, as well as other Google applications such as Gmail and Orkut.")

[39] Ulco, "Google Search in AJAX?!" (November 19, 2008), http://www.ulco.nl/gibberish/googlesearch-in-ajax.

64. One of the side effects of the AJAX search page is that the URL of the search results page includes the search query terms after a # symbol in the URL. Thus, on an AJAX enabled search page, the URL listed at the top of the page will be similar to: http://www.google.com/#hl=en&source=hp&q=drug+addiction

65. The addition of the # symbol had a significantly positive, albeit unintentional impact upon Google user privacy. This is because web browsers do not pass on any information after the # symbol in the referrer header. Thus, using the previous example of a search for the query "drug addiction," if a user clicked on the first result, the owner of that web site would only receive "http://www.google.com/" in the referrer header, rather than the search terms that follow the # symbol.

66. This change was immediately noticed by the webmaster and SEO community, who complained to Google:

- "I'm seeing hundreds of these empty google referrers today and wondered what was going on."[40]
- "This means organic searches from Google will now show up as just http://www.google.com/, with no search parameters. In other words, no analytics app can track these searches anymore. I started noticing lots of hits from just 'http://www.google.
  com/' recently in our own search logs. I thought maybe it was just a bug with Clicky. But then one of our users contacted me about this article,

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[40] Posting of sorabji.com to Clicky.blog, http://getclicky.com/blog/150/googles-new-ajaxpoweredsearch-results-breaks-search-keyword-tracking-for-everyone (February 03 2009, 1:05 p.m.).

and my jaw about broke from hitting the floor so hard."[41]

- "What actually breaks if Google makes this switchover, and is in fact broken during any testing they are doing, is much more widespread. Every single analytics package that currently exists, at least as far as being able to track what keywords were searched on to find your site in Google, would no longer function correctly."[42]

67. Responding to complaints from the webmaster community, Google quickly issued a public statement:

> Currently AJAX results are just a test on Google. At this time only a small percentage of users will see this experiment. It is not our intention to disrupt referrer tracking, and we are continuing to iterate on this project and are actively working towards a solution. As we continue experiments, we hope that this test may ultimately provide an easier solution for our customers and a faster experience for our users.[43]

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[41] Clicky.blog, http://getclicky.com/blog/150/googles-new-ajax-poweredsearch-resultsbreakssearch-keyword-tracking-for-everyone (February 03, 2009, 9:50 a.m.).

[42] Posting of Michael VanDeMar to Smackdown!, What Will *Really* Break If Google Switches To AJAX . . . ?, http://smackdown.blogsblogsblogs.com/2009/02/02/what-will-reallybreak-if-googleswitches-to-ajax/ (February 2, 2009, 11:26 a.m.).

[43] Posting of Matt McGee to Search Engine Land, Google AJAX Search Results = Death To Search Term Tracking?, http://searchengineland.com/google-ajax-search-results-death-to-search-termtracking-16431 (February 3, 2009, 5:41 p.m.) (emphasis supplied).

68. Google soon ended the test of the AJAX search results page, a fact confirmed by Google Senior Engineer Matt Cutts, who specializes in search optimization issues at Google:

> [T]he team didn't think about the referrer aspect. So they stopped [the test]. They've paused it until they can find out how to keep the referrers.[44]

69. In March 2009, Google again began to test technology that unintentionally caused the users' search terms to be stripped from the referrer header transmitted to web sites. The following is an example of the format of the new URL that was being tested in March 2009:

> http://www.google.com/url?q=http://www.webmd.com&ei=in66ScnjBtKgtwfn0LTiDw&sa=X&oi=smap&resnum=1&ct=result&cd=1&usg=AFQjCNF9RdVC6vXBFOYvdia1s_ZE_BMu8g

70. Michael VanDeMar, a prominent member of the SEO community noticed that he was again seeing AJAX based search results in addition to redirected URLs for every link in the search results page:

> Occasionally you will see these Google redirects in the normal [search engine results pages] as well, although usually not. The thing is, I was seeing them on every search I performed. It struck me as odd, until I suddenly realized that every search was being done via AJAX.[45]

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[44] Posting of Lisa Barone to Outspoken Media, Keynote Address – Matt Cutts, Google, http://outspokenmedia.com/internet-marketing-conferences/pubcon-keynote-matt-cutts/ (March 12, 2009).

[45] Posting of Michael VanDeMar to Smackdown!, Google Re-initiates Testing of AJAX SERP's With Faulty Proposed Fix, http://smack

71. Google's Matt Cutts soon responded to VanDeMar by leaving a comment on his blog:

> Hi Michael, I checked with some folks at Google about this. The redirection through a url redirector was separate from any AJAX-enhanced search results; we do that url redirection for some experiments, but it's not related to the JavaScript-enhanced [AJAX] search results.
>
> **The solution to the referrer problem will be coming online in the future. It uses a JavaScript-driven redirect that enables us to pass the redirect URL as the referrer. This URL will contain a 'q' param that matches the user's query.**[46]

72. On April 14, 2009, Google announced that it would be deploying the URL redirection tool for all links in the search results. The company described the details in a blog post to the webmaster community:

> Starting this week, you may start seeing a new referring URL format for visitors coming from Google search result pages. Up to now, the usual referrer for clicks on search results for the term "flowers", for example, would be something like this:
>
> http://www.google.com/search?hl=en&q=flowers&btnG=Google+Search
>
> Now you will start seeing some referrer strings that look like this:

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down.blogsblogsblogs.com/2009/03/13/google-re-initiates-testing-of-ajax-serps-with-faulty-proposed-fix/ (March 13, 2009, 11:14 a.m.).

[46] Posting of Matt Cutts to Smackdown!, *supra*, n.39, http://smackdown.blogsblogsblogs.com/2009/03/13/google-re-initiates-testing-of-ajax-serps-withfaulty-proposed-fix/ (March 17, 2009, 10:10 a.m.) (emphasis added).

> http://www.google.com/url?sa=t&source=web&ct=res&cd=7&url=http%3A%2F%2Fwww.example.com%2Fmypage.htm&ei=OSjdSa-1N508M_qW8dQN&rct=j&q=**flowers**&usg=AFQjCNHJXSUh7Vw7oubPA03tZOzz-F-u_w&sig2=X8uCFh6IoPtnwmvGMULQfw
>
> . . . .
>
> The new referrer URLs will initially only occur in a small percentage of searches. You should expect to see old and new forms of the URLs as this change gradually rolls out.[47]

73. The redirection tool that Michael VanDeMar described in March 2009 did not include the search terms in its URL (and thus, these terms were not subsequently transmitted to webmasters via the browser's referrer header). However, one month later when Google announced that it would be using the redirection tool for all links, the redirection script was changed to include the search terms in the redirection URL (via a new "q" parameter), thus guaranteeing that webmasters would not lose access to user search query data.

74. The new redirection tool also leaks data to web site administrators that had never before been available to anyone but Google: The item number of the search result that was clicked non (*e.g.*, the 3rd link or 5th link from the search results page).[48] The leakage of this addi-

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[47] Posting of Brett Crosby to Google Analytics Blog, An upcoming change to Google.com search referrals; Google Analytics unaffected, http://analytics.blogspot.com/2009/04/upcoming-change-togooglecom-search.html (April 14, 2009, 2:50 p.m.).

[48] Posting of Patrick Altoft to Blogstorm, Google Ads Ranking Data to Referrer String, http://www.blogstorm.co.uk/google-adds-ranking-data-to-referrer-string/ (April 15, 2009).

tional information was confirmed by Matt Cutts, which he described as a benefit to web site administrators:

> I think if you do experiments, you'll be able to confirm your speculation . . . **I think this is awesome for webmasters—even more information than you could glean from the previous referrer string.**[48]

75. A May 2009 video featuring Matt Cutts, posted to the official GoogleWebmasterHelp YouTube channel, describes the change in the search query information leaked via the referrer header:

> [T]here is a change on the horizon and it's only a very small percentage of users right now, but I think that it probably will grow and it will grow over time where Google's referrer, that is whenever you do a Google search and you click on a result, you go to another website and your browser passes along a value called a referrer. That referrer string will change a little bit.
>
> It used to be google.com/search, for example.
>
> Now, it will be google.com/url.
>
> **And for a short time we didn't have what the query was which got a lot of people frustrated,** but the google.com/search, **the new Google referrer string will have the query embedded in it.**
>
> And there's a really interesting tidbit that not everybody knows, which is—it also has embedded in

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[48] Posting of Matt Cutts to Blogstorm, Google Ads Ranking Data to Referrer String, http://www.blogstorm.co.uk/google-adds-ranking-data-to-referrerstring/#IDComment77457344 (April 15, 2009, 7:28 p.m.) (emphasis added).

> that referrer string a pretty good idea of where on the page the click happened.
>
> So, for example, if you were result number one, there's a parameter in there that indicates the click came from result number one. If you were number four, it will indicate the click came from, result number four. So, now, you don't necessarily need to go scraping Google to find out what your rankings were for these queries. You can find out, "Oh, yeah. I was number one for this query whenever someone clicked on it and came to my website."
>
> So that can save you a ton of work, you don't need to worry nearly as much, you don't have to scrape Google, you don't have to think about ranking reports. Now, we don't promise that these will, you know, be a feature that we guarantee that we'll always have on Google forever but definitely take advantage of it for now.
>
> . . . .
>
> [F]or the most part, this gives you a very accurate idea of where on the page you were, so you get all kinds of extra information that you can use in your analytics and to compute your ROIs without having to do a lot of extra work. So, if you can, it's a good idea to look at that referrer string and start to take advantage of that information."[20]

76. In or around July 2010, Google again began stripping the search terms from the Referrer Headers transmitted by a small percentage of browsers. On July 13, 2010, individuals in the SEO community noticed the

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[20] Matt Cutts, Can you talk about the change in Google's referrer string?, GoogleWebMasterHelp Channel (May 6, 2009), http://www.youtube.com/watch?v=4XoD4XyahVw (last viewed October 24, 2010).

change made by Google. One commentator in a web forum wrote that:

> More and more visits from Google in my server log files are without exact referrer information, and have only 'http://www.google.com', 'http://www.google.com.au', etc. which doesn't allow to find out keyword and SERP [search engine results] page from which this visit was made.[81]

77. On July 13 2010, Matt Cutts posted a message to the same SEO forum:

> Hey everybody, I asked folks who would know about this. It turns out there was an issue a couple weeks ago where some code got refactored, and the refactoring affected referrers for links opened in a new tab or window. Right now the team is **expecting to have a fix out in the next week** or so. Hope that helps.[82]

78. On or about May 21, 2010, Google introduced an encrypted search service at https://www.google.com.[83] By using the encrypted search service, Google would no longer pass along search queries via Referrer Headers to unencrypted search links. On or about June 25, 2010, Google moved the encrypted search service to https://encrypted.google.com.

79. Later, on or about October 18, 2011, Google announced a change in policy for how it handled search

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[81] Posting of at2000 to Webmaster World, More and more referrals from Google are without exact referrer string, http://www.webmasterworld.com/google/4168949.htm (July 13, 2010, 4:01 a.m.).

[82] Posting of Matt Cutts to Webmaster World, *supra*, n.45 (July 13, 2010, 9:46 p.m.) (emphasis added).

[83] http://googleblog.blogspot.com/2010/05/search-more-securely-with-encrypted.html (last visited April 26, 2012).

queries embedded in Referrer Headers.[54] According to its new policy, Google would proactively scrub out any and all search queries from all searches performed by users who were logged in to any Google service, such as Google Docs, before sending the Referrer Headers to the sites in the results on which users would click. Thus, when logged-in users would click on a search result link (whether the results link is encrypted or unencrypted), Google would no longer pass on the search queries used to find those results.

80. For users not logged in, Google would still transmit search queries via Referrer Headers to the results sites on which users would click, unless those users entered the search at https://encrypted.google.com.

81. Moreover, the new policy only applies to organic sites. For clicks on paid links or advertisements, Google would still pass on the search queries.

82. If nothing else, Google's new policy regarding search queries demonstrates two things: 1) Google is fully capable of determining independently whether to transmit search queries to third parties—transmitting search queries embedded within Referrer Headers is not just how the Internet works; and, 2) Google is now effectively selling search queries to paying advertisers. Stated differently, part of what paying advertisers pay for when they buy AdWords are the search queries users enter.

G. The Science of Reidentification

83. "Reidentification" is a relatively new area of study in the computer science field. Paul Ohm, a professor of law and telecommunications at the University of Colora-

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[54] http://googleblog.blogspot.com/2011/10/making-search-more-secure.html (last visited April 26, 2012).

do Law School, is a leading scholar on how reidentification impacts internet privacy. Much of the following information comes from Professor Ohm's article entitled "Broken Promises of Privacy: Responding to the Surprising Failure of Anonymizaton" published in the UCLA Law Review in August of 2010.[55]

84. In a nutshell, reidentification creates and amplifies privacy harms by connecting the dots of "anonymous" data and tracing it back to a specific individual. Professor Ohm describes it as follows:

> The reverse of anonymization is reidentification or deanonymization. A person, known in the scientific literature as an adversary, reidentifies anonymous data by linking anonymized records to outside information, hoping to discover the true identity of the data subjects.
>
> . . .
>
> Reidentification combines datasets that were meant to be kept apart, and in doing so, gains power through accretion. Every successful reidentification, even one that reveals seemingly nonsensitive data like movie ratings, abets future reidentification. Accretive reidentification makes all of our secrets fundamentally easier to discover and reveal.[56]

85. Reidentification techniques, like those used in the AOL debacle, can be used as links in chains of inference connecting individuals to harmful facts. Reidentification works by discovery pockets of surprising uniqueness in aggregated data sets. Just as human fingerprints can uniquely identify a single person and link that person

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[55] 57 UCLA L. Rev. 1701 (2010).

[56] *Id.* at *7-8.

with "anonymous" information—a print left at a crime scene—so too do data subjects generate "data fingerprints"—combinations of values of data shared by nobody else. What has surprised researchers is that data fingerprints can be found in pools of non-PII data, such as the uniqueness of a person's search queries in the AOL debacle.[87]

86. Once a person finds a unique data fingerprint, he can link that data to outside information, sometimes called auxiliary information. "Anonymous" search query information would protect privacy, if only the adversary knew nothing else about people in the world. In reality, however, the world is awash in data about people, with new databases created, bought and sold every day. "Adversaries" (as defined above) combine anonymized data with outside information to pry out obscured identities.[88]

87. And the amount of information contained in new databases has grown exponentially. What's more, the type of available data is increasingly personal and specific. Take, for example, the phenomenon of Facebook's growth. The data created by Facebook users is highly personal, and includes actual names, religious, sexual and political preferences, identification of friends, pictures, messages intended to be shared with friends, and more. With the exploding popularity of social network sites like Facebook, and personal blogs, the information available to adversaries is not only highly-specific to individuals, it is often user-created, increasing accuracy and veracity of available data. Never before in human history has it been so easy to peer into the private diaries of so many

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[87] *Id.* at *17.

[88] *Id.*

people. Some researchers call this the "age of self-revelation."[59]

88. Reidentification is characterized by accretion, or the growing together of separate parts into a single whole. As Professor Ohm explains:

> The accretion problem is this: once an adversary has linked two anonymized databases together, he can add the newly linked data to his collection of outside information and use it to help unlock other anonymized databases. Success breeds further success ... ***once any piece of data has been linked to a person's real identity, any association between this data and a virtual identify breaks the anonymity of the latter. This is why we should worry even about reidentification events that seem to expose only non-sensitive information, because they increase the linkability of data, and thereby expose people to potential future harm.***[60]

89. The accretive reidentification problem is exacerbated by the growing prevalence of internet "data brokers." The buying and selling of consumer data is a multibillion-dollar, unregulated business that's growing larger by the day.[61] Data is increasingly bought, sold and resold by data brokers, which amplifies the accretion problem. Advancements in computer science, data storage and processing power, and data accretion by data brokers make it much more likely that an adversary

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[59] *Id.* at *17-18.

[60] *Id.* at *29 (emphasis added).

[61] Rick Whiting, *Data Brokers Draw Increased Scrutiny* (July 10, 2006), http://www.informationweek.com/news/global-cio/showArticle.jhtml?articleID=190301136.

could link at least one fact to any individual and blackmail, discriminate against, harass, or steal the identity of that person.

90. On October 25, 2010, the Wall Street Journal reported that a highly-sophisticated data broker, RapLeaf Inc. is accomplishing accretive reidentification of "anonymous" data with astonishing success.[e] According to the report, RapLeaf has been gathering data, including user names and email addresses, from numerous sources across the internet. Using accretive reidentification techniques, RapLeaf is able to cross-index "anonymous" data with email addresses and thereby associate real names with Web-browsing habits and highly-personal information scraped from social network sites such as Facebook. By 2009, RapLeaf had indexed more than 600 million unique email addresses, and was adding more at a rate of 35 million per month.

91. Data gathered and sold by data brokers like RapLeaf can be very specific. RapLeaf deanonymizes and connects to real names a wide variety of data types, including data regarding demographics, interests, politics, lifestyle, finances, donations, social networks, site memberships, purchases, and shopping habits. RapLeaf's segments recently included a person's household income range, age range, political leaning, and gender and age of children in the household, as well as interests in topics including religion, the Bible, gambling, tobacco, adult entertainment and "get rich quick" offers. In all, RapLeaf segmented people into more than 400 categories. This aggregated and deeply personal information is

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[e] Emily Steele, *A Web Pioneer Profiles Users by Name* (October 25, 2010), available at http://online.wsj.com/article/SB10001424052702304410504575560243259416072.html.

then sold to or used by tracking companies or advertisers to rack users across the Internet.

H. Google's Systematic Disclosure of Billions of User Search Queries Each Day Presents an Imminent Threat of Concrete and Particularized Privacy Harm

92. One type of anonymization practice is called "release-and-forget," in which the data administrator will release records, and then forgets, meaning she makes no attempt to track what happens to the records after release.[63] To protect the privacy of the users in the released data, prior to releasing the data, the administrator will single out identifying information and either strip that information from the database, or modify it to make it more general and less specific to any individual.[64] Many of the recent advances in the science of reidentification target release-and-forget anonymization in particular.[65]

93. Google's transmission of search queries is a type of piecemeal "release-and-forget" anonymization.[66] Google transmits a single user search query each time a Google user clicks on a link in Google's search results page. Over the course of just one day, on information and belief, Google transmits millions of search queries to third parties. Google will likely argue that search query information alone contains no personally-identifiable information. Such an argument is practically equivalent to the data administrator who "anonymizes" data before releasing it to the outside world. But, as repeatedly

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[63] Ohm, *supra*, n.47 at *9-10.

[64] *Id.* at *11-12.

[65] *Id.* at *10.

[66] *Id.* at *9.

demonstrated, easy reidentification of "anonymous" highlights the flaws in this thinking.

94. Google itself has taken the position that even seemingly benign, "anonymous" information presents serious privacy concerns. For example, in *Gonzales* v. *Google*, *supra*, n.12, even though the Government was requesting search queries stripped of any "identifying information" (such as the user's IP address), Google argued that releasing such data would nonetheless risk disclosure of user identities.

95. In fact, when a Google user clicks on a link in Google's search results page, the user's search query is not the only information revealed. For the vast majority of Google users, the user's IP address is concurrently transmitted along with the search query. An IP address is similar to a phone number in that it identifies the exact computer being used by the user to search and navigate the internet.

96. In response to an inquiry from Congressman Joe Barton about privacy issues surrounding Google's acquisition of DoubleClick, Google admitted that "information that can be combined with readily available information to identify a specific individual is also generally considered personal information."[67] But Google has repeatedly downplayed the existence of "readily available information" helpful for tying IP addresses to places and individuals. Professor Ohm highlights Google's untenable position as follows:

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[67] Letter from Alan Davidson, Google's Senior Policy Counsel and Head of U.S. Public Policy, to Congressman Joe Barton at 12-13 (December 21, 2007), available at http://searchengineland.com/pdfs/071222-barton.pdf.

> For example, websites like Google never store IP addresses devoid of context; instead, they store them connected to identity or behavior. Google probably knows from its log files, for example, that an IP address was used to access a particular email or calendar account, edit a particular word processing document, or send particular search queries to its search engine. By analyzing the connections woven throughout this mass of information, Google can draw some very accurate conclusions about the person linked to any particular IP address.
>
> Other parties can often link IP addresses to identity as well. Cable and telephone companies maintain databases that associate IP addresses directly to names, addresses, and credit card numbers. That Google does not store these data associations on its own servers is hardly the point. Otherwise, national ID numbers in the hands of private parties would not be "personal data" because only the government can authoritatively map these numbers to identities.[68]

97. Similarly, an independent European advisory body on data protection and privacy found that "The correlation of customer behaviour across different personalised services of a search engine provider . . . can also be accomplished by other means, based on cookies or other distinguishing characteristics, such as individual IP addresses."[69]

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[68] Ohm, *supra*, n.47 at *41.

[69] Article 29 Data Protection Working Party at 21 (January 2008), available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2008/wp148_en.pdf.

98. Congressman Barton's inquiry in connection with the DoubleClick acquisition also focused on cookies and privacy. Cookies are small data files that store user preferences and other information, and allow websites to recognize the user or computer visiting their site. In its response to Congressman Barton, Google wrote that "online ad-serving technology can be used by advertisers to serve and manage ads across the web . . . the ad server sets a cookie on the user's computer browser when the user views an ad served through the ad server. That cookie may be read in the future when the ad server serves other ads to the same browser."[70] An ad serving company with any substantial market share would thus be able to readily link the search queries that Google provides to the IP addresses or cookies of internet users visiting the websites they serve.

I. Google Accounts

99. In addition to search, Google operates many services that require users to register for Google Accounts. Google Accounts grant access to services such as Gmail, Google Docs, and Google+, among others.

FACTS RELATING TO PLAINTIFFS

A. Paloma Gaos

100. Plaintiff Paloma Gaos has a Google Account and has at all material times been a user of Google's search engine services, including the period prior to November 2008 when Google first began to test advanced AJAX technologies that temporarily eliminated user search queries from referrer headers coming from Google search results pages, and for all periods thereafter when Google was disseminating search queries to third party websites.

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[70] Letter from Davidson to Barton, *supra*, n.58 at 15.

101. During all time periods in which Google was transmitting user search queries to third parties, Plaintiff Gaos conducted numerous searches, including "vanity searches" for her actual name and the names of her family members, and clicked on links on her Google search results pages.

102. As a result, Google transmitted Plaintiff Gaos's full search queries to third parties by sending the URLs containing her search queries to third party websites that appeared in Plaintiff Gaos's Google search results page and which Plaintiff Gaos clicked on a link.

103. In other words, when Plaintiff Gaos clicked on each link on her Google search results pages, the owner of the destination website that Plaintiff clicked on received from Google Plaintiff Gaos's search terms through the Referral Header function.

104. As a result, Plaintiff Gaos has suffered actual harm in the form of Google's unauthorized and unlawful dissemination of Plaintiff Gaos's search queries, which sometimes contained sensitive personal information, to third parties.

B. Anthony Italiano

105. Plaintiff Anthony Italiano has at all material times been a user of Google's search engine services, including the period prior to November 2008 when Google first began to test advanced AJAX technologies that temporarily eliminated user search queries from referrer headers coming from Google search results pages, and for all periods thereafter when Google was disseminating search queries to third party websites.

106. Plaintiff Italiano has also had a Google Account since at least January 2008.

107. During all time periods in which Google was transmitting user search queries to third parties, including the time period from July 2010 to August 2011, Plaintiff Italiano conducted numerous searches on Google's unencrypted search service, including:

a. His name + his home address;
b. His name + bankruptcy;
c. His name + foreclosure proceedings;
d. His name + short sale proceedings;
e. His name + Facebook; and,
f. His name + the name of his then soon-to-be ex-wife + forensic accounting.

108. These searches and the timeframe during which he conducted them are particularly memorable to Plaintiff Italiano because it was during this time that he was going through formal divorce proceedings. Moreover, many of his searches related directly or indirectly to his divorce proceedings—exactly the sort of personal, confidential searches that he did not want disclosed to third parties without his knowledge or consent, and exactly the sort of personal, confidential searches Google described to the federal government in the *Gonzales* matter.

109. As a result, Google transmitted Plaintiff Italiano's full search queries to third parties by sending the URLs containing his search queries to third party websites that appeared in Plaintiff Italiano's Google search results page and which Plaintiff Italiano clicked on a link.

110. In other words, when Plaintiff Italiano clicked on each link on his Google search results pages, the owner of the destination website that Plaintiff clicked on received from Google Plaintiff Italiano's search terms through the Referral Header function.

111. As a result, Plaintiff Italiano has suffered actual harm in the form of Google's unauthorized and unlawful

dissemination of Plaintiff Italiano's search queries, which sometimes contained sensitive personal information, to third parties.

C. Gabriel Priyev

112. Plaintiff Gabriel Priyev has at all material times been a user of Google's search engine services, including the period prior to November 2008 when Google first began to test advanced AJAX technologies that temporarily eliminated user search queries from referrer headers coming from Google search results pages, and for all periods thereafter when Google was disseminating search queries to third party websites.

113. Plaintiff Priyev began using Google search in the fall of 2005, while living in California. Plaintiff Priyev's Web History, kept by Google, reinforces this fact, stretching all the way back to September 2006. Plaintiff Priyev has continued to search using Google in both California, from the Fall of 2005 through the Spring of 2008, and then in Illinois from the Spring of 2008 until the present.

114. Priyev has also had a Google Account at all relevant times.

115. During all time periods in which Google was transmitting user search queries to third parties, Plaintiff Priyev conducted numerous searches, including searches for financial and health information, and clicked on links on his Google search results pages.

116. As a result, Google transmitted Plaintiff Priyev's full search queries to third parties by sending the URLs containing his search queries to third party websites that appeared in Plaintiff Priyev's Google search results page and which Plaintiff Priyev clicked on a link.

117. In other words, when Plaintiff Priyev clicked on each link on his Google search results pages, the owner of the destination website that Plaintiff clicked on received from Google Plaintiff Priyev's search terms through the Referral Header function.

118. As a result, Plaintiff Priyev has suffered actual harm in the form of Google's unauthorized and unlawful dissemination of Plaintiff Priyev's search queries, which sometimes contained sensitive personal information, to third parties.

CLASS ALLEGATIONS

119. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs bring these claims on behalf of themselves as individuals and all other similarly situated persons in the following class:

> *All persons in the United States who submitted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification* (the "Class"). Excluded from the Class are Google, its officers and directors, legal representatives, successors or assigns, any entity in which Google has or had a controlling interest, any judge before whom this case is assigned and the judge's immediate family.

120. The Class is composed of numerous people, whose joinder in this action would be impracticable. The disposition of their claims through this class action will benefit Class members, the parties and the courts. Upon information and belief, Google's search engine has been used by hundreds of millions of users during the relevant time period.

121. There is a well-defined community of interest in questions of law and fact affecting the Class. These ques-

tions of law and fact predominate over individual questions affecting individual Class members, including, but not limited to, the following:

a. whether and to what extent Google has disclosed its users' search queries to third parties, and whether the disclosure is ongoing;
b. whether Google continues to use or store information that is part of Web History after users choose to delete, remove or to no longer store with Google such information;
c. whether Google's conduct described herein violates Google's Terms of Service, Privacy Policy, Web History policy and representations to Plaintiffs and the Class;
d. whether Google's conduct described herein violates the Electronic Communications Privacy Act, 18 U.S.C. §2702 *et seq.*;
e. whether Google's conduct described herein constitutes a breach of contract or implied contract;
f. whether Google's conduct breached its duty of good faith and fair dealing;
g. whether Google is unjustly enriched as a result of its conduct described herein; and
h. whether Plaintiffs and members of the Class are entitled to injunctive and other equitable relief.

122. Google has engaged, and continues to engage, in a common course of conduct giving rise to the legal rights sought to be enforced by Plaintiffs and the Class. Similar or identical statutory and common law violations, business practices and injuries are involved. Individual questions, if any, pale by comparison to the numerous common questions that dominate.

123. The injuries, actual and imminent, sustained by Plaintiffs and the Class flow, in each instance, from a common nucleus of operative facts. In each case, Google caused or permitted unauthorized communications of private and personally-identifying information to be delivered to third parties without adequate or any notice, consent or opportunity to opt out.

124. Given the similar nature of the Class members' claims and the absence of material differences in the statutes and common laws upon which the Class members' claims are based, a nationwide class action will be easily managed by the Court and the parties.

125. Because of the relatively small size of the individual Class members' claims, no Class user could afford to seek legal redress on an individual basis.

126. Plaintiffs' claims are typical of those of the Class as all members of the Class are similarly affected by Google's uniform and actionable conduct as alleged herein.

127. Google has acted and failed to act on grounds generally applicable to Plaintiffs and members of the Class, requiring the Court's imposition of uniform relief to ensure compatible standards of conduct toward the members of the Class.

128. Plaintiffs will fairly and adequately protect the interests of the Class, and have retained counsel competent and experienced in class action litigation. Plaintiffs have no interests antagonistic to, or in conflict with, the Class that Plaintiffs seek to represent.

129. Plaintiffs reserve the right to revise the above class definition as appropriate or based on facts learned in discovery.

COUNT I

Violation of the SCA, 18 U.S.C. § 2702

(on behalf of all Plaintiffs individually and the Class)

130. Plaintiffs incorporate the foregoing allegations as if fully set forth herein.

131. The Electronic Communications Privacy Act (the "ECPA") broadly defines an "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in party by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce . . . " 18 U.S.C. § 2510(12).

132. The ECPA also broadly defines the contents of a communication. Pursuant to the ECPA, "contents" of a communication, when used with respect to any wire, oral, or electronic communications, include any information concerning the substance, purport, or meaning of that communication. 18 U.S.C. § 2510(8). "Contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication. The definition thus includes all aspects of the communication itself. No aspect, including the identity of the parties, the substance of the communication between them, or the fact of the communication itself, is excluded. The privacy of the communication to be protected is intended to be comprehensive.

133. Pursuant to the ECPA, "electronic storage" means any "temporary storage of a wire or electronic communication incidental to the electronic transmission thereof." 18 U.S.C. § 2510(17)(A).

134. Pursuant to the ECPA, Google operates an "electronic communications service" as defined in 18 U.S.C. §2510(15). Pursuant to the Stored Communications Act of 1986 (the "SCA"), Google also provides a "remote computing service" to the public. 18 U.S.C. §2711(2).

135. In relevant part, 18 U.S.C. §2702(a) of the ECPA provides as follows:

> (a) **Prohibitions.**— Except as provided in subsection (b) or (c)—
>
> > (1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and
> >
> > (2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—
> >
> > > (A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;
> > >
> > > (B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

> (3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

136. As alleged herein, by disclosing the private search queries and Web History information of Plaintiffs and members of the Class without authorization, Google has knowingly divulged the contents of communications of Plaintiffs and members of the Class while those communications were in electronic storage on its service, in violation of 18 U.S.C. § 2702(a)(1).

137. As alleged herein, by disclosing the private search queries and Web History information of Plaintiffs and members of the Class without authorization, Google has knowingly divulged the contents of communications of Plaintiffs and members of the Class carried or maintained on its systems, in violation of 18 U.S.C. § 2702(a)(2).

138. Google intentionally disclosed its users' communications to third parties to enhance its profitability and revenue. The disclosures were not necessary for the operation of Google's systems or to protect Google's rights or property.

139. As a result of Google's unauthorized and unlawful disclosure of Plaintiffs' and the Class members' private search queries and Web History information, Plaintiffs and members of the Class have suffered damages from Google's violations of 18 U.S.C. § 2702 in an amount to be determined at trial.

140. Plaintiffs and Class members are "person[s] aggrieved by [a] violation of [the SCA] in which the conduct constituting the violation is engaged in with a knowing or intentional state or mind . . . " within the meaning of 18 U.S.C. §2707(a).

141. Plaintiff and members of the Class therefore seek remedy as provided for by 18 U.S.C. §2707(b) and (c), including such preliminary and other equitable or declaratory relief as may be appropriate, damages consistent with subsection (c) of that section to be proven at trial, punitive damages to be proven at trial, and attorneys' fees and other litigation costs reasonably incurred.

COUNT II

Breach of Contract

(on behalf of all Plaintiffs individually and the Class)

142. Plaintiffs incorporate by reference the foregoing allegations.

143. The provisions of Google's Terms of Service, which expressly incorporate its Privacy Policy, and Web History Privacy Policy constitute a valid and enforceable contract between Plaintiffs and the Class on the one hand, and Google on the other.

144. Under the Terms of Service, Web History Privacy Policy and Privacy Policy, Plaintiffs and the Class agreed to use Defendant's services and transmit sensitive personally-identifiable information to Google in exchange for Google's promise that it would not share that personal information with third parties without users' authorization.

145. Google materially breached the terms of its Terms of Service, Web History Privacy Policy and Privacy Policy through its unlawful conduct alleged herein, including the disclosure of Plaintiffs and the Class's private

search queries and Web History information to third parties, as more fully set forth above.

146. Google's conduct also violates principles of equity and justice, which prohibit Google from retaining the above-described benefits.

147. As a result of Google's misconduct and breaches of Google's Terms of Service, Web History Privacy Policy and Privacy Policy described herein, Plaintiffs and the Class suffered injury. Plaintiffs, on behalf of themselves and the Class, seek damages and/or restitution from Google in an amount to be determined at trial.

COUNT III

Breach of Covenant of Good Faith and Fair Dealing (on behalf of all Plaintiffs individually and the Class)

148. Plaintiffs incorporate by reference the foregoing allegations.

149. At all times, Google owed Plaintiffs and the Class a duty of good faith and fair dealing.

150. Google delivered search services, and maintained Web History, pursuant to contract, whereby Plaintiffs and other Class members' Web History, Personal Information, search queries, and Referrer Headers were to be stored and used only according to Google's published terms, which promise that their information is private, and is their property, as set forth more fully above.

151. Google abused its discretion as described above for its own benefit, and to the detriment of the property rights and expectations of Plaintiffs and the Class. Google's conduct breached its duty of good faith and fair dealing to Plaintiffs and the Class and damaged Plaintiffs and the Class.

152. Google was unjustly enriched by its aforementioned conduct and Plaintiffs and the Class are entitled to restitution. Google should account for revenues and profits it improperly collected from its transmission of Referrer Headers and Web History information, including from increased Google AdWords business, and should have a constructive trust imposed with respect to such monies until further order of the Court.

COUNT IV

Breach of Contract Implied in Law
(on behalf of all Plaintiffs individually and the Class)

153. Plaintiffs incorporate by reference the foregoing allegations.

154. Google has knowingly, voluntarily and willfully received and retained benefits by sharing Plaintiffs' and other Class members' Web History, Personal Information and search queries or results via Referrer Headers and/or Google Analytics, as set forth above, under circumstances that would render it unjust to allow Google to retain such benefits.

155. The benefits received by Google from sharing Plaintiffs and other Class members' Web History, Personal Information and search queries via Referrer Headers and/or Google Analytics were related to the obligation and duty of Google to use such information only as outlined in the Google's Web History Privacy Policy which does not include dissemination to third parties and in Google's other above-described terms of use, and/or as prescribed by applicable law.

156. Google has increased its revenues and profits by peddling Plaintiffs' and the Class members' Personal Information, Web History, Referral Headers, or search terms or results without notice or their consent.

157. Google's above-described conduct violates principles of equity and justice, which prohibits Google from retaining these above-described benefits and constitutes a breach of contract implied in law.

158. As a result, Plaintiffs and other Class members are entitled to disgorgement and restitution of Google's revenues, profits and/or monies received by Google due to Google's use of Plaintiffs' and other Class members' property *i.e.*, their search terms and results.

COUNT V

Unjust Enrichment (In the Alternative)
(on behalf of all Plaintiffs individually and the Class)

159. Plaintiffs incorporate by reference the foregoing allegations.

160. Plaintiffs and members of the Class have conferred a benefit upon Google. Google has received and retained valuable information belonging to Plaintiffs and members of the Class, and as a result of sharing its users' search queries with third parties without their consent, Google has improved the quality of its search engine and enjoyed increased revenues from advertisers.

161. Google appreciates or has knowledge of said benefit.

162. Under principles of equity and good conscience, Google should not be permitted to retain the benefits that it unjustly received as a result of its actions.

163. Plaintiffs, on their own behalf and on behalf of the Class, seek the imposition of a constructive trust on and restitution of the proceeds of Google received as a result of its conduct described herein, as well as attorney's fees and costs pursuant to Cal. Civ. Proc. Code § 1021.5.

COUNT VI

Declaratory Judgment and Corresponding Injunctive Relief

28 U.S.C. §§2201, 2202

(on behalf of all Plaintiffs individually and the Class)

164. Plaintiffs incorporate by reference the foregoing allegations.

165. Google has violated applicable law as more fully set forth above.

166. Plaintiffs and the Class are entitled to a declaration of their rights in connection with what Google can and cannot do with their Web History and search queries.

167. Plaintiffs and the Class and Google have adverse legal interests, and there is a substantial controversy between Plaintiffs and the Class, and Google, to warrant the issuance of a declaratory judgment as to whether Google violated applicable law by its above-described practice of sharing Plaintiffs' and other Class members' Referrer Headers, and whether Google is entitled to share the Web Histories of Plaintiffs and the Class with third-parties for its commercial gain, in violation of its preexisting contract and terms of use.

168. Absent injunctive relief, Google is likely to continue its above-described practices, as Google is endowed with all of the discretion to do as it wishes with Plaintiffs' and the Class members' information.

169. As a result of Google's above-described conduct in violation of applicable law, Plaintiffs and the Class are entitled to corresponding injunctive relief, and an order establishing a constructive trust, for the benefit of Plaintiffs and the Class, consisting of monies received by Google from its unlawful sharing of Plaintiffs' and the

Class's search queries with third-party persons and entities.

170. Google's new Terms of Use do not directly address preexisting Web History, changes to Web History, or the issues described above leaving Plaintiffs and the Class without any indication of what Google intends to do with the Web Histories belonging to Plaintiffs and the Class creating a need for injunctive relief holding Google to the terms of previous contract with and terms of use for Plaintiffs and the Class described in detail above.

171. As a result of Google's above-described conduct in violation of applicable law, Plaintiffs and the Class are also entitled to an order requiring Google not to use or store preexisting Web History for purposes of profiting by transmitting their information to third-parties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the Class, pray that the Court provide the following relief:

A. Certify this case as a class action on behalf of the Class, as defined above, appoint Plaintiffs Gaos, Italiano, and Priyev as representatives of the Class, and appoint their counsel as counsel for the Class, pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. Declare that Google's actions, as described herein, violate the Stored Communications Act (18 U.S.C. §2702 *et seq.*), constitute Breach of Express and Implied Contracts, and unjust enrichment;

C. Award injunctive and other equitable relief as is necessary to protect the interests of Plaintiffs and the Class, including, *inter alia*, an order declaring the rights of the parties as stated above and prohibiting Google

from engaging in the wrongful and unlawful acts described herein;

D. Award damages, including statutory damages where applicable, to Plaintiffs and the Class, in an amount to be determined at trial;

E. Award all economic, monetary, actual, consequential, and compensatory damages caused by Google's conduct, and if its conduct is proved willful, awarding Plaintiffs and the Class exemplary damages;

F. Award restitution against Google for all money to which Plaintiffs and the Class are entitled in equity;

G. Establish a constructive trust, until further order of the Court, consisting of monies Google improperly collected or received from its above-described illicit conduct;

H. Order Google to disgorge revenues and profits wrongfully obtained;

I. Award Plaintiffs and the Class their reasonable expenses and attorneys' fees;

J. Award Plaintiffs and the Class interest, to the extent allowable; and,

K. Award such other and further relief as equity and justice may require.

JURY TRIAL

Plaintiffs demand a trial by jury for all issues so triable.

Dated: April 26, 2013 Respectfully submitted,

/s/ Kassra P. Nassiri

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APPENDIX B
RELEVANT STATUTORY PROVISIONS

1. 18 U.S.C. §2702(a)-(c) provides:

§2702. Voluntary disclosure of customer communications or records

(a) PROHIBITIONS.—Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processsing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such

service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

(b) EXCEPTIONS FOR DISCLOSURE OF COMMUNICATIONS.—A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

(2) as otherwise authorized in section 2517, 2511(2)(a), or 2703 of this title;

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

(4) to a person employed or authorized or whose facilities are used to forward such communication to its destination;

(5) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A;

(7) to a law enforcement agency—

(A) if the contents—

(i) were inadvertently obtained by the service provider; and

(ii) appear to pertain to the commission of a crime; or

[(B) Repealed. Pub. L. 108–21, title V, § 508(b)(1)(A), Apr. 30, 2003, 117 Stat. 684]

(8) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.

(c) EXCEPTIONS FOR DISCLOSURE OF CUSTOMER RECORDS.—A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))—

(1) as otherwise authorized in section 2703;

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency;

(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A; or

(6) to any person other than a governmental entity.

2. 18 U.S.C. §2707(a)-(c) provides:

§2707. Civil action

(a) CAUSE OF ACTION.—Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In a civil action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) DAMAGES.—The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) 19

None of the three named plaintiffs has Article III standing.

The district court upheld Gaos's standing based on then-controlling Ninth Circuit precedent permitting a plaintiff to establish standing simply by alleging the violation of a federal statute. JA 27 (citing *Edwards* v. *First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010)).

This Court squarely rejected that approach in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), holding that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. A plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants [him] a statutory right and purports to authorize [him] to sue to vindicate that right." *Ibid.*

The complaint here does not plausibly allege either concrete injury or certainly impending risk of concrete injury caused by the disclosure of the named plaintiffs' search terms. But even if the allegations passed muster, a party or *amicus* could challenge the factual basis for those allegations and obtain judicial resolution of disputed facts to be assessed under this Court's current standing jurisprudence.

This Court could itself assess the sufficiency of the complaint, or remand to enable the lower courts to do so. If the Court finds the complaint sufficient, then it could remand to permit the district court to undertake the second, factual inquiry. Alternatively,

the Court could simply dismiss the petition as improvidently granted.[1]

STATEMENT

A. The Relevant Technology.

1. Internet-connected devices exchange information through data transmissions formatted according to industry-standard "protocols." The hypertext transfer protocol ("HTTP") is the generally applicable protocol that allows Internet users to access webpages through their web browsers. When a user clicks on a hyperlink to a webpage, the user's browser requests the webpage by sending an HTTP transmission. (An HTTP transmission also is sent when a user enters a web address into her browser (for example, typing "www.supremecourt.gov").)[2]

That message contains a "request line" (which identifies the webpage that the user is requesting) and "header fields" (which provide additional details relevant to the request). The server hosting the webpage then interprets the request and returns the requested webpage. RFC 2616 §§ 5, 14 (published 1999).

One of the standard header fields in an HTTP transmission is the "referrer" (sometimes spelled

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[1] There appears to be no dispute that this Court cannot address the question presented if no named plaintiff has standing. *Robertson* v. *Allied Solutions, LLC*, 902 F.3d 690, 698 (7th Cir. 2018).

[2] The standards for HTTP transmissions are developed by the Internet Engineering Task Force. Although denominated "Requests for Comments" ("RFCs"), they are foundational standards. See RFC 2026, https://tools.ietf.org/html/rfc2026 (explaining the standard-setting process). The HTTP standards are RFC 2616, https://tools.ietf.org/html/rfc2616.

"referer"). When an Internet user clicks on a hyperlink to access a new webpage, the user's browser sends to the server hosting the webpage a referrer header that conveys the address of the webpage that contained the hyperlink.

For example, a user might visit this Court's webpage containing 2018 oral argument transcripts at the following address:

```
http://www.supremecourt.gov/oral_arguments/ar
  gument_transcript/2018
```

If the user clicked on the link for the October oral argument in this case, the HTTP request sent to the Court's web server would include this referrer header:

```
Referer: http://www.supremecourt.gov/
  oral_arguments/argument_transcript/2018
```

During the relevant time period, this standard process worked the same way when a user clicked on a hyperlink from a Google search results page. For example, if a user searched "Supreme Court" using Google and clicked on the link to this Court's website from the search results page, the HTTP request sent by the user's browser to the Court's server would include a referrer header resembling:

```
Referer: http://www.google.com/search/
  q=Supreme+Court
```

A referrer header is not disclosed to the general public; in the examples above, only the server hosting www.supremecourt.gov would receive the referrer header. The referrer header identifies only the immediately preceding website; it does not contain any other information about the search

history of the user requesting the webpage. RFC 2616 § 14.36.

Nothing in the HTTP protocol requires the server receiving the request to review or retain the information contained in the referrer header. But referrer headers can provide useful information; for example, the referrer headers leading to a page-not-found error might identify other webpages containing outdated hyperlinks. *Ibid.*

2. In addition to the referrer header, the server hosting the user-requested webpage also receives the user's Internet Protocol address (or "IP address"). The IP address is a numerical identifier that enables a message sent over the Internet to reach its intended destination. See, *e.g.*, RFC 791, https://tools.ietf.org/html/rfc791, § 2.3. When a user requests a webpage from a server, the server needs the user's IP address to send the webpage back. See *id.* § 2.2.

Laptop computers and smartphones rarely have fixed IP addresses. In the consumer context, IP addresses are assigned by the consumer's internet service provider ("ISP"). An ISP has a limited supply of IP addresses,[3] and it therefore assigns IP addresses to devices temporarily and changes them at its discretion. RFC 2131 § 2 (defining widely adopted Dynamic Host Configuration Protocol for distributing IP addresses).

For that reason, only the ISP knows the IP address assigned to a particular device at a

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[3] See RFC 6302 § 1 (noting that "[s]ervice providers will [as of 2011] have a hard time finding enough [IP] addresses to sustain product and subscriber growth").

particular time. See, *e.g.*, *United States* v. *Vosburgh*, 602 F.3d 512, 518 (3d Cir. 2010) (FBI subpoenaed ISP to learn user associated with IP address that attempted to download illegal file).

Even though the server hosting the requested webpage may log the IP addresses associated with webpage requests, the IP address does not identify the device (or computer user) requesting the webpage.

3. Several Members of the Court raised questions during oral argument regarding the advertisements displayed on webpages that a user visits. See, *e.g.*, Tr. 39:9-40:4, 41:5-25.

Referrer headers identify the webpage from which the user clicked to the current webpage; plaintiffs do not allege that referrer headers play a role in ad serving.

In most cases, ad serving is based upon the information stored in cookies. A cookie—in the Internet sense—is a small data file inserted into and stored on a user's computer. Third-party advertising servers will sometimes use cookies to determine which advertisements to display to a web user, based on the user's browsing history. See generally RFC 6265.

Referrer headers do not modify, transmit, or control cookies. No claim in this case relates to information stored in cookies.

B. The Complaint's Allegations.

The consolidated amended complaint operative at the time of the settlement was brought on behalf of three named plaintiffs: Paloma Gaos, Anthony Italiano, and Gabriel Priyev. Compl. (Dist. Ct. Dkt.

No. 50) ¶¶ 100-129. Each plaintiff alleges that disclosures of search queries by Google to third-party website operators through the referrer header function violates the restrictions in the Stored Communications Act of 1986 ("SCA"), 18 U.S.C. §§ 2701 *et seq.*, on "knowingly divulg[ing] to any person the contents of a communication" in electronic storage or carried on a remote computing service, *id.* § 2702(a)(1)-(2). See Compl. ¶¶ 130-141.

The complaint does not identify any specific search conducted by named plaintiffs Gaos or Priyev. Gaos alleges only that she "conducted numerous searches, including 'vanity searches' for her actual name and the names of her family members.'" *Id.* ¶ 101. And Priyev alleges that he "conducted numerous searches, including searches for financial and health information." *Id.* ¶ 115.

The third plaintiff, Italiano, alleges six searches, each a combination of his name and (a) "his home address"; (b) "bankruptcy"; (c) "foreclosure proceedings"; (d) "short sale proceedings"; (e) "Facebook"; and (f) "the name of his then soon-to-be ex-wife + forensic accounting." *Id.* ¶ 107. Italiano alleges that these searches occurred during "the time period from July 2010 to August 2011," and that during this time "he was going through formal divorce proceedings." *Id.* ¶¶ 107-108.

Neither Italiano nor the other plaintiffs identify which website or websites—if any—they clicked on from the Google search results page displayed after they entered their searches. In other words, they do not allege which websites received referrer headers.

Each plaintiff claims to have "suffered actual harm" from Google's "dissemination of * * * search

queries, which sometimes contained sensitive personal information, to third parties." *Id.* ¶¶ 104, 111, 118. No plaintiff alleges that any search by itself revealed the searcher's identity.

The complaint includes general allegations about the possibility of "reidentifying" the person associated with information that by itself is not linked to an individual. Compl. ¶¶ 83-98. Plaintiffs state that, although referrer headers do not reveal the Internet user's name, a hypothetical "adversary" could use the "Science of Reidentification" to "combine anonymized data" from referrer headers "with outside information to pry out obscured identities." *Id.* ¶ 86.

The complaint does not allege that any plaintiff was reidentified and tied to a particular search. It does not allege a substantial risk of any such reidentification. Nor does it allege that any person has "combined" the information from referrer headers relating to plaintiffs' searches "with outside information to pry out obscured identities." *Ibid.*

Finally, the complaint asserts several state common-law claims based on the same alleged conduct. *Id.* ¶¶ 142-171.

ARGUMENT

Plaintiffs Lack Standing to Pursue This Action.

A. Plaintiffs must show a concrete harm or certainly impending risk of concrete harm.

To establish Article III standing, a plaintiff must "[f]irst and foremost" demonstrate that she suffered "an injury in fact" that is both "concrete and

particularized." *Spokeo*, 136 S. Ct. at 1547-48 (quotation marks omitted).

The Constitution requires an injury that "actually exist[s]" and is "'real,' and not 'abstract.'" *Id.* at 1548. This Court has cautioned that "concrete" is "not necessarily synonymous with 'tangible'"; some "intangible injuries can nevertheless be concrete" enough to support standing. *Id.* at 1549. And Congress to some extent can make actionable intangible harms not previously held sufficient to confer standing. See pages 21-24, *infra*. But all intangible harms must satisfy Article III's concreteness requirement in order to confer standing: they must be "*de facto*," not "conjectural" or "hypothetical." *Spokeo*, 136 S. Ct. at 1548.

Finally, "the risk of real harm can[] satisfy the requirement of concreteness." *Id.* at 1549 (citing *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398 (2013)). The Court reiterated in *Clapper* "the well-established requirement that threatened injury must be 'certainly impending.'" 568 U.S. at 401 (citation omitted). "'Allegations of *possible* future injury' are not sufficient" to establish standing. *Id.* at 409 (citation omitted).

B. The complaint does not allege facts that establish the named plaintiffs' standing.

"Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element" of Article III standing. *Spokeo*, 136 S. Ct. at 1547 (alterations and quotation marks omitted).

Allegations supporting standing, like those supporting the elements of a plaintiff's claim, must contain sufficient factual support to "plausibly

establish[] injury." *Auer* v. *Trans Union, LLC*, 902 F.3d 873, 878 (8th Cir. 2018) (citing *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)). In other words, the complaint must plausibly allege that the claimed statutory violation resulted in real-world harm or a sufficient risk of harm to the plaintiff. See, *e.g.*, *Dutta* v. *State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir. 2018) (plaintiff must "plausibly allege a 'concrete' injury causally connected to the violation"); *Beck* v. *McDonald*, 848 F.3d 262, 270 (4th Cir. 2017); *Meyers* v. *Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2017); *Nicklaw* v. *CitiMortgage, Inc.*, 839 F.3d 998, 1002-03 (11th Cir. 2016); *Lee* v. *Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016); *Hancock* v. *Urban Outfitters, Inc.*, 830 F.3d 511, 513-14 (D.C. Cir. 2016).[4]

Plaintiffs' allegations do not satisfy that standard.

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[4] Petitioners cite the remand opinion in *Spokeo* (Reply Br. 26), but the Ninth Circuit noted that "even when a statute has allegedly been violated, Article III requires such violation to have caused some real—as opposed to purely legal—harm to the plaintiff." *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017), cert. denied, 138 S. Ct. 931 (2018). A plaintiff in the Ninth Circuit still must "demonstrate how the 'specific' violation of [the statute] alleged in the complaint actually harmed or 'present[ed] a material risk of harm' *to him*." *Dutta*, 895 F.3d at 1175 (emphasis added) (quoting *Robins*, 867 F.3d at 1113).

1. *Plaintiffs have not alleged an already-recognized tangible or intangible harm or a certainly impending risk of such harm.*

   a. *Disclosure of the search terms by themselves could not inflict harm or create a plausible risk of harm.*

Plaintiffs appear to contend that disclosing the terms used in their searches by itself—without any link to the identity of the individual who conducted the search—is sufficient to inflict concrete harm or create a plausible risk of such harm. Settled case law forecloses that claim.

First, the complaint does not allege facts demonstrating any real-world consequence to plaintiffs from the disclosure of their search terms standing alone. For example, plaintiffs do not allege pecuniary injury, emotional distress, or any other potential concrete harm.

The complaint does contain a conclusory allegation of "actual harm" resulting from the disclosure of plaintiffs' search terms. Compl. ¶¶ 104, 111, 118. But *Iqbal* and *Twombly* require a court to disregard such "'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). A complaint must support conclusory allegations with facts creating a plausible inference of actual harm.

Second, the complaint does not contain even a conclusory assertion that plaintiffs faced any certainly impending risk of harm from the disclosure of search terms not linked to the searcher's identity. Plaintiffs have therefore waived that contention.

Nor could the facts alleged support a plausible inference of certainly impending harm.

That failure is understandable. Without allegations plausibly establishing that a searcher's identity can be linked to his or her search terms, there virtually never can be harm or certainly impending harm from disclosure of those terms.

Examples from the physical world illustrate the point. Imagine that a person enters a store and asks for "brown lace-up shoes" without giving his name to the salesperson, and the salesperson subsequently reports to the store manager that "a man came into our store and asked for 'brown lace-up shoes.'" The reporting of that query by itself could not inflict real-world harm on the person who made it.

That remains true even if the content of the conversation touches upon matters that might otherwise be sensitive. If an individual asks a librarian for books on "divorce" or "bankruptcy" or a health problem without giving her name—and the librarian subsequently describes the anonymous queries to the research desk manager, or to a book salesperson offering books on those topics—there simply is no legally cognizable effect on the person who asked for the information.

Plaintiffs allege that some searches included the name of the plaintiff conducting the search. But "vanity searches" consisting solely of a name indicate only that someone is searching for information about that individual—they do not reveal anything about the individual or about who is conducting the search.

Neither does the inclusion of an individual's name as one of several terms in a search plausibly support a conclusion that the search terms reveal

personal information about the individual. Because the searcher could be anyone, there cannot be a plausible inference that the search terms involve accurate information about the individual named in the search—indeed, the search could be conducted by someone seeking to confirm that the named individual does not have financial problems or another characteristic related to the search terms. Certainly it is common knowledge that individuals frequently search the name of potential employees, potential dates, and friends in order to gain information about them. See, *e.g.*, Michael Fertik, "Your Future Employer Is Watching You Online," Harvard Business Review (Mar. 3, 2012) https://hbr.org/2012/04/your-future-employer-is-watchi (more than 75% of employers research prospective employees online).[5]

Third, petitioners and plaintiffs rely heavily on an alleged intangible privacy harm. See Pet. Reply Br. 25-26; Class Resp. Br. 55-56. But, as just discussed, the complaint does not explain how the disclosure of plaintiffs' search terms could cause such harm. Merely incanting the term "invasion of privacy" does not state a concrete injury. And the authorities on which they rely only underscore the complaint's failure to plausibly allege concrete harm.

For example, petitioners cite (Reply Br. 25) *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017), for the proposition that "with privacy torts, improper dissemination of

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[5] Moreover, even if it were plausible to conclude that the search terms revealed accurate information about an individual, disclosure of the particular information here could not plausibly inflict concrete harm. See pages 16-17, *infra*.

information can itself constitute a concrete injury." *Id.* at 638-39. But *Horizon* involved alleged harm from "unauthorized dissemination" of the plaintiffs' own "names," "social security numbers," "medical histories," and "test and lab results." *Id.* at 629. The information allegedly disclosed here is not linked to a plaintiff.

b. *The absence of allegations plausibly linking search terms to the plaintiff conducting the search further confirms the absence of harm or sufficient risk of harm.*

Plaintiffs try to create the impression that search terms can be linked to the plaintiff who conducted the search. But they do not allege facts plausibly supporting that conclusion.

The complaint asserts generally that there is a "Science of Reidentification." Compl. ¶¶ 83-91. But plaintiffs do not allege that this "science" was actually used to link their searches to any plaintiff's identity.

Neither do plaintiffs plausibly allege a certainly impending risk that someone could link any of their searches to their identity. They simply declare that the possibility of reidentification creates a supposed "Imminent Threat" of harm. Compl. at 31; *id.* ¶¶ 92-93. But that conclusory allegation cannot create the necessary plausible inference. *Iqbal*, 556 U.S. at 678.

Moreover, the contention is purely speculative.

Plaintiffs' sole example of anyone tying search terms to a searcher's identity involves a journalist's efforts based on the information revealed in an AOL data release. Compl. ¶ 47. But that release included

much more information than the single search query provided to a website owner through a referrer header. The AOL release revealed an average of more than 30 searches per user as well as cookie contents and other information, allowing the journalist to correlate dozens of each user's searches. *Id.* ¶¶ 45-49; *id.* ¶ 47 (cookies).

A web server operator could obtain information regarding multiple searches only if a plaintiff conducted different searches and each time clicked on the same website, so that the website would receive multiple search queries from the same plaintiff. The operator would also have to keep track of all those queries. None of those prerequisites are alleged in the complaint. (In addition, there is no allegation that any of these website operators separately had access to the cookie and other information revealed in the AOL data release.)

And if those (unlikely) conditions were satisfied, the unidentified third-party website operator "adversary" (not Google) would have to take at least five additional steps described in the complaint (at ¶¶ 83-86):

(1) retrieve and combine these multiple anonymized search queries;

(2) identify "data fingerprints" in those queries;

(3) combine those fingerprints with unspecified other data such as cookies, presumably from other websites but not from referrer headers;

(4) discern individuals' identities and their personal information from this combined, unspecified data; and, finally,

(5) exploit individuals' discovered identities to their detriment.

This lengthy and "highly attenuated chain of possibilities[] does not satisfy the requirement that threatened injury must be certainly impending." *Clapper*, 568 U.S. at 410. And it "rest[s] on speculation about the [capabilities and] decisions of independent actors" who are not before the Court. *Id.* at 414. Plaintiffs acknowledge that steps 3 and 4 require "combin[ing]" the information from referrer headers "with outside information to pry out obscured identities." Compl. ¶ 86. But they do not allege any actual combination involving referrer headers from a Google search results page.

Moreover, the complaint does not allege any facts supporting an inference that a referrer header was sent to a web server operated by an "adversary" that had any inclination to, let alone made any effort to, reidentify the plaintiffs or use the referrer information to harm them in some way. And the complaint alleges no facts explaining how any such outside "adversary" would be able to aggregate referrer headers, or link that information to an individual without additional information from additional unnamed third parties.[6]

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[6] Plaintiffs also do not allege that any website operator identified them or that they were at substantial risk of being identified from the potential disclosure of their IP addresses. Nor could they: as explained above, there is no public or generally available method for linking an IP address to a computer user's identity.

c. *Even if the alleged search terms could have been linked to the named plaintiffs, disclosure of those terms could not inflict harm or create a sufficient risk of harm.*

Even if plaintiffs had plausibly alleged that their search terms could be linked to them as individuals, they have not plausibly alleged that any such link inflicted or could inflict concrete harm. Their attempted analogy to the public disclosure of private facts still fails, for at least two additional reasons.

First, the Restatement makes clear that it is not an invasion of privacy to communicate a private fact "to a single person or even to a small group of persons." Restatement (Second) of Torts § 652D cmt. a (1977). The particular tort requires "publicity," which is a communication "that reaches, or is sure to reach, the public." *Ibid.* Disclosing a search query to a single website—the website on which a user clicked from Google's search results page—does not in any way resemble the "publicity" required to support a common-law privacy tort claim.

Second, the complaint contains no allegations plausibly alleging a disclosure of *private* information that could give rise to a privacy injury. Gaos and Priyev do not allege any specific searches at all. As for Italiano, most of his searches contain facts that are a matter of public record and are therefore not actionable. "There is no liability when the defendant merely gives further publicity to information about the individual that is already public." Restatement (Second) of Torts § 652D cmt. b.

Italiano references his ongoing divorce proceedings at the time he conducted his searches.

But divorces are matters of public record, including in Italiano's home state of Florida. As the Florida Supreme Court observed long ago, Florida maintains "well-kept public records covering vital statistics, such as * * * divorces"; "the State Bureau of Vital Statistics is the custodian of records that reflect the granting of divorces in every county in Florida." *Teel* v. *Nolen Brown Motors, Inc.*, 93 So.2d 874, 876 (Fla. 1957); see also http://www.floridahealth.gov/certificates/certificates/index.html.

The subjects of most of Italiano's other searches are also matters of public record, including addresses (Fla. Stat. §§ 695.22, 695.26), foreclosures (*id.* § 45.031), and bankruptcies (11 U.S.C. § 107(a)).

Italiano's remaining searches are innocuous and concern nothing that "would be highly offensive to a reasonable person" if disclosed. Restatement (Second) of Torts § 652D & cmt. c. Italiano's link of his name and the word "Facebook" can hardly be considered private. Nor can the names of Italiano and his now ex-wife and the term "forensic accounting."

2. The Stored Communications Act does not elevate the disclosure of every search term to a harm sufficient to establish standing.

This Court identified two inquiries to aid in determining whether an intangible harm not previously deemed sufficient to confer standing has been elevated by Congress to the status of a concrete injury satisfying Article III.

First, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as

providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549.

Second, if Congress tries to "identify intangible harms that meet minimum Article III requirements," Congress's judgment is "instructive and important." *Ibid.* But "Congress's role * * * *does not mean* that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Ibid.* (emphasis added). Instead, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.*

The SCA violation alleged in this case fails each test.

a. *Disclosure of a search term is not analogous to a harm actionable at common law.*

Injury in fact may exist when "an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549.

The focus of analysis is the claimed "intangible harm" and the "harm" that was required to maintain an action at common law. *Ibid.* And the relevant time is the period when the Constitution was ratified: the injury-in-fact requirement ensures that the jurisdiction of federal courts does not expand beyond the "cases" and "controversies" permitted by Article III. See, *e.g.*, *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008); *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000).

Disclosure of a search term, without more, does not have a "close relationship" to any harm recognized at common law.

1. At oral argument, plaintiffs attempted to analogize the claims here to the interception and publication of a letter. But Justice Story's opinion in *Folsom* v. *Marsh*, 9 F. Cas. 342 (C.C. D. Mass. 1841) did not recognize an actionable interest against disclosure of every communication. *Folsom* holds only that George Washington's letters and other papers were entitled to *copyright* protection against unauthorized publication. *Id.* at 346-47; see also Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 211 (1890) (recognizing that *Folsom* is based on "the theory of property in the contents of letters"); *Woolsey* v. *Judd*, 1855 WL 6410 (N.Y. Super. 1855) (right to enjoin publication of letters based on writer's "right of property").

Copyright confers a concrete "property" interest—"the right to exclude others"—upon which an infringer trespasses. *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932). And copyright's status as a protected property interest is well grounded in the common law. See *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 348-55 (1998) (collecting English and early American cases).

Plaintiffs also pointed at oral argument to the government's briefing in *Bartnicki* v. *Vopper*, which explained that the common law prohibited "the publication of a private letter without the author's consent." U.S. Reply Br. 9-10 & n.6, *Bartnicki* v. *Vopper*, 2000 WL 1755243 (Nov. 27, 2000). But again, those cases are based on a property right in letters that has no analog here.

In addition, the search terms embedded in the webpage address in the referrer header are nothing like the contents of a private letter. They are not sealed, but rather shared with the search engine. In other words, they are more akin to a written research query to a librarian than to a locked diary. Nor, for the reasons explained above, is there publication of private facts. See page 16, *supra*.

These fundamental distinctions undermine petitioners' reliance on the Ninth Circuit's opinion on remand in *Spokeo* for the proposition that an alleged injury "need not 'exactly track[]' the common law." Reply Br. 26 (quoting *Robins*, 867 F.3d at 1115). Whatever the merits of that determination, *Spokeo* at least involved allegedly false information *tied to a specific person*. The absence of any similar link here to the person conducting the search underscores that any relationship between the plaintiffs' alleged injury and the harm that would support an action at common law is remote rather than "close," as *Spokeo* requires. 136 S. Ct. at 1549.[7]

2. Common-law privacy torts provide no basis for standing-by-analogy, as they arose more than a century after the Framing. "Prior to 1890 no English or American court had ever expressly recognized the existence of the right [to privacy]." Restatement (Second) of Torts § 652A cmt. a.

In any event, privacy torts generally require proof of harm. See *id.* §§ 652A, 652H. This Court has acknowledged "the traditional understanding that

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[7] Plaintiffs pointed to this Court's Fourth Amendment cases. Class Resp. Br. 56. But the Fourth Amendment does not apply to private parties. See, *e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984).

tort recovery requires not only wrongful act plus causation reaching to the plaintiff, but proof of some harm for which damages can reasonably be assessed." *Doe* v. *Chao*, 540 U.S. 614, 621 (2004) (citing PROSSER AND KEETON ON LAW OF TORTS § 30 (5th ed. 1984)).

To be sure, some "privacy * * * torts" permit recovery for "presumed damages" calculated "without reference to specific harm." *Ibid.* But presumed damages, like statutory damages, merely avoid problems of quantifying a nonmonetary harm that actually occurred; they are "an estimate, however rough, of the probable extent of *actual loss* a person had suffered and would suffer in the future." PROSSER ON TORTS, *supra*, § 116A (emphasis added); see also *Memphis Cnty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310-11 (1986) (liquidated statutory damages "roughly approximate the harm that the plaintiff suffered" from the violation—because "ordinary compensatory damages" are too difficult to quantify).

In sum, the disclosure of search terms to third-party websites through referrer headers alleged here does not resemble the public disclosures of private facts that may support a common-law privacy tort.

b. *Congress did not elevate disclosure of every search term to an actionable intangible harm.*

The SCA does not embody any "instructive" judgment by Congress (*Spokeo*, 136 S. Ct. at 1549) that all disclosures of communications should be actionable even if the plaintiff's allegations do not satisfy the ordinary standards of harm.

In other contexts where Congress legislates against the backdrop of default rules, courts have consistently held that Congress must expressly state its intent to displace the general rule.[8] The same approach should govern here: A statute cannot be interpreted to expand the class of persons entitled to sue without (at minimum) some indication in the text that Congress intended that effect.

Indeed, in explaining Congress's ability to elevate a formerly non-actionable harm to the status of an injury in fact, this Court cited (*Spokeo*, 136 S. Ct. at 1549) "Justice Kennedy's concurrence" in *Lujan* v. *Defenders of Wildlife*, which in turn explained that, if Congress seeks "to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before[,] * * * Congress must at the very least *identify the injury* it seeks to vindicate and *relate the injury to the class of persons entitled to bring suit*." 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (emphasis added). It would be "remarkable" and "unfortunate" to "hold[] that Congress may override the injury limitation of Article III" when "there is no indication that Congress embarked on such an ambitious undertaking." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1227 (1993).

There is no such "indication" in the SCA.

First, plaintiffs and petitioners contend that Congress recognized and elevated to the status of concrete injury all disclosures prohibited by the SCA.

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[8] See, *e.g.*, *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013); *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991).

But just as the Court in *Spokeo* held that the FCRA does not make all inaccuracies actionable because "not all inaccuracies cause harm or present any material risk of harm" (136 S. Ct. at 1550), the SCA cannot be read to make all disclosures actionable. See also *Hancock*, 830 F.3d at 514 (explaining that, under *Spokeo*, "some statutory violations could 'result in no harm,' even if they involved producing information in a way that violated the law").

The absence from the SCA's text of any indication that Congress intended to expand the class of intangible injuries sufficient to support a lawsuit therefore requires rejection of the contention that the statute has that effect.

Second, Congress limited the availability of a private cause of action to a "person *aggrieved* by any violation of this chapter." 18 U.S.C. § 2707(a) (emphasis added). The inclusion of that additional requirement precludes any conclusion that Congress intended to expand the class of eligible plaintiffs. Indeed, the Court has held that the statutory term "aggrieved" may be even more restrictive than the generally applicable Article III standard of injury—by requiring the plaintiff also to show that he "falls within the zone of interests sought to be protected by the statutory provision." *Thompson* v. *N. Am. Stainless, LP*, 562 U.S. 170, 176-78 (2011). Thus, the SCA's text reflects a congressional judgment *not* to expand the class of persons entitled to sue.[9]

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[9] In rejecting a challenge to a plaintiff's "prudential standing" in an earlier case, the Court associated "the word 'aggrieved' with a congressional intent to cast the standing net broadly." *FEC* v. *Akins*, 524 U.S. 11, 19 (1998). That observation may not survive Justice Scalia's opinion in *Thompson*. See *Akins*, 524 U.S. at 30 (Scalia, J., dissenting) (arguing that the Court's

Third, the minimum damages provision does not show that Congress intended to create a new class of actionable harms. The FCRA contains a statutory damages provision for a willful violation of any of the statute's requirements. 15 U.S.C. § 1681n. But the *Spokeo* Court recognized that "[a] violation of one of FCRA's procedural requirements may result in no harm" and remanded for consideration of "whether the particular procedural violations entail a degree of risk sufficient to meet the concreteness requirement" (136 S. Ct. at 1550)—a remand that would have been unnecessary if the statutory damages provision sufficed to satisfy Article III.

C. Even if the complaint's allegations were sufficient, Google would be entitled to an evidentiary hearing to disprove the relevant allegations.

Standing is not conclusively established merely because the complaint's allegations are sufficient. A "factual" challenge to standing "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Leite* v. *Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). "[T]he plaintiff must support her jurisdictional allegations with 'competent proof,'" and it is generally for the district court to resolve any "disputed factual issues" on which the existence of jurisdiction depends. *Id.* at 1121-22 (quoting *Hertz Corp.* v. *Friend*, 559 U.S. 77, 96-97 (2010)).

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interpretation of "aggrieved" "deprives it of almost all its limiting force"). But whether "aggrieved" encompasses a broader or narrower range of plaintiffs with conventional standing, the word certainly does not *expand* the category of injuries that confer standing.

If this Court holds that the complaint plausibly alleges injury in fact, then Google or an *amicus* would be entitled to question the veracity of the facts alleged in the complaint and have those factual disputes resolved by the district court before plaintiffs' standing could be conclusively established under *Spokeo* and *Clapper*.

CONCLUSION

The judgment of the court of appeals should be vacated and the action remanded with directions to dismiss for lack of Article III standing.

Respectfully submitted.

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No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK, ET AL., PETITIONERS

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether a class-action settlement that provides no direct relief to unnamed class members, but instead distributes settlement funds to non-parties on a *cy pres* theory, is "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

This case presents the question whether a class-action settlement that provides no direct relief to unnamed class members, but instead distributes settlement funds to non-parties on a *cy pres* theory, should be approved as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2). The United States has a substantial interest in the resolution of that question. Under 28 U.S.C. 1715, class-action defendants seeking court approval of settlements must notify the Attorney General or other designated federal official of the settlement terms. Consistent with its interests in protecting consumers and ensuring the fair disposition of class actions—particularly those that aggregate federal claims—the United States has filed statements of interest in district courts raising concerns

about particular settlements. Although the government has not yet submitted a statement raising concerns about the use of *cy pres* relief in class-action settlements, the Attorney General has issued a memorandum directing Department of Justice litigating entities not to enter *cy pres* settlements. Many of the principles underlying that decision are relevant to the question presented here. The government has participated in multiple cases before this Court involving class-action rules and practices. See, *e.g.*, *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036 (2016); *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663 (2016); *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455 (2013).

STATUTORY PROVISIONS AND RULES INVOLVED

As especially relevant here, Federal Rule of Civil Procedure 23(e)(2) provides: "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise: * * * If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."

This Court has approved amendments to Rule 23 that will take effect on December 1, 2018, if Congress does not modify them. The amended version of Rule 23(e)(2) submitted to Congress is reproduced in this brief's appendix, along with other pertinent statutory provisions and rules. App., *infra*, 1a-12a. Material differences in the amended rule are discussed further below.

STATEMENT

1. a. Plaintiffs bringing a class action under Federal Rule of Civil Procedure 23 must meet several "threshold requirements." *Amchem Prods., Inc.* v. *Windsor*,

521 U.S. 591, 613 (1997). First, under Rule 23(a), the class representatives must show "numerosity," "commonality," "typicality," and "adequacy of representation." *Ibid.* Next, plaintiffs "must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Id.* at 614. As relevant here, Rule 23(b)(3) authorizes a court to certify a class if plaintiffs show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

In a class action certified under Rule 23(b)(3), the district court must provide notice to class members informing them that they have right to "request[] exclusion" from the class. Fed. R. Civ. P. 23(c)(2)(B)(v). The notice must also inform class members that they will be subject to "the binding effect of a class judgment" if they do not exercise their opt-out right. Fed. R. Civ. P. 23(c)(2)(B)(vii); see Fed. R. Civ. P. 23(c)(3)(B).

b. "Like all American litigation, class action lawsuits are likely to settle." 4 William B. Rubenstein, *Newberg on Class Actions* § 13:1, at 273 (5th ed. 2014) (*Newberg*). Unlike a typical settlement, however, a class-action settlement inherently involves a potential conflict of interest, because it "compromises the claims of absent class members, litigants not themselves part of the settlement negotiations." *Id.* at 273-274. "Worse, the class representatives and class counsel litigating on behalf of those absent class members may have incentives to settle which conflict with the class's interests." *Ibid.* In particular, class counsel have a "pecuniary interest * * * in their fees," while class members have a "pecuniary interest * * * in the award to the class," which

can result in an "acute conflict of interest." *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014).

To protect the rights of absent class members against these potential conflicts, Rule 23(e) provides that the "claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). A court reviewing a class-action settlement serves as a "fiduciary of the class," *Pearson*, 772 F.3d at 780 (citation omitted), and must keep "the interests of absent class members in close view," *Amchem*, 521 U.S. at 629; see Fed. Judicial Ctr., *Manual for Complex Litigation* § 21.61, at 310 (4th ed. 2004) (Manual) ("[T]he judge must adopt the role of a skeptical client and critically examine the class certification elements, the proposed settlement terms, and procedures for implementation.").

Specifically, a district court considering a class-action settlement "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Any "class member may object to" the settlement, Fed. R. Civ. P. 23(e)(5), and the court "may refuse to approve a settlement unless it affords a new opportunity" for class members in a Rule 23(b)(3) class action to opt out, Fed. R. Civ. P. 23(e)(4). Of particular relevance here, a court may approve a settlement that "would bind class members" only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). A court may also "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).

To facilitate judicial consideration of a class-action settlement, the parties "must file a statement" with the district court identifying the settlement agreement.

Fed. R. Civ. P. 23(e)(3). In addition, within ten days of filing the proposed settlement, the class-action defendant must serve specified federal and state officials with the settlement and other case-related documents. 28 U.S.C. 1715(b). The court may not finally approve the settlement "earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served" with the required notice. 28 U.S.C. 1715(d).

c. Rule 23(e)(2) does not specify particular criteria that a court must consider in determining whether a proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The advisory committee notes, however, state that "[f]urther guidance can be found in the [Manual]." Fed. R. Civ. P. 23 advisory committee's note (2003 Amendment). The Manual explains that "[j]udicial review" of class-action settlements "must be exacting and thorough," and it outlines "a number of recurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements." § 21.61, at 309-310.

Notably, the Manual highlights a settlement "releasing claims of parties who received no compensation in the settlement" as one of the "potential abuses" of which the court should be "wary." § 21.61, at 310-311; see *Newberg* § 13:56, at 490 (citing "compromising claims without compensation" as a "red flag[]"). Such a settlement often arises when the parties agree to *cy pres* relief, which "permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries for the indirect benefit of the class." Pet. App. 7 (citation omitted); see *Newberg* § 12:32, at 238-242. Although *cy pres* remedies "are a growing feature of class-action settlements,"

this Court "has not previously addressed" when such remedies are appropriate. *Marek* v. *Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari). Some courts of appeals, however, have "criticized and severely restricted the practice." *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015) (collecting authorities).

2. This case arises from consolidated class actions filed against respondent Google, Inc. See Pet. App. 3. In the first action, plaintiff (now respondent) Paloma Gaos challenged the manner in which Google operates its search engine, specifically its disclosure of users' search terms through a "referrer header" when a user clicks on a link after conducting a Google search. *Id.* at 4. Gaos alleged that such disclosure violates the Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.*, which prohibits certain service providers from divulging the contents of communications. 18 U.S.C. 2702(a)(1) and (2); see J.A. 18, 28. She also asserted various state-law claims. J.A. 18.

The district court dismissed the state-law claims for lack of Article III standing, reasoning that Gaos had failed to identify any injury-in-fact resulting from Google's dissemination of referrer headers. J.A. 26-27. With respect to the federal claims, however, the court concluded that Gaos had standing. J.A. 27-31. Relying on then-extant circuit precedent, the court reasoned that "the injury required by Article III * * * can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" J.A. 27 (quoting *Edwards* v. *First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), cert. dismissed, 567 U.S. 756 (2012)) (per curiam). Because the SCA creates a private right of action and a statutory-damages remedy, see 18 U.S.C. 2707(a) and

(c), the court concluded that Gaos had adequately alleged an Article III injury. J.A. 29. Gaos subsequently amended her complaint to add another class representative, respondent Anthony Italiano, and the district court consolidated another class action raising similar claims filed by respondent Gabriel Priyev. See J.A. 82, 84-85. The district court did not expressly address the standing of Italiano or Priyev.

3. a. The parties reached a settlement agreement. See Pet. App. 69-111. As relevant here, plaintiffs Gaos, Italiano, and Priyev agreed to dismiss their class actions and release their claims in return for two steps by Google.

First, Google agreed to pay $8.5 million into a settlement fund. Pet. App. 82-83. That fund would be used to pay attorney's fees (ultimately about $2.125 million), to provide "incentive awards" to each of the individual class representatives, and to pay administrative costs of about $1 million. *Id.* at 41; see *id.* at 83-84. The remainder of the fund (about $5.3 million) would be distributed as *cy pres* relief to several academic or non-profit institutions "to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." *Id.* at 84; see *id.* at 5. The agreement did not provide for any direct compensation to members of the class.

Second, Google agreed to "maintain information on its website" disclosing "how information concerning users' search queries are shared with third parties." *Id.* at 40; see *id.* at 82. Google, however, was "not required to make changes to its homepage * * * or to practices or functionality of Google Search" or other aspects of its website. *Id.* at 40; see *id.* at 82.

b. The district court granted preliminary certification of the class under Rule 23(b)(3) and preliminary approval of the settlement under Rule 23(e)(2). J.A. 82-100. When class members were notified of the settlement, four objected, including petitioners. Pet. App. 34, 112-150. Among other objections, petitioners argued that *cy pres* relief was inappropriate because "it would be practicable to distribute" the settlement fund "through a lottery or claims-made process." *Id.* at 121. Petitioners also argued that the *cy pres* award was improper because "class counsel are the alumni of several of the *cy pres* recipients," creating "the appearance of divided loyalties of class counsel." *Id.* at 125.

c. After a hearing, the district court certified the class for settlement, granted final approval of the settlement, overruled petitioners' objections, and awarded attorney's fees to class counsel. Pet. App. 34-60.

The district court first concluded that the class could be certified for settlement under Rule 23(b)(3) because the proposed class action was "a superior process" for litigating the claims of a "class comprised of approximately 129 million individuals who all share a common injury." Pet. App. 35-36. In the court's view, "[t]he alternatives to class certification—millions of separate, individual and time-consuming proceedings or a complete abandonment of claims by a majority of class members—were not preferable." *Id.* at 36.

The district court next determined that the settlement was "fair, adequate, and reasonable" under Rule 23(e)(2). Pet. App. 41; see *id.* at 39-50. The court observed that plaintiffs' SCA claims were "legally unproven, technically complex and potentially of little value." *Id.* at 44. The court concluded that *cy pres* relief was appropriate because the settlement fund was "non-distributable"

given the large size of the class, *id.* at 47, and the proposed *cy pres* distribution was acceptable because it "bears a substantial nexus to the interests of the class members," *ibid.* (quoting *Lane* v. *Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), cert. denied, 571 U.S. 1003 (2013)). The court granted $2.125 million in attorney's fees, which was "equal to 25% of the" $8.5 million settlement fund. *Id.* at 54.

4. The court of appeals affirmed. Pet. App. 1-23. All three panel members agreed with the "district court's finding that the settlement fund was non-distributable." *Id.* at 8; see *id.* at 23 (Wallace, J., concurring in part and dissenting in part). The court explained that the settlement fund, after subtracting attorney's fees and other expenses, "was approximately $5.3 million, but there were an estimated 129 million class members, so each class member was entitled to a paltry 4 cents in recovery—a *de minimis* amount if ever there was one." *Id.* at 9. The court rejected petitioners' contention that the settlement fund could have been distributed through a claims process, explaining that its "review of the district court's settlement approval [wa]s not predicated simply on whether there may be 'possible' alternatives," but rather on "whether the district court discharged its obligation to assure that the settlement [wa]s 'fair, adequate, and free from collusion.'" *Id.* at 9-10 (quoting *Lane*, 696 F.3d at 819) (citation omitted).

The panel divided over "whether approval of the settlement was an abuse of discretion due to claimed relationships between counsel or the parties and some of the *cy pres* recipients." Pet. App. 11. The majority recognized that "Google has in the past donated to" and directed "settlement funds" to several of the *cy pres* recipients, and that "three of the *cy pres* recipients are

organizations housed at class counsel's *alma maters*." *Id.* at 13. The majority concluded, however, that none of those prior affiliations raised "substantial questions about whether the selection of the recipient was made on the merits." *Id.* at 14 (citation omitted). Judge Wallace dissented on that point, concluding that "the fact alone that 47% of the settlement fund is being donated to the alma maters of class counsel raises an issue which, in fairness, the district court should have pursued further." *Id.* at 23 (Wallace, J., concurring in part and dissenting in part).

SUMMARY OF ARGUMENT

This Court granted the petition for a writ of certiorari to consider when a class-action settlement that incorporates *cy pres* relief is "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2). There is, however, considerable doubt whether the Court has Article III jurisdiction to address that question, because plaintiffs' standing in the district court depended on a theory of injury that this Court subsequently rejected in *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016). The Court accordingly may wish to remand the case for the lower courts to address the standing question in the first instance.

If the Court addresses the merits, it should vacate the decision below and remand for more rigorous scrutiny of the *cy pres* relief in the settlement. As explained further below, *cy pres* relief has little basis in history, creates incentives for collusion, and raises serious questions under Article III. A court should approve a class-action settlement that includes *cy pres* relief only in rare circumstances after careful examination to determine whether several important limitations are satisfied. Specifically, *cy pres* distributions are permissible

only if they redress plaintiffs' injuries and only if there is no non-arbitrary way to distribute settlement funds to allegedly injured class members. In addition, settlement funds distributed through *cy pres* rather than directly to class members should be discounted in calculating attorney's fees. Because the courts below applied an overly permissive standard in approving the *cy pres* settlement in this case, this Court should vacate and remand for further proceedings.

ARGUMENT

THIS COURT SHOULD VACATE THE DECISION BELOW AND REMAND FOR THE LOWER COURTS TO ADDRESS STANDING OR CONDUCT FURTHER REVIEW OF THE *CY PRES* RELIEF IN THE SETTLEMENT

A. A Substantial Jurisdictional Question Exists

Although no party raised a jurisdictional objection in the court of appeals or at the certiorari stage, this Court has an "obligation to satisfy itself * * * of its own jurisdiction * * * even though the parties are prepared to concede it." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (citation and internal quotation marks omitted). Article III jurisdiction "must be extant at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). This Court therefore has "an obligation * * * to inquire not only into [its own] authority to decide the questions petitioners present, but to consider, also, the authority of the lower courts to proceed." *Id.* at 73; see *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (explaining that this Court has "an obligation to assure [itself] that [plaintiffs] had Article III standing at the outset of the litigation").

1. This Court has recognized that "Article III constraints" apply in the class-action settlement context. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (citation omitted); see *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-613 (1997). Specifically, courts "evaluate standing for the purposes of class certification and settlement approval under Rule 23." *In re Deepwater Horizon*, 739 F.3d 790, 800 (5th Cir.) (collecting cases), cert. denied, 135 S. Ct. 754 (2014); see 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1785.1 (3d ed. 2005 & Supp. 2018). And courts of appeals have vacated district court approvals of class-action settlements that failed to address Article III standing. See, *e.g.*, *Central States Se. & Sw. Areas Health & Welfare Fund* v. *Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 203 (2d Cir. 2005).

Article III constraints apply to the district court actions under review here. The court granted class certification, approved the settlement, and entered a judgment dismissing the action with prejudice. Pet. App. 62-66. The judgment imposed the terms of the settlement, including the *cy pres* provisions and the release of plaintiffs' claims, as "binding" on the parties, with "*res judicata* and preclusive effect." *Id.* at 64. The court also retained "jurisdiction to oversee the implementation and enforcement of the Settlement." *Id.* at 65. The court could not perform those actions if it lacked Article III jurisdiction. See *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994); cf. *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."). Indeed, the

district court's judgment stated that it had "appropriate subject matter jurisdiction over this action." Pet. App. 63.

No exception to the need for an Article III standing inquiry applies here. Under this Court's precedent, certain class-certification issues may be considered before Article III standing when "their resolution * * * is logically antecedent to the existence of any Article III issues." *Amchem*, 521 U.S. at 612. But the propriety of class certification is not logically antecedent to the Article III issue here—whether the named plaintiffs had standing to bring their claims in the first place. The court of appeals' decision upholding approval of the settlement can thus be affirmed only if plaintiffs actually had Article III standing in the district court.

2. There is a substantial question about whether plaintiffs had such standing. Article III requires a plaintiff to allege an "injury in fact" that is both "'concrete'" and "'particularized.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016) (citation omitted). Plaintiffs here allege that they suffered "actual harm in the form of Google's unauthorized and unlawful dissemination of [their] search queries, which sometimes contained sensitive personal information, to third parties." Consolidated Compl. (Compl.) ¶¶ 104, 111, 118. The district court determined that this allegation, which at the time was asserted only by plaintiff Gaos, did not constitute "injury sufficient for Article III standing with respect to" the state-law claims. J.A. 27. But the court concluded that Gaos's SCA claim sufficed to create standing because "[t]he injury required by Article III * * * can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Ibid.* (quoting *Edwards* v. *First Am. Corp.*, 610 F.3d 514, 517 (9th Cir. 2010), cert. dismissed, 567 U.S. 756 (2012) (per

curiam)). Specifically, the court concluded that "a violation of one's statutory rights under the SCA is a concrete injury," even "without additional injury." J.A. 29. The court did not separately address standing based on the substantially similar allegations asserted by plaintiffs Italiano and Priyev.

In *Spokeo*, this Court vacated a Ninth Circuit decision that relied on the same reasoning as the district court here. 136 S. Ct. at 1545; see *id.* at 1546 n.5 (citing *Edwards*, 610 F.3d at 514). The Court rejected the premise that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 1549. Rather, the Court explained, "Article III standing requires a concrete injury even in the context of a statutory violation." *Ibid.* To qualify as "'concrete,'" an "injury must be '*de facto*'; that is, it must actually exist." *Id.* at 1548. The "requirement of concreteness," however, may be satisfied by an "intangible" injury or "the risk of real harm." *Id.* at 1549. And "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Ibid.*

Here, it is unclear whether any injury alleged by any plaintiff satisfies the injury-in-fact requirement as elucidated in *Spokeo*. Plaintiffs do not appear to identify any particular injury that actually resulted from Google's use of referrer headers. See Google Br. in Opp. 2-3 (citing plaintiffs' "lack of injury" and suggesting that their allegations would not suffice to create standing after *Spokeo*); *id.* at 23 (stating that "plaintiffs failed to allege any actual harm that they or class members suffered as a result of the challenged practices");

see also D. Ct. Doc. 44, at 3 (June 14, 2012) (Google arguing that "[s]hould the Supreme Court reverse the *Edwards* decision, the [district court] should dismiss Plaintiffs' SCA claim based on * * * lack of standing.").[1] Plaintiffs contend instead that a website operator could learn their identity and their search queries through "reidentification," Compl. ¶¶ 4, 83-91, and they provide examples of search terms that allegedly create privacy-related harms, see Compl. ¶¶ 101, 107. The lower courts did not address whether such allegations present a "risk of real harm" sufficient to create Article III standing. *Spokeo*, 136 S. Ct. at 1549; cf. *Robins* v. *Spokeo, Inc.*, 867 F.3d 1108, 1112-1117 (9th Cir. 2017) (finding, on remand from this Court, that plaintiffs' asserted injury under federal consumer privacy statute was sufficiently concrete to support standing), cert. denied, 138 S. Ct. 931 (2018). This Court accordingly may wish to remand the case for the lower courts to address standing in the first instance. Cf. *Kremens* v. *Bartley*, 431 U.S. 119, 128-130 (1977) (finding claims of named plaintiffs in class action mooted by intervening development in the law and remanding for further analysis with respect to other class members).

B. Class-Action Settlements Relying On *Cy Pres* Require Careful Scrutiny And Should Be Approved Only When Certain Limitations Are Met

If the Court addresses the merits, it should hold that class-action settlements relying on *cy pres* distributions

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[1] Google withdrew its standing argument after this Court dismissed the petition for a writ of certiorari in *Edwards* as improvidently granted. See D. Ct. Doc. 46, at 2 n.2 (Aug. 2, 2012). Google later notified the court of appeals of this Court's decision in *Spokeo*, which came after the appeal had been briefed. See C.A. Doc. No. 41-1 (May 25, 2016).

require careful examination and should be approved as "fair, reasonable, and adequate" under Rule 23(e)(2) only in rare circumstances when certain limitations are satisfied.

1. The history and logic of cy pres *do not support its use in class-action settlements*

The *cy pres* doctrine "takes its name from the Norman French expression *cy pres comme possible*," or "as near as possible." Pet. App. 7. *Cy pres* "developed originally in the law of trusts, where it is deeply rooted." Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 624 (2010) (Redish). In that "original context," the need for *cy pres* arose when it became "impossible or impractical" to use a charitable donation for its intended purpose "because of exigent circumstances." *Id.* at 625. Courts developed *cy pres* "to give effect to the testator's intent by putting the funds to the next closest use." *Ibid.* For example, "the March of Dimes Foundation, which was initially established to treat polio victims[,] * * * was permitted to alter its mission to combat other childhood diseases once the polio vaccine was developed and the donors' precise intent could no longer be effectuated." Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 114-115 (2014) (Wasserman).

As a trust-law doctrine with centuries-old roots, *cy pres* "was never thought to have anything to do with the structuring of relief awarded against a defendant who had been judicially found in an adversary proceeding to have violated the legal rights of the plaintiff." Redish 630. Nevertheless, in the 1970s, some courts began to import the concept of *cy pres* from trust law to "the class action context." Wasserman 116. Even then,

courts "originally contemplated" that *cy pres* "would be used only in large classes with unclaimed remainders," on the theory that distributing unclaimed funds to charities would be preferable to allowing the funds to revert to the defendant. Redish 633. Over time, however, "litigants and courts have enthusiastically latched onto cy pres," Wasserman 117, as a mechanism not only for distributing unclaimed settlement funds, but also for structuring settlements to direct *all* funds to *cy pres* recipients (and class counsel), thereby leaving class members "no recovery at all," American Law Institute, *Principles of the Law: Aggregate Litigation* § 3.07 cmt. a, at 218 (2010) (*ALI Principles*). The "*cy pres*-only distribution" in this case is a typical example. Pet. App. 7.

Such settlements are irreconcilable with the logic of *cy pres* as historically understood. Because the need for *cy pres* arose only when a donor's intent was frustrated, there was no such thing as a voluntary *cy pres* agreement or award. See *Newberg* § 12:32 n.7, at 239 (calling application of *cy pres* to class-action settlements "beguiling" because "*cy pres* evolved in trust law from the *absence* of specific direction"); see also *Klier* v. *Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring) ("It is inherently dubious to apply a doctrine associated with the voluntary distribution of a gift to the entirely unrelated context of a class action settlement."); *Mirfasihi* v. *Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (explaining that a *cy pres* class-action settlement is "badly misnamed"). Applying the *cy pres* doctrine to class-action settlements of the kind at issue here therefore has no basis in history or equity practice.

2. *Use of* cy pres *in class-action settlements raises serious concerns that warrant additional analysis*

Aside from its historical novelty, the extension of *cy pres* to class-action settlements raises "fundamental concerns" about the fairness of such relief. *Marek* v. *Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari); see *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015) (explaining that some courts of appeals have "criticized and severely restricted the practice"); Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 17 (3d ed. 2010) (identifying *cy pres* relief as a "hot button indicator[]" showing "potential unfairness" in a class-action settlement).

First, *cy pres* relief provides no direct compensation to members of the plaintiff class. That is a significant "red flag[]," because the plaintiffs' injuries are the basis for the lawsuit. *Newberg* § 13:56, at 489; see Manual § 21.61, at 310-311 ("Releasing claims of parties who received no compensation in the settlement" is a "potential abuse[]" of which a court should be "wary."). Class members are thus "presumptively" entitled to a share of the "funds generated through the aggregate prosecution of [their] claims," which are typically released by the settlement. *ALI Principles* § 3.07 cmt. b, at 218; see *Klier*, 658 F.3d at 474. But in a *cy-pres* only settlement like the one at issue here, injured class members receive no funds in exchange for the release of their claims. Rather, a *cy pres* distribution provides relief only "imperfectly," by "substituting for * * * direct compensation an indirect benefit that is at best attenuated and at worse illusory." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013).

Second, *cy pres* settlements exacerbate "the perennial risk of collusion" between the parties at the expense of absent class members. Wasserman 123; see *Mirfasihi*, 356 F.3d at 785 (noting that "class actions are rife with potential conflicts of interest between class counsel and class members"). By shifting the focus of settlement negotiations from the value of plaintiffs' claims to the amount and destination of a charitable contribution, the prospect of *cy pres* relief distorts incentives for class counsel and defendants alike. Class counsel often receive attorney's fees calculated as a percentage of the overall settlement fund, and "a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *Baby Prods.*, 708 F.3d at 173. The incentive to maximize the *cy pres* amount rather than negotiate for more direct relief to the class creates a "potential conflict of interest between class counsel and their clients." *Ibid.*; see *Pearson* v. *NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (describing the "acute conflict of interest" between class counsel's "pecuniary interest * * * in their fees" and class members' "pecuniary interest * * * in the award to the class").

From the defendant's perspective, *cy pres* relief offers the prospect of "a reputational boost from large charitable contributions" without an admission of wrongdoing to class members or the public. *Newberg* § 12.32, at 243 (emphasis omitted); see Wasserman 120 ("Typically, when a defendant makes a donation to charity in lieu of direct payments to class members, the defendant enjoys the good will and good publicity (and possibly even the tax deduction) associated with making a charitable gift, while the class members may receive little, if any, benefit from the charity's activities."). The risk of

collusion is especially high where, as here, the defendant already contributes to the *cy pres* recipients, see Pet. App. 13-14, and thus may view the *cy pres* payment as little more than a change in accounting, see *Mirfasihi*, 356 F.3d at 785 ("[W]hat may be going on here is that class counsel wanted a settlement that would give them a generous fee and [the defendant] wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself.").

Third, *cy pres* relief creates a risk of self-dealing—or the appearance of self-dealing—by parties and, potentially, the court. See Wasserman 124-125. By allowing the parties or the court to select the recipients of charitable contributions, *cy pres* relief opens the door to apparent favoritism toward entities with which the parties or the court have prior affiliations, such as an *alma mater* or favorite local charity. See *id.* at 124-125 & nn.116-120 (citing examples); Pet. App. 30 (Wallace, J., concurring in part and dissenting in part) (discussing appearance of potential self-dealing by counsel in this case); see also *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 38 (1st Cir.) ("[H]aving judges decide how to distribute cy pres awards both taxes judicial resources and risks creating the appearance of judicial impropriety."), cert. denied, 568 U.S. 932 (2012).

Fourth, *cy pres* remedies in class actions involving federal statutory claims often conflict with the remedies specified by Congress in the underlying substantive law. See Redish 644-650. "The private causes of action aggregated in this class action—as in many others—were created by Congress to allow plaintiffs to recover * * * damages for their injuries." *Baby Prods.*, 708 F.3d at 173; see 18 U.S.C. 2707(c) (providing for statutory damages). But the *cy pres*-only settlement here did not

provide any compensation to plaintiffs. It instead provided compensation to non-parties. Such a remedy is not expressly authorized by the underlying substantive statute, Rule 23, or any other affirmative source of law. Cf. 28 U.S.C. 1712(e) (authorizing courts to order a form of *cy pres* relief in certain settlements involving coupons).

In light of these and other concerns, see Pet. Br. 28-39, this Court should direct lower courts to conduct additional analysis in determining whether a class-action settlement that includes *cy pres* relief is "fair, reasonable, and adequate" under Rule 23(e)(2). In an ordinary settlement that does not involve *cy pres* relief, the Rule 23(e)(2) analysis typically focuses on the amount of the settlement and the strength of the plaintiffs' claims. See *Newberg* § 13.48, at 457. But when a settlement includes a *cy pres* component, a court must not only analyze the size of the payment and the strength of the claims, but must also determine whether the parties have shown a sufficient justification for directing the relief to an entity other than the plaintiffs. As explained further below, in applying that "increased scrutiny," *Baby Prods.*, 708 F.3d at 173, courts should ensure that certain conditions are satisfied before approving a settlement that includes *cy pres* relief, which will often require courts to make specific findings about the ability of *cy pres* recipients to redress putative violations, the feasibility of direct distributions to the class, and the extent to which the *cy pres* distribution should be considered in calculating attorney's fees.

Recognizing the potential for abuse inherent in *cy pres* settlements, the Attorney General recently directed litigating entities within the Department of Justice not to enter settlements that provide payment to non-parties, including through *cy pres* relief, except in

narrow circumstances. Memorandum from Jefferson B. Sessions III, U.S. Att'y Gen., regarding Prohibition on Settlement Payments to Third Parties (June 5, 2017), https://www.justice.gov/opa/press-release/file/971826/download. As the Attorney General explained, the "goals of any settlement are, first and foremost, to compensate victims, redress harm, or punish and deter unlawful conduct." *Ibid.* By compensating victims for their harm only indirectly (if at all) and by allowing defendants to replace payments to injured plaintiffs with donations to charities or other preferred third parties, *cy pres* relief runs counter to those basic settlement purposes. See *ibid.* The same principles that led the Department of Justice to stop entering into *cy pres* settlements counsel in favor of careful judicial scrutiny before approving *cy pres* settlements under Rule 23(e)(2). See, *e.g.*, *In re BankAmerica*, 775 F.3d at 1067 (applying "rigorous standards" in reviewing *cy pres* components of settlement).

3. In conducting scrutiny of cy pres *settlements, courts should enforce several limitations*

In conducting the required scrutiny of settlements that include *cy pres* distributions, courts should enforce at least three important limits on the use of such relief.

a. Cy pres *distributions are permissible only if they redress plaintiffs' injuries*

As a threshold matter, a court may not approve a *cy pres* settlement unless the *cy pres* relief redresses plaintiffs' injuries. This limitation flows from both Article III and Rule 23.

i. Under Article III, a court must "confine[] itself to its constitutionally limited role of adjudicating actual

and concrete disputes, the resolutions of which have direct consequences on the parties involved." *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (citation omitted). In a class action, the parties involved do not include *cy pres* recipients who were not injured and did not join the lawsuit. A court has no Article III authority over such entities, which are "not parties to the case." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (plurality opinion). Accordingly, *cy pres* relief complies with Article III only if it has "direct consequences on" the plaintiffs themselves. *Sanchez-Gomez*, 138 S. Ct. at 1537 (citation omitted). Specifically, plaintiffs must demonstrate "redressability—a likelihood that the requested relief will redress the[ir] alleged injury." *Steel Co.*, 523 U.S. at 103.

In the context of *cy pres* class-action settlements, redressability will generally require two showings. First, plaintiffs must show either a present, "continuing violation" that causes injury or "the imminence of a future violation" that would inflict the same injury. *Steel Co.*, 523 U.S. at 108; see *Laidlaw*, 528 U.S. at 187-188; *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 107-108 (1983). Otherwise, a payment to a third party could not redress plaintiffs' injury and could not be ordered consistent with Article III, which requires that a "remedy must * * * be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1921 (2018) (citation omitted); see, *e.g.*, *Lewis* v. *Casey*, 518 U.S. 343, 360 (1996) (Courts generally lack power to order a remedy "beyond what [i]s necessary to provide relief" for the particular injury plaintiffs assert.); *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of * * * relief is dictated by the extent of the violation established.").

Second, plaintiffs must show that the *cy pres* recipient will use the funds in a way that makes it "likely, as opposed to merely speculative," that the specific injury asserted by plaintiffs "will be redressed." *Laidlaw*, 528 U.S. at 181. That means showing that a defendant's payment to a *cy pres* recipient—like the civil penalty paid to the government that this Court found sufficient to create Article III standing in *Laidlaw*—will "encourage [the] defendant[] to discontinue current violations" against the plaintiffs and "deter [the defendant] from committing future ones" against the plaintiffs. *Id.* at 186. In sum, before a court can approve a *cy pres* settlement under Rule 23(e)(2), it must find that the *cy pres* relief is likely to redress the specific injuries asserted by the plaintiffs in the class-action litigation.

Cy pres distributions that have a more "insubstantial" or "remote" effect on the injured plaintiffs would raise serious questions under Article III. *Laidlaw*, 528 U.S. at 186; see *id.* at 204 (Scalia, J., dissenting) ("[T]he traditional business of Anglo-American courts is relief specifically tailored to the plaintiff's injury, and not *any* sort of relief that has some incidental benefit to the plaintiff."). Thus, for instance, a *cy pres* distribution that does no more than "sufficiently approximate[] the interests of the class," *In re BankAmerica*, 775 F.3d at 1067, or provide exclusively "emotional" relief, *Mirfasihi*, 356 F.3d at 783-784, cannot satisfy the redressability requirement. Likewise, *cy pres* relief to an organization that advocates for general environmental protections would not redress the injury of a plaintiff who alleges harm to a particular forest; nor would a *cy pres* award to an organization devoted to opposing police brutality redress the injuries of a plaintiff challenging a particular

police technique. Cf. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 494 (2009); *Lyons*, 461 U.S. at 107-108.

Applying this rule would lead courts to disapprove a considerable number of *cy pres* settlements, as some courts have done under relatively similar approaches. For example, the Seventh Circuit disapproved a *cy pres* settlement that directed payment to an orthopedic research foundation in part because the court found it "hopelessly speculative" that the payment would benefit class members allegedly injured by the false advertising of nutritional supplements. *Pearson*, 772 F.3d at 784; see *Dennis* v. *Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (rejecting *cy pres* settlement of false-advertising claims that directed payments to charities that feed the needy because the *cy pres* organizations were not "dedicated to protecting consumers from, or redressing injuries caused by, false advertising"). Other courts, however, have incorrectly approved *cy pres* settlements that did not redress the plaintiffs' specific asserted injuries. See, *e.g.*, *Kritzer* v. *Safelite Solutions, LLC*, No. 10-cv-729, 2012 WL 1945144, at *10 (S.D. Ohio May 30, 2012) (approving settlement in a wage-and-hour case directing *cy pres* relief to charities including the National Wildlife Federation and Habitat for Humanity); *Jones* v. *National Distillers*, 56 F. Supp. 2d 355, 359-360 (S.D.N.Y. 1999) (approving settlement in securities-fraud case that directed *cy pres* relief to the Legal Aid Society).

ii. Similar limitations follow from Rule 23, which "must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 613. A settlement cannot be "fair, reasonable, and adequate" if it provides no more than a speculative prospect of redressing plaintiffs' injuries. Fed. R. Civ. P. 23(e)(2). Similarly, a set-

tlement that delivers no more than the speculative possibility of relief to class members cannot support class certification under Rule 23(b)(3) because a class action is not "superior to other available methods for fairly and efficiently adjudicating the controversy" if it results in no relief whatsoever. Fed. R. Civ. P. 23(b)(3). Even if the alternative to a class action is that the plaintiff would not bring a lawsuit at all, a class action that yields no relief is still not "superior" to that alternative. *Ibid.*

b. Cy pres *distributions are permissible only if there is no non-arbitrary way to distribute the settlement funds to class members*

As explained above, the injuries allegedly suffered by class members are the source of a court's Article III jurisdiction to entertain a class action suit. It follows that class members are entitled to receive direct distribution of the settlement funds, if economically feasible in a non-arbitrary way, before those funds are redistributed to non-injured non-parties. A contrary approach would not only be unfair to class members; it would contradict the core premise of *cy pres* as a second-best remedy that "arises only if it is not possible to put those funds to their very best use: benefitting the class members directly." *Klier*, 658 F.3d at 475.

The preference for direct distributions to class members is reflected in the *ALI Principles*, which state that "settlement proceeds should be distributed directly to individual class members" if "individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable." § 3.07(a), at 217. Multiple courts of appeals have adopted that approach expressly or in substantial part. See *In re BankAmerica*, 775 F.3d at 1064 (adopting *ALI Principles*); *Klier*,

658 F.3d at 475 (same); see also *Pearson*, 772 F.3d at 784 ("A *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members."); *Baby Prods.*, 708 F.3d at 173-174 (explaining, without fully adopting *ALI Principles*, that "direct distributions to the class are preferred over *cy pres* distributions").

Moreover, the amended version of Rule 23(e)(2) recently approved by this Court at least implicitly reflects the same concept by directing a court to consider the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii) (effective Dec. 1, 2018). In evaluating the effectiveness of a proposed method, a court's first priority should be to distribute funds directly to the injured parties in the class. "[T]here is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of disbursement through some other means." *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997). Only if a court finds that there is no feasible non-arbitrary way to distribute funds to class members should it consider approving *cy pres* relief.[2]

The decision below concluded that the settlement fund was "non-distributable" because "each class member's individual recovery would have been '*de minimis*.'" Pet. App. 8-9. But the court expressly refused

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[2] Petitioners briefly endorse (Pet. Br. 44) the prospect of allocating funds to class members by "random lottery distribution." Petitioners do not explain why a truly random distribution of settlement funds would be "reasonable" under Federal Rule of Civil Procedure 23(e)(2) or why it would necessarily result in greater relief to the class as a whole than a properly tailored *cy pres* award.

to consider potential "alternatives" to an all-*cy pres* distribution, and its analysis of the *cy pres* relief consisted of little more than dividing the available settlement funds by the total number of class members. *Id.* at 9. That cursory approach is flawed, because it is rare for more than a small percentage of class members in large consumer class actions to submit claims. See *Pearson*, 772 F.3d at 782. A court performing a feasibility inquiry must therefore conduct a "vigilant and realistic" analysis, considering factors such as the claims rate for similar class-action settlements, alternative mechanisms for providing notice and processing claims, the possibility of additional distributions to class members who have already submitted claims, and other mechanisms for providing relief directly to class members. *Id.* at 787; see *ALI Principles* § 3.07 cmt. b, at 218-219; *Baby Prods.*, 708 F.3d at 174. For example, if the average claims rate in a class action like this one were 1%, the average payout to each class member would not be $0.04—as the lower courts calculated on an unstated assumption of 100% claims participation, see Pet. App. 9—but rather $4.00. It might well have been economically feasible to distribute that amount, which would have provided direct relief to the class members and eliminated the need for resort to second-best relief through *cy pres*.

c. Cy pres distributions should be discounted in awarding attorney's fees

A third important limitation on *cy pres* relief involves attorney's fees. As explained above, one of the central risks presented by *cy pres* settlements is that class counsel and defendants will collude to reach a settlement that "increase[s] a settlement fund, and with it attorney's fees, without increasing the direct benefit to the class." *Baby Prods.*, 708 F.3d at 173. Relatedly, the

prospect of collecting attorney's fees based on *cy pres* distributions may provide incentives for class counsel to bring class actions with little or no actual claim value that "serve[] only the 'self-interests' of the attorneys and the parties, and not the class." *Dennis*, 697 F.3d at 868 (vacating settlement under which the defendant would donate $5.5 million of its products to charity, thereby "assigning a dollar number to the fund that is fictitious" for purposes of calculating attorney's fees); cf. *International Precious Metals Corp.* v. *Waters*, 530 U.S. 1223, 1224 (2000) (O'Connor, J., respecting the denial of certiorari) (warning that fee awards disconnected from "the actual distribution to the class" could "encourage the filing of needless lawsuits where * * * the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery").

Rule 23 therefore requires close judicial scrutiny of attorney's fees in class-action settlements. Under Rule 23(e)(2), a court must assess any proposed award of attorney's fees in determining whether the settlement is "fair, reasonable, and adequate." See *Newberg* § 13:61, at 506 ("If the fees set in the settlement agreement appear unrealistically high, that provision casts doubt on the settlement."). Indeed, the 2018 amendments to Rule 23(e) expressly require courts to consider "the terms of any proposed award of attorney's fees." Fed. R. Civ. P. 23(e)(2)(C)(iii) (effective Dec. 1, 2018). In addition, even when fees are "authorized * * * by the parties' agreement," Rule 23(h) permits a court to award fees only if they are "reasonable." Fed. R. Civ. P. 23(h); see Fed. R. Civ. P. 23 advisory committee's note (2003

Amendment) (explaining that "[a]ctive judicial involvement" is necessary to ensure that fee awards are "fair and proper").

To be fair and reasonable, a fee award calculated as a percentage of a settlement fund must reflect the settlement's benefit to the plaintiffs. After all, the premise of that calculation is that "the appropriate benchmark" for the fee is "the amount of the benefit conferred." 1 Alba Conte, *Attorney Fee Awards* § 2:5, at 67 (3d ed. 2004). As the Advisory Committee has explained, "[f]or a percentage approach to fee measurement," a "fundamental focus is the result actually achieved for class members." Fed. R. Civ. P. 23 advisory committee's note (2003 Amendment); see *ibid.* (urging courts to "ensure that" alternatives to monetary relief to class members "have actual value to the class" before awarding attorney's fees). A *cy pres* distribution, however, achieves at best an indirect benefit for the class, because the money is paid to a third party, not to the individuals who have allegedly suffered injuries. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Baby Prods.*, 708 F.3d at 178. Because "[t]he class benefit conferred by cy pres payments is indirect and attenuated," it is "inappropriate to value cy pres on a dollar-for-dollar basis." *Ibid.* (citation omitted).

Congress has endorsed that approach in a related context. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3)(A), 119 Stat. 4, includes a finding that "[c]lass members" are "harmed" when "counsel are awarded large fees, while leaving class members with * * * awards of little or no value." Congress implemented that finding by, *inter alia*, restricting attorney's fee awards in class-action settlements that provide relief

through coupons—a form of relief that, like *cy pres*, does not provide direct monetary compensation for plaintiffs' alleged injuries. Specifically, Congress provided in 28 U.S.C. 1712(a) that the calculation of attorney's fee awards may not be based on the value of unredeemed coupons, which do not provide a "tangible, nonspeculative benefit to the class members." S. Rep. No. 14, 109th Cong., 1st Sess. 32 (2005). Congress further provided that "the value of unclaimed coupons" may be distributed to "charitable or governmental organizations, as agreed to by the parties," but that "any proceeds" of such a *cy pres*-like distribution "shall not be used to calculate attorneys' fees." 28 U.S.C. 1712(e).

A court calculating attorney's fees could account for the second-best nature of *cy pres* relief in any of several ways. First, if this Court declines to adopt the redressability and infeasibility limitations on *cy pres* relief outlined above—*i.e.*, that *cy pres* distributions may be approved only if they redress plaintiffs' specific asserted injuries and only if non-arbitrary direct distributions to class members are infeasible—then the *cy pres* component of a settlement's value should be deducted entirely in calculating attorney's fees, because the *cy pres* relief may not have produced any benefit for the class. Alternatively, a court could disregard the settlement value as a basis for attorney's fees and instead calculate attorney's fees by the lodestar method. Cf. 28 U.S.C. 1712(a) and (b) (requiring attorney's fees in coupon settlements to be calculated by deducting unredeemed coupons or by the lodestar method).

If, however, a court concludes after careful examination that *cy pres* relief is permissible because it redresses plaintiffs' specific asserted injuries and non-arbitrary direct distribution to the class is infeasible, the court

could appropriately award attorney's fees based in part on the *cy pres* distribution. But even in that circumstance, the court should discount those fees, "because cy pres payments * * * only indirectly benefit the class." *ALI Principles* § 3.13 cmt. a, at 205. To "give such payments the same full value for purposes of setting attorneys' fees as would be given to direct recoveries by the class," *ibid.*, would risk undermining the principle that direct distributions are the "very best" form of relief, while *cy pres* distributions are necessarily "next best," *Klier*, 658 F.3d at 475; see *Baby Prods.*, 708 F.3d at 178. Discounting fees for *cy pres* distributions—even permissible ones—would "better align the interests of class counsel and the class," and would "give class counsel a personal, financial incentive to push hard to get more money into the hands of individual claimants." Wasserman 137.

CONCLUSION

The Court should vacate the judgment below and remand for the lower courts to address plaintiffs' standing or to reconsider the *cy pres* settlement under the principles outlined here.

Respectfully submitted.

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APPENDIX

1. Fed. R. Civ. P. 23 provides in pertinent part:

Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

* * * * *

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

* * * * *

(h) **Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for

motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

2. Fed. R. Civ. P. 23(e) (effective Dec. 1, 2018) provides in pertinent part:

Class Actions

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(2) ***Approval of the Proposal.*** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

3. 18 U.S.C. 2702(a) provides:

Voluntary disclosure of customer communications or records

(a) PROHIBITIONS.—Except as provided in subsection (b) or (c)—

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of

a communication while in electronic storage by that service; and

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such service;

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing; and

(3) a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by paragraph (1) or (2)) to any governmental entity.

4. 18 U.S.C. 2707(a)-(c) provides:

Civil action

(a) CAUSE OF ACTION.—Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In a civil action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c); and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) DAMAGES.—The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court.

5. 28 U.S.C. 1712 provides:

Coupon settlements

(a) CONTINGENT FEES IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS.—

(1) IN GENERAL.—If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

(2) COURT APPROVAL.—Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS.—If a proposed settlement in a class action provides for an award of

coupons to class members and also provides for equitable relief, including injunctive relief—

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

(d) SETTLEMENT VALUATION EXPERTISE.—In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.—In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

6. 28 U.S.C. 1715 provides in pertinent part:

Notifications to appropriate Federal and State officials

(a) DEFINITIONS.—

(1) APPROPRIATE FEDERAL OFFICIAL.—In this section, the term "appropriate Federal official" means—

(A) the Attorney General of the United States; or

(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) APPROPRIATE STATE OFFICIAL.—In this section, the term "appropriate State official" means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not

subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

(b) IN GENERAL.—Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of—

(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

(2) notice of any scheduled judicial hearing in the class action;

(3) any proposed or final notification to class members of—

(A)(i) the members' rights to request exclusion from the class action; or

(ii) if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

* * * * *

(d) FINAL APPROVAL.—An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national voluntary bar association founded in 1946 to safeguard the right of all Americans to seek legal recourse for wrongful injury, strengthen the civil-justice system, and protect access to the courts. AAJ is the world's largest trial bar association, with members in the United States, Canada, and abroad. Throughout its 70-year history, AAJ has served as a leading advocate of the right to access to the courts for legal redress for wrongful injury.

This case is of acute interest to AAJ. AAJ's members frequently represent litigants in aggregate litigation, including class actions, in which cy pres settlements are fashioned by the parties and approved by the courts.[2] This brief draws on the experience of AAJ members in similar cases. AAJ is concerned that added restrictions on cy pres settlements are unwarranted and will undermine the effectiveness of class actions in vindicating the constitutional, statutory, and common law rights of Americans.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief.

[2] AAJ generally does not receive cy pres award money.

SUMMARY OF ARGUMENT

I. Cy pres-only settlements ensure that the objectives of class actions are met and preserve litigants' ability to bring class actions in small claims cases. Petitioners incorrectly argue that the sole purpose of class actions is to financially compensate class members. However, class actions also promote efficient and economical litigation and deter wrongdoing. Cy pres settlements help achieve these objectives, especially in cases where there are practical difficulties with distributing settlement funds to each class member individually.

Without the option of cy pres awards, non-distributable funds could revert to the defendant or escheat to the state. These options, however, ignore the objectives of class actions to deter wrongdoing and to benefit the class members. Both of those objectives are achieved when the non-distributable funds are awarded to cy pres recipients. Cy pres awards have a large-scale deterrent effect and benefit the class by going to a recipient with goals closely aligned to the issues central to the litigation. Class members can benefit on an even larger scale through cy pres awards than were they each to receive a financially insignificant share of the settlement.

Class actions allow plaintiffs to bring claims that are unlikely to be brought individually, and the availability of cy pres awards is vital to the settlement of these types of claims.

II. Petitioners make the baseless argument that the potential to obtain cy pres-only settlements incentivizes attorneys to bring class action cases in the first place. This is simply not true. First, there is no indication at the beginning of a case that the case is going to settle, or that any settlement will involve a cy pres-only award. Second, attorney compensation is not treated differently depending on whether the case is a "regular" class action or involves a cy pres-only award. The same requirements and safeguards exist in determining the reasonableness of attorneys' fees in either situation. Studies have shown that attorneys do not receive more money in cy pres-only class actions compared to any other class action. It is simply illogical to suggest that attorneys are any more incentivized to bring a case where the result may be a cy pres-only award.

Nor does the availability of cy pres relief make it more likely that a plaintiff's attorney will act in bad faith or disregard ethical rules. Indeed, there is no specific allegation in this case that the attorneys involved violated any code of conduct, but Petitioners allege that these types of cases *generally* give attorneys the *opportunity* to act badly. However, the mere possibility of unethical behavior should not trigger a far-reaching rule that cy pres-only settlements are inappropriate. Petitioners blatantly ignore the existence of the rules of professional responsibility to which attorneys must adhere, and improperly suggest that attorneys are acting in bad faith.

III. Beyond being a practical tool for the distribution of settlement funds, cy pres-only settlements

also have the added benefit of improving access to justice for litigants who may not otherwise have the ability to pursue a case. This Court has acknowledged the importance of access to justice and has specifically noted that the availability of class actions plays an important role therein. If class certification is deemed inappropriate in cases where there is a cy pres-only settlement, the ability of litigants in small stakes claims cases to bring a case will be negatively impacted. In addition, cy pres-only awards frequently go to charities that have "access to justice" as part of their mission. Thus, cy pres-only awards are in fact compatible with guidelines regarding the appropriateness of settlements and allow for greater access to the justice system. The objectives of class actions would not be achieved if cy pres-only settlements were disallowed as an option in these types of cases.

ARGUMENT

Cy pres settlements typically come in two forms. The first form is cy pres *remainders*, which is when, after an initial distribution to class members, there are distributions of leftover settlement funds to charities. The second form is what this brief labels "cy pres-only" settlements. These types of settlements occur when a settlement is deemed non-distributable to the class, and therefore instead goes almost entirely to a charity *instead of* first being distributed to class members. This case contemplates the adequacy of cy pres-only settlements when there is "no direct relief to class members." *See* Cert. Pet. Question Presented.

Though used throughout this brief, amicus AAJ first highlights that the term "cy pres-only" is misleading. A cy pres-only settlement does not mean that there is no relief to class members, nor does it mean that the entire settlement amount goes to a charity. For example, in this case there was injunctive relief in the form of a requirement that Google better inform users about the disclosure of their search terms. Gaos Br. 48. That is, the entire class received a direct benefit in the form of this injunctive relief. In addition, the settlement also included incentive awards for each class representative and reasonable attorneys' fees. *Id.* at 18. Thus, the settlement was not truly "cy pres-only," as the settlement included relief and benefits to class members apart from payments to charities.

Petitioners do not clearly distinguish between cy pres and cy pres-only settlements, and instead discuss the two different types of relief interchangeably. Moreover, Petitioners show little regard for the injunctive relief granted in this case and fail to recognize that there is in fact a direct benefit to class members here. Amicus AAJ supports cy pres-only settlements, which have the same safeguards as any other class action relief and are a necessary tool in cases where the distribution of monetary settlements in a class action is impracticable.

I. CY PRES-ONLY SETTLEMENTS ENSURE THAT THE OBJECTIVES OF CLASS ACTIONS ARE MET AND PRESERVE THE VIABILITY OF CLASS ACTIONS.

Class actions have objectives beyond monetary compensation to plaintiffs, and the potential for cy pres-only settlements in class actions supports those objectives. Class actions deter corporate wrongdoing, increase legal efficiency, and provide legal relief to small claimants while remedying a wrong to vulnerable members of society. *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 728 (N.J. 2007).

Petitioners in this case ignore the various objectives of class actions and the benefits to class members provided by cy pres relief, and instead suggest that the purpose of class action is to provide compensation to the class and that cy pres-only settlements only create the "illusion of relief." Pet. Br. 20, 28. The value of class actions, however, extends well beyond the compensation of individuals. It has even been suggested that compensation "is just a by-product of a class action's regulatory function." Christine P. Bartholomew, *Saving Charitable Settlements*, 82 Fordham L. Rev. 3241, 3258 (2015). Indeed, "[m]ore critical than the limited compensatory relief now offered in these low-value class actions is the prospect that the law would be unable to deter future misconduct...." Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis L. Rev. 805, 816 (1997).

The availability of cy pres-only settlements plays a major role in ensuring that the objectives of class actions, beyond compensatory relief alone, are met. Cy pres is useful in preserving the viability of class actions, and is a practical, judge-created tool allowing courts to direct a remaining portion of a settlement when class members cannot be located, or it is otherwise unreasonable to facilitate payment.

A. The Value and Objectives of Class Actions Extend Beyond Monetary Compensation Alone.

Class actions have value and purpose apart from monetary compensation to class members. For example, in enacting the Class Action Fairness Act of 2005, Congress expressly recognized the value of class actions in the legal system, stating "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Pub. L. No. 109-2, 119 State. 4 (codified in scattered sections of 28 U.S.C.) § 2(a)(1).

This Court has similarly recognized the value of class actions, stating that a principal purpose of Rule 23 class actions is "the efficiency and economy of litigation." *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). The usefulness of class actions extends not only to class members, but to other players as well. As explained by this Court, "[t]he justifications that led to the development of the class

action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980). *See also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (stating that class actions save resources, not only for the parties, but also for the courts).

Class actions also have the goal of deterrence; that is, an objective to prevent future wrongs. *See Eisen v. Carllisle and Jacquelin*, 417 U.S. 156, 186 n.8 (1974) (Douglas, J., concurring) ("Judge Weinstein writing in the N.Y. Law Journal, May 2, 1972, p. 4, col. 3, said: 'When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.'"); *see also* Edward F. Sherman, *Consumer Class Actions: Who Are the Real Winners?*, 56 Me. L. Rev. 223, 228 (2004) ("[I]t must be kept in mind that the objective of consumer class actions is not only compensation, but also deterrence and disgorgement of wrongful profits."); Bartholomew, *supra*, at 3264 ("Deterrent potential is a key reason consumers bring aggregate claims."). Class actions allow individuals to "supplement regulatory agencies both by requiring wrongdoers to give up their ill-gotten gains and by ferreting out misconduct that may have escaped the regulators' observance." Stephen C. Yeazell, *From*

Medieval Group Litigation To The Modern Class Action, 232 (1987).

Class actions aim to allow individuals to assert their legal rights, deter wrongdoing, and help to prevent future harm.

B. The Availability of Cy Pres Awards Advances the Value and Objectives of Class Actions.

Oftentimes in class action settlements, there are issues with distributing individual monetary amounts to each class member. As a result, there are leftover or non-distributable settlement funds. *See, e.g.*, *In re Motorsports Merchandise Antitrust Litig.*, 160 F. Supp.2d 1392, 1393 (N.D. Ga. 2001) (noting that "a fairly extensive body of caselaw has developed" addressing the difficulties of distributions to the settlement class); *Lane v. Facebook, Inc.*, 696 F.3d 811, 817-19 (9th Cir. 2012) ($6.5 million in settlement funds non-distributable); *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013) ($18.5 million less administrative expenses in excess settlement funds); *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *7 (N.D. Cal. 2013) (noting that *de minimis* payout to individual class members would likely be nullified by distribution costs). The question becomes: what should the parties or the court do with leftover or non-distributable funds?

It is widely accepted that there are three main options for distribution of these funds: (1) reversion

to the defendant; (2) escheat to the state; (3) *cy pres* awards. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990); Bartholomew, *supra*, at 3248; Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 Va. J. Soc. Pol'y & L. 267, 269 (2014). Two of these options – reversion to defendant and escheat to state – fail to achieve the objectives of class actions.

First, were leftover or non-distributable funds simply to revert to the defendant, the defendant would be receiving a windfall in response to its alleged misconduct, with no motivation to change its behavior. Moreover, there would be no benefit to the class. Therefore, "[r]eversion to the defendant undermines the deterrent effect of class actions." Boies & Keith, *supra*, at 269. *See also* Matt Fenn, *The Use of Cy Pres in Class Action Settlements: The Best of Bad Options*, 6 (May 1, 2014), *available at* http://ssrn.com/abstract=2446989 ("Allowing a reversion of funds back to the defendant or refusing to certify the class seriously dampens the deterrent effect of class action litigation"). Second, escheat to the state provides no benefit to the class, only a benefit to the local government. Boies & Keith, *supra*, at 269.

The third option, cy pres awards, is one that achieves both the objective of deterring defendants while serving the interests of class members when individual compensation is impractical. "Cy pres awards...preserve the deterrent effect and allow

courts to distribute residual funds to charitable causes that reasonably approximate the interests pursued by the class action for absent class members who have not received individual distributions." Boies & Keith, *supra*, at 270.

Cy pres-only settlements are "a tool to promote the larger regulatory objectives underlying class action procedures, including access to justice and deterrence." Bartholomew, *supra*, at 3241. They not only deter defendants by requiring them to make a monetary payment, but also have a large-scale deterrent effect. For example, similarly-situated companies may see the class action settlement, such as a cy pres award of $9 million, as a strong signal to avoid similar behavior. David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 Va. L. Rev. 1871, 1890–91 (2002) (explaining that optimal deterrence maximizes society's total welfare by encouraging potential wrongdoers to avoid unreasonable risks). This provides a greater benefit to society in general, and theoretically decreases the likelihood of future similar litigation, thereby saving judicial resources. *Califano*, 442 U.S. at 701.

This deterrent effect exists whether the funds go to the class members or to cy pres recipients. Bartholomew, *supra*, at 3267. However, the availability of cy pres awards ensures that "defendants are exposed to potential litigation for all types of wrongdoing, not just wrongdoing where damages can be efficiently distributed to individual class members." *Id.*

Taking cy pres-only awards away as an option in class actions "would effectively gut the use of class actions for private enforcement of laws designed to protect consumers." *Id.* at 3246. For example, recent data breach incidents have highlighted companies' massive violations of consumers' privacy. *See* Stacy Cowley, *2.5 Million More People Potentially Exposed in Equifax Breach*, N.Y. Times (Oct. 2, 2017), *available at* http://www.nytimes.com/2017/10/02/business/equifax-breach.html; Tony Romm & Craig Timberg, *Cambridge Analytica Shuts Down Amid Scandal Over Use of Facebook Data*, Wash. Post (May 2, 2018), *available at* http://www.washingtonpost.com/news/the-switch/wp/2018/05/02/cambridge-analytica-shuts-down-amid-scandal-over-use-of-facebook-data/?noredirect=on&utm_term=.71dfd54a6c02. Millions of people were affected by these matters, however there is not *necessarily* a large economic damage to each individual due to these privacy violations. This Court should not make it difficult to defend important rights – such as the right to privacy – by making it more difficult to bring class actions through limiting the availability of cy pres settlements.

Class actions encourage plaintiffs to bring claims that would be low value if brought individually, and therefore unlikely to be brought at all. Cy pres awards facilitate the settlement of these types of claims. Without the availability of cy pres settlements, it would be possible for a defendant to avoid having to make any payment at all simply because it would be infeasible to individually pay each class

member. Cy pres awards remain the best use of non-distributable funds in class actions.

II. THE AVAILABILITY OF CY PRES SETTLEMENTS DOES NOT MOTIVATE ATTORNEYS TO BRING CLASS ACTIONS, ACT IN BAD FAITH, OR DISREGARD ETHICAL RULES.

Petitioners make numerous far-reaching arguments, with little support, about the behavior of class counsel and judges in relation to cy pres settlements. Petitioners claim that cy pres settlements in class actions create a situation "where perverse incentives tempt class attorneys to breach their fiduciary duty to class members." Pet. Br. 16. They also contend that the availability of potential cy pres settlements "incentivizes meritless class actions that a class counsel might otherwise not be able to bring and settle profitably." Pet. Br. 17. They further allege that not only do plaintiffs' attorneys have "an obvious incentive to seek the largest possible portion for themselves," but that they act on that incentive by accepting bargains that are worse for the class. Pet. Br. 22.

The idea that attorneys have more incentive to take a potential cy pres case than any other case, or that they act unethically on that alleged incentive, is unfounded and without merit.

A. There is no incentive for attorneys to take cy pres-only settlement cases.

Petitioners' assertion that there is an incentive for attorneys to seek cases where there may be a cy pres settlement, including a cy pres-only settlement, is baseless. As the Ninth Circuit explained in this case, cy pres-only settlements "are considered the exception, not the rule." *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 741 (9th Cir. 2017). There is also no indication or certainty at the beginning of a case that it is going to be a cy pres-only, or even a partial cy pres case. *See, e.g., In re Heartland Payment Sys, Inc. Customer Data Sec. Breach Litig.*, 851 F.Supp.2d 1040, 1077 (S.D. Tex.—Houston 2012) (noting that settlement agreement was "organized so cy pres relief is triggered only after class members have ample opportunity to file claims.").

Perhaps more importantly, attorney compensation is not treated differently by the court depending upon whether the case is a "regular" class action or a class action that involves a cy pres-only settlement. *See* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized...by the parties' agreement."). The same protections exist in all class actions, regardless of whether the final award involves cy pres money. *See* Fed. R. Civ. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class); Fed. R. Civ. P. 23(h) (setting out uniform standard of "reasonable attorney's fees" in all certified class actions). In fact,

cy pres settlements are not mentioned at all in Rule 23.

There is no indication that attorneys are awarded any more in cases involving cy pres awards, including cy pres-only settlements, than in a typical class action. *See, e.g., In re Netflix*, 2013 WL 1120801, at *10 (approving attorney fee of 25% of Settlement Fund, noting that it "is similar to that of similar settlements involving cy pres distribution."); *City of Roseville Employees' Retirement System v. Orloff Fam. Tr. UAD 12/31/01*, No. 06-CV-85-WFD, 2011 WL 1882515, at *7 (D. Idaho 2011), *aff'd*, 11-35455, 2012 WL 2046106 (9th Cir. 2012) (finding attorneys' fees award of 25% of common fund reasonable and comparable to award calculated using lodestar); *In re Polyurethane Foam Antitrust Litig.*, 168 F.Supp.3d 985, 1012 (N.D. Ohio 2016) (finding that class counsel is entitled to 24% of the gross settlement amount in case with cy pres distributions). Studies have shown that the median attorney fee in class actions is 24% of the class recovery. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993- 2008*, 7 J. Empirical Legal Stud. 248, 265 (2010), *available at* http://scholarship.law.cornell.edu/clsops_papers/64. In fact, "as class recovery increases, the fee percentage for attorneys actually decreases, which provides more money for clients." Center for Justice & Democracy ["CJD"], *Fact Sheet: Lawyers' Income and Fees* (July 2012), *available at* http://centerjd.org/content/fact-sheet-lawyers-income-and-fees.

Petitioners argue that plaintiffs' attorneys should only be awarded attorneys' fees based on the "direct and actual recovery by class members," Pet. Br. 18, which, they argue, will require plaintiffs' attorneys to align their interest with the class (namely, if class members do not get paid, the attorneys do not get paid). Again, this argument is without support.

In cy pres-only cases, often the issue is one of feasibility of distribution of the settlement. In this case the district court found that the cost of sending out small payments to the millions of class members (just 6.5 cents before deducting any administrative costs or attorneys' fees, Gaos Br. 49) would exceed the total monetary benefit to the class. Gaos Br. 18. This issue would not be remedied by greater zeal on the part of plaintiffs' counsel. For example, had the settlement here quadrupled, entitling every class member to 26 cents before costs, there would still be the same issue of distributing the monetary award to each class member. Petitioners' argument simply makes no sense.

Moreover, class action settlements, including cy pres-only settlements, are negotiated heavily, scrutinized by courts, and subject to objectors. For example, in this case the settlement award was negotiated before an experienced mediator and subject to a fairness hearing before the district court. *Id.* at 13, 16. In addition, as the Ninth Circuit noted, the district court also "took an extra step, cross-checking this result by using the lodestar method." *In re Google*, 869 F.3d at 848. The court found that class

counsel's documentation of hours reasonably expended and reasonable hourly rate supported the fee awarded here. The same protections against unwarranted or unreasonable fees apply in cy pres-only cases and in all other class actions. There is simply no incentive for attorneys to seek out class actions that might be settled on a cy pres basis.

B. There is no evidence that class counsel act in bad faith or disregard ethical rules in cases involving cy pres-only settlements.

There are rules that govern the conduct of attorneys, including rules regarding bringing meritorious claims. *See* Model Rules of Professional Conduct 3.1 (2016), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html ("A lawyer shall not bring or defend a proceeding...unless there is a basis in law and fact for doing so that is not frivolous..."). Similarly, Fed. R. Civ. P. 23 requires class counsel to "fairly and adequately represent the interests of the class."

Petitioners contend that cy pres-only cases are used as a type of "gamesmanship," stating that cy pres is a way to "create an illusion of relief...while increasing attorneys' fees to class counsel, all at the expense of absent class members." Pet. Br. 27-28. They blatantly ignore the rules of professional responsibility to which attorneys must adhere and the risk assumed by plaintiffs' attorneys, instead

making vast assumptions about the behavior of attorneys simply due to the *perception* of conflicts of interest.

There is no evidence, and Petitioners point to none, that the attorneys in this case, or in cy pres cases generally, are more likely to act in bad faith. Attorneys *do* have an incentive and duty to get the greatest benefit for the class as a whole. There is no bad faith simply because a case settles after an attorney determines that the greatest benefit for the class as a whole is a cy pres-only settlement.

III. CY PRES-ONLY SETTLEMENTS IMPROVE ACCESS TO JUSTICE FOR CLASS MEMBERS.

Underlying this case is the notion of "access to justice" and how it relates to class actions, in particular those involving cy pres-only awards. Cy pres-only settlements offer valuable benefits that improve access to justice not just for class members, but for similarly-situated communities of people. The availability of cy pres-only settlements in class action cases where individual litigation may be irrational for various reasons gives litigants access to counsel and a vehicle through which to assert their rights. Additionally, cy pres awards themselves are designed to go to organizations that are closely related to helping to fix the problems central to the case and that frequently have "access to justice" as part of their mission.

This Court has recognized that the right of access to the courts to seek legal redress is guaranteed by multiple provisions of the Constitution of the United States. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). That fundamental right is violated by economic roadblocks that preclude the assertion of meritorious claims. *Id.* at 413. A major benefit of class actions is that they give access to the justice system to people who otherwise might not be able to pursue a case. Class actions are useful for individuals, as "such collective efforts offer broader relief, higher stakes and visibility, and greater bargaining leverage." Deborah L. Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785, 1803 (2001), *available at* http://ir.lawnet.fordham.edu/flr/vol69/iss5/11.

This Court has acknowledged this benefit, stating that class actions "may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise." *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338 (1980). *See also American Pipe*, 414 U.S. at 553; *Geraghty*, 445 U.S. at 402-03. This Court has also noted that a purpose behind Rule 23 is "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C.L. Rev. 497 (1969)).

Other courts have similarly addressed the access to justice objective of class actions. The Seventh Circuit explained that "[t]he policy at the very core of the class action mechanism is to overcome the

problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). In addition, the Second Circuit reasoned that a class action is an appropriate means of litigation when there are many injured individuals, but nobody was damaged to a degree that would warrant them bringing a case individually. *Green v. Wolf Corp.*, 406 F.2d 291, 296 (2d Cir. 1968).

As Judge Posner has noted,

> The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.

Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004). Thus, the ability to successfully bring a class action preserves a plaintiff's ability to assert their legal rights and advances democratic participation in the justice system.

Petitioners argue that class certification is inappropriate in this case, and in cases when it is impossible to distribute the settlement proceeds to class members, that is, when the resulting

settlement is a cy pres-only award. Pet. Br. 18. Prohibiting certification of a class simply because a settlement contemplates a cy pres-only award would severely limit an individual's access to the courts. The smaller the individual claim, the greater the benefit of a class action. *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 675 (7th Cir. 2013) (reversing and remanding a decertification order in a consumer class action). Small stakes claims, such as this one, are rarely pursued and make individual litigation irrational. Certifying a class when it is not clear that class members will be directly compensated, or when it is likely that there will be cy pres-only relief, allows for these class actions to go forward with the resources it needs to proceed. In such cases, cy pres awards "amplify the effect of the modest damages in protecting consumers." *Id.* at 676.

Moreover, cy pres-only awards are in line with guidelines regarding the appropriateness of a settlement. The Manual for Complex Litigation states, "[a]dequacy of the settlement involves a comparison of the relief granted relative to what class members might have obtained without using the class action process." Manual for Complex Litigation (Fourth) § 21.62 (2004). To that end, "since [cy pres-only] settlements provide greater access to justice than otherwise possible, they provide sufficiently valuable relief—even without providing class members monetary compensation." Bartholomew, *supra*, at p. 3264. For example, in this case class counsel sought cy pres recipients that dealt with privacy issues and would use the funds to educate class members about the risks involved with internet use. Gaos Br. 14.

These recipients were adequate, as they provide more relief to the class than class members might have obtained on their own.

It is also important to note that cy pres-only awards themselves go to organizations that support the interests of the class and generally support access to justice. Moreover, various states have rules requiring that cy pres remainders go to benefit legal aid groups within the state. *See* ABA Br. 16. These ideas are discussed in detail by the American Bar Association, and therefore are not discussed here. *See generally* ABA Br. However, AAJ believes that it is important to recognize that not only is access to justice is realized by giving class members the opportunity to be a part of a class action that may not be brought otherwise, but it is often promoted by the organizations receiving cy pres money as well.

The ability to assert a right has value far beyond direct compensation. Certification of class actions that might result in cy pres-only settlements allows citizens to access the justice system when they otherwise could not. Class actions should not be limited to cases in which individual class member compensation is certain. Such a limitation would stifle the ability of individuals to obtain relief through institutions of justice.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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No. 17-961

In The Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA's membership of over 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[1]

The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession." Among the ABA's goals is to "[i]ncrease public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," to "[a]ssure meaningful access to justice for all persons," and to "eliminate bias in the . . . justice system." ABA Mission and Association Goals, available at

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[1] Pursuant to Supreme Court Rule 39(6), the ABA certifies that no counsel for a party authored this brief in whole or in part, and that no party, no party's counsel, and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council before filing.

All parties have consented to the filing of this brief.

http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

In 2016, the ABA House of Delegates adopted a resolution in support of cy pres awards advanced by its Standing Committee on Legal Aid & Indigent Defendants, Commission on Homelessness & Poverty, and Commission on Interest on Lawyers' Trust Accounts. The resolution provided, in full:

> RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.
>
> FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non- profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.

Resolution and Report to the House of Delegates, available at https://www.americanbar.org/content/dam/aba/admin

istrative/legal_aid_indigent_defendants/ATJReports/ls_atj_cypres.authcheckdam.pdf.

The ABA's Standing Committee on Legal Aid and Indigent Defendants also supports the growth and development of state Access to Justice ("ATJ") Commissions, collaborative entities that bring together courts, the bar, civil legal aid providers, and other stakeholders in an effort to remove barriers to civil justice for low-income and disadvantaged people. https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions.html. Beginning with the first ATJ Commission in 1994 (Washington State), such entities have been developing all over the country, engaging in a full range of activities and strategies to accomplish their goals and objectives. *Id.* In multiple states, ATJ Commissions have been instrumental in pressing for statutes and rules that authorize cy pres awards and providing educational information for attorneys and judges regarding cy pres awards.

Further, for decades, the ABA has been at the forefront of assessing the ability of the indigent and those with low or moderate income to use the justice system to obtain assistance with legal problems. *See, e.g.*, ABA Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans* (1994). It also collects state-by-state reports that assess the legal needs of low-income people and the economic impact provided by legal services organizations. *See generally* https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj_commission_self-

assessment_materials1/studies.html (collecting studies).

The ABA also is the only organization that tracks cy pres awards nationally. Its data reflects that cy pres awards from federal and state class action settlements provide an average of $15.5 million annually to legal services organizations.

The ABA's expertise regarding cy pres awards and their role in funding legal services organizations is germane to this appeal. This brief *amicus curiae* will demonstrate that legal services organizations are appropriate recipients of cy pres awards in class action settlements, which, if recognized by this Court, will promote access to justice for underserved populations.

SUMMARY OF ARGUMENT

The ABA takes no position on the precise question before this Court – if and under what circumstances can a court approve a settlement that consists solely of a cy pres award with no direct relief to class members based on a finding that such payments are not feasible. Consistent with that limited scope, the ABA will not argue the specifics of whether the district court's decision should be affirmed, reversed, or remanded. However, as an *amicus curiae*, the ABA seeks to provide information to this Court about the role of cy pres awards in class actions, their importance in funding legal services to low-income and indigent litigants, and the potential impact on state statutes and rules providing for cy pres awards. These are important considerations for this Court as it considers for the first time the

specific standards that lower courts should apply in considering if and under what circumstances they should authorize cy pres awards in class action settlements.

The cy pres doctrine, originally a creation of trust law, has increasingly been used as a basis to distribute residual funds from class action settlements to nonprofit organizations or other third-party beneficiaries with interests reasonably approximate to those of the class members. This equitable doctrine ensures that neither the defendant nor class members receive windfalls when settlement funds go unclaimed or distribution to class members proves infeasible.

Cy pres is most commonly used in class actions brought under Federal Rule of Civil Procedure 23(b)(3), which permits aggregate claims for monetary damages. Such claims often involve small individual recoveries, which may deter individual litigants from pursuing claims and counsel from taking on representations. Rule 23(b)(3), thus, serves the purpose of improving the ability of class members to obtain justice by aggregating their claims and deterring wrongful conduct.

A similar purpose is served by the legal services organizations that are often appropriate recipients of cy pres awards. These organizations provide legal services to low-income and indigent litigants who otherwise would have no representation in civil courts. This unity of purpose justifies cy pres awards to legal services organizations, as both courts and state legislatures have recognized. The ABA urges this Court to do the same.

Finally, the ABA asks this Court to limit any decision about cy pres awards to the question presented and to avoid broad pronouncements about the constitutionality of cy pres remedies in class action settlements. Such a ruling would not only impact federal class actions, but would potentially disrupt state statutory schemes that provide for cy pres awards to legal services organizations.

ARGUMENT

I. Cy Pres Serves Important Purposes in Class Action Settlements.

Cy pres serves important purposes in class action settlements, particularly in cases involving small claims. The cy pres doctrine takes its name from the Norman French term "*cy pres comme* possible," meaning "as near as possible." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (internal quotation marks and citation omitted). Originally used as an equitable means of distributing trust fund assets when the trust's original purpose could not be achieved, the principles of cy pres have been applied to modern class action settlements. *Id.*; Martin H. Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 653-56 (2010) (hereinafter "Redish").

Soon after the 1966 amendments to Rule 23 and the ensuing expansion of class actions, a student comment proposed that the equitable cy pres principle in trust law could be employed when class action settlements and awards could not be

distributed fully to the class members. Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 448 (1972); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) (discussing development of cy pres awards in class actions). Significant growth of cy pres awards followed from approximately once per year between 1974 and 2000 to approximately eight per year between 2001 and 2008. Redish, 62 FLA. L. REV. at 653.

The cy pres doctrine is particularly appropriate in class actions aggregating small claims. American Law Institute's Principles of Law of Aggregate Litigation (2010), § 3.07, cmt. b ("ALI Principles"). Because class members with only small amounts at stake seldom bother to claim their shares of a settlement fund, residual funds may remain after an initial effort to distribute it to the class. Courts then face a dilemma over the distribution of the residual funds. Distributing the residual to class members that have already received full compensation would provide a windfall to those members. Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 393 (1999) (citing *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2d Cir. 1977)). Returning unclaimed settlement funds would be equally inequitable. *Id.*; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (by authorizing cy pres awards, courts prevent defendants "from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement [or] judgment").

Cy pres "serves deterrence better than returning funds to the defendant; it avoids windfalls to class members, and it directs left-over funds in a way that creates some benefit to the class." Robert G. Bone, *Justifying Class Action Limits: Parsing the Debate over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 943-44 (2017).

Cy pres awards in class action settlements were envisioned to "'put[] the unclaimed fund to its *next best* compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (alteration in original) (quoting 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 10:17 (4th ed. 2002)); *accord Nachsin*, 663 F.3d at 1038. Under rules proposed by the American Law Institute's Principles of Law of Aggregate Litigation(, when feasible, undistributed residual funds should be distributed to recipients "whose interests *reasonably approximate* those being pursued by the class. . . ." ALI Principles, § 3.07 cmt. a (emphasis added). This "reasonable approximation" test has been adopted by numerous courts in determining the fairness of class action cy pres awards. *See, e.g., Oetting v. Green Jacobson, P.C. (In re BankAmerica Corp. Sec. Litig.)*, 775 F.3d 1060, 1067 (8th Cir. 2015); *In re Lupron Mktg. & Sales Practice Litig.*, 677 F.3d 21, 33 (1st Cir. 2012); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990).

II. Legal Services Organizations That Serve Low-Income and Indigent Litigants Are Proper Recipients of Cy Pres Awards Because They Share the Same Purpose as Rule 23(b)(3) Class Actions.

A fundamental purpose of class actions is to offer access to justice for people who, on their own, could not otherwise realistically obtain the protections of the justice system. Legal services organizations that represent poor and indigent litigants serve the same fundamental purpose – to provide access to the judicial system to people who otherwise might be unable to litigate. With these closely aligned purposes, legal services organizations should in most cases be appropriate recipients of cy pres awards.

1. Class actions often provide access to courts for civil litigants that otherwise might forego judicial relief. In most class actions seeking monetary relief, certification requires a court to find that a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

As part of this superiority analysis, courts have long recognized that claims that would result in small individual recoveries are particularly amenable to class action treatment. As this Court has explained, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods. v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 2246 (1997) (quoting Kaplan, Prefatory Note, 10 B.C.

IND. & COM. L. REV. 497, 497 (1969)). "'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" *Id.* (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). "'A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" *Id.*; *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 515 (9th Cir. 2013) ("In light of the small size of the putative class members' potential individual monetary recovery, class certification may be the only feasible means for them to adjudicate their claims" and thus "is also the superior method of adjudication.").

Thus, a fundamental role of the class action device is to provide a means of access for litigants who might otherwise be unable to bring claims. As Judge Posner explained, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *see also* Bob Glaves & Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond*, 27 MGMT. INFO. EXCH. J., 24, 25 (2013) ("[N]o matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system."); Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards*: Emerging Problems and Practical Solutions, 21 VA. J. SOC.

POL'Y & L. 267, 291 (2014) (hereinafter "Boies") ("One interest of every class member in any class action in any area of the law is access to justice for a group of litigants who, on their own, would not realistically be able to seek court relief").

2. Legal services organizations serve a similar purpose as Rule 23(b)(3): They provide representation to litigants that otherwise might be unable to protect their interests in civil actions.

These organizations provide a vital service. More than 60 million Americans live below the poverty level. Legal Services Corp., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (2017), at 16 ("*Justice Gap*"), available at https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf. In the Legal Services Corporation's ("LSC") 2017 Justice Gap survey, 71% of survey respondents reported having at least one civil legal problem in the prior year, 54% faced at least two such problems, and nearly a quarter had experienced six or more civil legal problems. *Id.* at 21. These problems often related to basic issues of health, finances, rental housing, children and custody, education, income maintenance, and disability. *Id.* at 21-23. Seventy percent of low-income Americans who personally experienced a civil legal problem in the past year, reported that at least one of the problems has affected them "very much" or "severely." *Id.* at 25. Respondents reported to the LSC survey that they sought the help of a legal professional for only 20% of all of the civil legal problems they face, and for only 24% of the problems that affect them "very much" or "severely." *Id.* at 29.

LSC alone provides funding to organizations and programs that helped approximately 1.8 million people in 2016. LSC, *By the Numbers: The Data Underlying Legal Aid Programs*, at 63 (2016) (hereinafter "*By the Numbers*"). However, demand for legal aid far outstrips the resources available. In the most recent *Justice Gap* survey, LSC-funded organizations could not assist on approximately 41% of the eligible problems low-income Americans presented to these organizations. *Justice Gap*, at 43. Most of those problems were rejected due to limited resources. *Id.*

The federal government also recognizes that civil legal services organizations provide vital support for federal efforts to serve the low-income and other vulnerable populations. For example, the White House Legal Aid Interagency Roundtable ("WH-LAIR") cites the role that legal services organizations play in supporting veterans, including preventing avoidable evictions and foreclosures, negotiating fair child support orders, resolving credit report problems, and assisting veterans secure government benefits. Dep't of Justice, WH-LAIR Case Study: Help Veterans and Servicemembers, available at https://www.justice.gov/lair/file/826546/download.[2]

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[2] Other case studies reflect the Department of Justice's view that civil legal services organizations support federal efforts in numerous areas, including, inter alia, protecting consumers, keeping children in school, preventing domestic violence, helping people exit homelessness and stay housed, and assisting Americans with disabilities. *See generally* WH-LAIR Case Studies, available at https://www.justice.gov/lair/wh-lair-case-studies.

3. Because of this unity of interest between the purpose of the class action mechanism and legal services organizations, legal services organizations should always be appropriate recipients of residual class action settlement funds. Legal services organizations that provide access to the courts satisfy the reasonable approximation test for cy pres awards. Boies, 21 VA. J. SOC. POL'Y & L. at 290-91 ("The access to justice nexus falls squarely within ALI Principles' guidance that 'there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.'").

Consistent with that reasoning, courts authorizing cy pres awards consistently find legal services organizations to be appropriate recipients of class action residual funds. Cecily C. Shiel, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 WASH. L. REV. 943, 955-56 (2015) (discussing cases providing for distribution of residual funds to legal services organizations); Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 GEO. J. LEGAL ETHICS 435, 438 (2012) ("there are many cases in which judges grant cy pres distributions to legal aid foundations and bar associations"); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 LA. B.J. 248, 251 (2011) (citing cy pres awards to local legal services organizations and the Louisiana Bar Foundation); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 TENN. BAR J. 12, 13-14 (2009) (identifying federal cases that have "awarded unclaimed class action settlement funds to

legal aid programs because, like class action lawsuits, the programs provide a means to legal representation").

Indeed, recognizing this connection, many states have enacted statutes or rules expressly directing that residual funds from class action settlements be distributed to nonprofit and state Bar-affiliated organizations that provide civil legal services for low-income residents. *See*, section III, *infra*.

This Court should similarly recognize that legal services organizations are proper recipients of cy pres awards in class action settlements.

4. To rule otherwise would risk depriving legal services organizations of an important source of funding. The ABA tracks cy pres awards nationally and has determined that, an average of $15.5 million in cy pres awards at the state and federal level are provided to legal services organizations each year. These funds are critical to their operations, as direct government funding for these organizations has decreased. *See, e.g.*, LSC, *By the Numbers*, at 11-12 (reflecting decline in funding between 2010 and 2016 in inflation-adjusted dollars from $457 million to $385 million).[3]

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[3] In 2018, funding increased by $25 million to $410 million, which is still significantly less than the 2010 data. Press Release, LSC Receives $25 Million Spending Boost from Congress (Mar. 23, 2018), *available at* https://www.lsc.gov/media-center/press-releases/2018/lsc-receives-25-million-spending-boost-congress. The President's proposed budget sought to eliminate spending for the LSC altogether. Press Release, Legal Services Corporation Leaders Confident of Bipartisan Support in Wake of Defunding Proposal.

III. States Laws and Rules Providing for Cy Pres Awards in Class Action Proceedings Could Be Imperiled by a Ruling Imposing Constitutional or Other Strict Limitations on Cy Pres Awards.

Petitioners briefly mention due process and First Amendment concerns about cy pres awards, but do not directly raise constitutional challenges to the use of cy pres in class action settlements. However, *amici* at the petition stage and courts have argued that the use of cy pres awards may fail constitutional scrutiny. *See, e.g.*, Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners, filed Feb. 7, 2018, at 11-19 (arguing the award in this action violates due process); *id.* at 20-24 (arguing that cy pres award compels class members to support speech with which they do not agree in violation of the First Amendment); Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners, filed Feb. 7, 2018, at 7-10 (arguing that cy pres awards violate due process, free speech, and Article III); *Keepseagle v. Perdue*, 856 F.3d 1039, 1071 (D.C. Cir. 2017) (arguing that cy pres awards may raise Article III concerns) (Brown, J., dissenting). Should *amici* invite this Court to consider the constitutional implications of cy pres awards, the ABA urges this Court to decline the invitation.

(Feb. 12, 2018), *available at* https://www.lsc.gov/media-center/press-releases/2018/legal-services-corporation-leaders-confident-bipartisan-support.

A decision implicating the constitutionality of cy pres awards would affect not just the distribution of class action settlement funds in federal courts, but would also undermine state laws directing cy pres funds to legal services organizations.

Twenty-three states and Puerto Rico have enacted laws or rules authorizing cy pres awards from class action settlements to be distributed to legal services organizations that provide services to low-income residents. ABA Resource Center for Access to Justice Initiatives, Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals, *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_sclaid_atj_cypres.authcheckdam.pdf. For instance, by statute, California mandates that 25% of class action residuals should be provided to the Equal Access Fund of the Judicial Branch for distribution to legal aid programs, 25% to the Trial Court Improvement and Modernization Fund, and the remaining 50% to organizations that may include "nonprofit organizations providing civil legal services to the indigent." CAL. CODE CIV. P. § 384. See also 735 ILCS 5/2-807 (providing that at least 50% of residual funds must go to organizations eligible for funding under the Illinois Equal Justice Act); NEB. REV. STAT. 25-319(2) (requiring distribution of residual funds to the Nebraska Legal Aid and Services Fund); N.C. GEN. STAT. § 1-267.10(b) (requiring "the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents"); P.R. LAWS ANN. tit. 32A.

§ 20.6(b) (authorizing distribution of residual funds to programs that provide legal representation to persons of limited means in civil, administrative, and family law proceedings); S.D. CODIFIED LAWS § 16-2-57; (requiring at least 50% of residual funds go to the South Dakota Commission on Equal Access to Our Courts); TENN. CODE ANN. § 16-3-821 (authorizing distribution of residual funds to the Tennessee Voluntary Fund for Indigent Civil Representation); WISC. STAT. 803.08(10) (requiring that "not less than 50 percent of the residual funds shall be disbursed to [Wisconsin Trust Account Foundation, Inc.] to support direct delivery of legal services to persons of limited means in non-criminal matters").

Other states have similar requirements by rule. *See* COL. R. CIV. P. 23(g) ("not less than fifty percent (50%) of the residual funds shall be disbursed to the Colorado Lawyer Trust Account Foundation (COLTAF) to support activities and programs that promote access to the civil justice system for low income residents of Colorado"); CONN. SUP. CT. R. 9-9(g)(2) ("residual funds [from class judgment or settlement] shall be disbursed to the organization administering the program for the use of interest on lawyers' client funds . . . for the purpose of funding those organizations that provide legal services for the poor in Connecticut"); HAW. CIV. P. R. 23(f) (court has discretion to disburse residual funds to eligible nonprofit tax exempt organizations that provide legal services to the indigent); IND. R. TRIAL P. 23(F)(2) (at least 25% of residual funds must be disbursed to the Indiana Bar Foundation); KY. CIV. R. 23.05(6) (providing that at least 25% of residual funds be distributed to legal aid organizations through the

Kentucky IOLTA Fund Board of Trustees); LA S. C. RULE XLIII Part Q (authorizing residual funds to be distributed to the Louisiana Bar Foundation); ME. R. CIV. P. 23(f)(2) (mandating that residual funds be distributed to the Maine Bar Foundation); MASS. R. CIV. P. 23(e) (permitting distribution of residual funds "to support activities and programs that promote access to the civil justice system for low income residents"); N.M. DIST. CT. R. C.P. 1-023(G)(2) (authorizing distribution of residual funds to "nonprofit organizations that provide civil legal service to low income persons"); OR. R. CIV. P. 32(O)(1) (requiring at least 50% of residual funds to be paid to the Oregon State Bar to fund legal services to the poor); Pa. R. Civ. P. Ch. 1700 (requiring at least 50% of residual funds to be paid to the Pennsylvania IOLTA Board to promote the delivery of civil legal assistance); S.C. R. CIV. P. 23(e) (requiring at least 50% of residual funds to be paid to the South Carolina Bar Foundation "to support activities and programs that promote access to the civil justice system for low income residents"); WASH. CIV. R. 23(f) (requiring distribution of at least 50% of residual funds to the Legal Foundation of Washington); W. VA. R. CIV. P. 23(f) (directing that 50% of residual funds be disbursed to Legal Aid of West Virginia).

That so many states expressly mandate a specific percentage of the residual funds be directed to providing legal services to low income residents only highlights the identity of interests between legal services organizations and class members, as well as the states' considered judgment that residual funds be used to promote access to justice. This Court

should consider that persuasive evidence of both the unity of interest between cy pres awards and access to justice, as well as the appropriateness of legal services organizations as cy pres recipients.

Because the parties agree that the issue before this Court is simply the proper course a court should undertake in the event of residual funds exist after a class action settlement, the case provides a poor vehicle for the determination of the constitutionality of cy pres more generally. On that issue, this Court lacks the considered views of the lower courts. Moreover, if this Court reaches beyond the limited scope of the question presented and imposes constitutional restrictions on cy pres awards, it will imperil these state laws and potentially deprive legal services organizations of critical funding and low-income residents of legal representation. The American Bar Association urges the Court to consider the impact of its holding on the availability of legal services for low-income persons.

CONCLUSION

For the foregoing reasons, amicus American Bar Association requests that this Court recognize the availability of cy pres awards in class action settlements and legal services organizations as appropriate recipients of residual funds.

Respectfully submitted.

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July 16, 2018

No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ATTORNEYS GENERAL OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, COLORADO, GEORGIA, IDAHO, INDIANA, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, NORTH DAKOTA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND WYOMING, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are their respective States' chief law enforcement or chief legal officers and hold authority to file briefs on behalf of their offices.

Amici's interest arises from two responsibilities. *First*, as chief law enforcement or chief legal officers, amici have an overarching responsibility to protect their States' consumers. *Second*, amici have a responsibility to protect consumer class members under CAFA, which provides a role for state Attorneys General in the class action settlement approval process. *See* 28 U.S.C. § 1715; *see also* S. Rep. No. 109-14, 2005 U.S.C.C.A.N. 3, 6 (requirement "that notice of class action settlements be sent to appropriate state and federal officials," exists "so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens."); *id.* at 34 ("notifying appropriate state and federal officials ... will provide a check against inequitable settlements"; "Notice will also deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties.").

Consistent with these responsibilities, state Attorneys General actively monitor proposed class action settlements in federal court in an ongoing effort to protect consumers from abuse in the class action settlement process. State Attorneys General also speak against unfair settlements by filing briefs

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[1] Pursuant to Rule 37.6, amici certify that no parties' counsel authored this brief and only amici or their offices made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice of amici's intent to file at least ten days prior to this brief's due date and have given written consent.

under CAFA, often with bipartisan support. *See e.g., In re Google Inc. Cookie Placement*, No. 17-1480, Dkt. 29 (3d Cir.) (brief of thirteen-state, bipartisan coalition urging reversal of *cy pres*-only settlement); *In re EasySaver Rewards Litigation*, No. 16-56307, Dkt. 21 (9th Cir.) (brief of thirteen-state, bipartisan coalition urging reversal of imbalanced coupon settlement); *Cannon, et al. v. Ashburn Corp.*, No. 16-1452, Dkt. 68-3 (D.N.J.) (brief of nineteen-state, bipartisan coalition urging rejection of imbalanced coupon settlement). And these efforts have helped generate meaningful outcomes for consumers. *See, e.g., Allen v. Similasan Corp.*, No. 12-cv-376, Dkts. 219, 223, 257, 261, 268 (S.D. Cal.) (after Arizona-led coalition filed *amicus* brief and District Court rejected initial deal, revised settlement was reached that increased the cash recovery to the class from $0 to ~$700,000).

The Attorneys General, acting in a bipartisan coalition, submit this brief to further these interests and continue the ongoing CAFA efforts of state Attorneys General. Amici are able to offer a unique perspective on class action matters that should aid the Court in its analysis. Based on that experience, amici urge the Court to prohibit *cy pres*-only class action settlement arrangements and confirm strict limits on the use of *cy pres* to ensure that consumers are not relegated to an afterthought in the class action settlement process.

SUMMARY OF ARGUMENT

A settlement cannot be in the class's best interest or fair, adequate, and reasonable under Rule 23 where it releases millions of consumer claims, generates millions of settlement dollars, and yet the class languishes without direct compensation—the touchstone of a class settlement under Rule 23(b)(3) must be a direct class benefit.

Cy pres diverts settlement compensation from the class while heightening the risks consumers already face in the class action settlement process. And *cy pres*-only deals, which release class claims yet block consumers from receiving any direct benefit, represent the worst possible outcome for consumers. This type of arrangement is precisely why courts are tasked with policing the "inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003).

Cy pres-only settlement arrangements are a judicial creation that this Court has never blessed; the Court should not do so now. The Court should confirm that: (1) *cy pres*-only deals are *per se* invalid because class action settlements under Rule 23(b)(3) must include a direct class benefit, and (2) given *cy pres*'s lack of direct class benefit, Rule 23 prevents using *cy pres* amounts to reach a fair, adequate, and reasonable determination or award attorneys' fees as part of a court's settlement analysis. Confirming these points would constrain *cy pres* (to the extent allowed at all under Rule 23) to its only potentially proper role: addressing relatively immaterial remainder amounts in class actions that otherwise provide a direct benefit to consumers.

ARGUMENT

I. *CY PRES* HARMS CONSUMER CLASS MEMBERS, ESPECIALLY AS BLESSED BY THE NINTH CIRCUIT

A. IMPORTATION OF *CY PRES* TO CLASS ACTIONS DIVERTS COMPENSATION FROM CLASS MEMBERS AND MAGNIFIES PROBLEMS CONSUMERS ALREADY FACE IN THE CLASS ACTION SETTLEMENT PROCESS

The use of *cy pres* in the class action settlement context is a judicial creation (imported from the trust arena), which has had the effect of diverting compensation away from the class members whose interests are supposed to be served by class actions. Yet sending settlement funds directly to class members is a critical component of resolving class actions. Class members extinguish their present (and sometimes future) claims in class action settlements. And since class members extinguish these claims in exchange for settlement funds, those "settlement funds are the property of the class[.]" *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *see also Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) ("[S]ettlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members."); American Law Institute, Principles of the Law of Aggregate Litigation § 3.07, cmt. b (2010) ("funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members"). [2]

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[2] This key aspect of Rule 23 settlements—the release of claims in exchange for settlement funds—is in marked contrast

Cy pres's diversion of settlement funds away from consumers is particularly concerning because consumers already face disadvantages in the class action settlement process. Most notably, in dividing settlement funds that are obtained via the release of class members' claims, the interests of class members and others often diverge.[3] There is an ever-present risk of conflict between class counsel and the class because counsel has an incentive to obtain a large fee, which invariably comes from class members' pockets. *See, e.g.*, *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178 (9th Cir. 2013) ("interests of class members and class counsel nearly always diverge"); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 175 (3d Cir. 2013) ("'class actions are rife with potential conflicts of interest between class counsel and class members'"); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 720 (E.D. N.Y. 1989) (noting need to protect the "[c]lass from whose pockets the attorney's fees will come[.]").

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to statutorily based actions by state Attorneys General for the benefit of consumers, which are almost always brought and resolved without directly representing consumers or releasing consumer claims.

[3] Consumers also face procedural hurdles, including being only indirectly represented, having to make interest-based determinations with limited notice documentation, and facing burdens in raising concerns with the court. *See, e.g.*, *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157, 1163–64 (9th Cir. 2013) (incentive awards undermine adequacy of class representatives); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (discussing class representatives' failure to protect absent class members' interests); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 198 (5th Cir. 2010) (notice failed to provide "interested parties with knowledge critical to an informed decision as to whether to object[.]").

And defendants have no incentive to help correct for this risk of conflict between the class and class counsel. "[A] defendant who has settled a class action lawsuit is ultimately indifferent to how a single lump-sum payment is apportioned between the plaintiff's attorney and the class." William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 Tul. L. Rev. 813, 820 (2003). "[A]llocation ... is of little or no interest to the defense." *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 820 (3d Cir. 1995). The fee and class award "represent a package deal," *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996), with a defendant "'interested only in the bottom line: how much the settlement will cost him.'" *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 712 (7th Cir. 2015).

Indeed, there is an "inherent risk" in class action settlements of "class counsel ... collud[ing] with the defendants, 'tacitly reducing the overall settlement in return for a higher attorney's fee.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). Both Congress and the courts have noted that coupon settlements are an example of this problem. *See, e.g., In re HP Inkjet*, 716 F.3d at 1178 ("[B]y decoupling the interests of the class and its counsel, coupon settlements may incentivize lawyers to 'negotiate settlements under which class members receive nothing but essentially valueless coupons, while the class counsel receive substantial attorney's fees.'" (quoting S. Rep. No. 109–14, at 29–30)).

Cy pres arrangements are a particularly salient example of this inherent risk playing out—as with coupons, *cy pres* presents a "conflict of interest

between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *In re Baby Prods.*, 708 F.3d at 173; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 834 (9th Cir. 2012) (noting "incentive for collusion" in *cy pres* class settlements; "the larger the *cy pres* award, the easier it is to justify a larger attorneys' fees award.").

It is easy to find examples where *cy pres* is relied upon to increase an attorneys' fee award without a concomitant benefit to the class. *See, e.g., In re Baby Prods.*, 708 F.3d at 169-70 (attorneys requested ~$14 million as a percentage of the $35.5 million settlement, where ~$18.5 million was designated for *cy pres* and only ~$3 million to consumers); *Dennis v. Kellogg Co.*, 697 F.3d 858, 862 (9th Cir. 2012) (counsel requested ~$2 million in fees from a $10.64 million settlement where ~$7.4 million went to *cy pres* and only $800,000 to consumers).

And defendants may prefer *cy pres* over other class action resolution options. *See, e.g., Lane*, 696 F.3d at 834 (defendant "may prefer a *cy pres* award ... for the public relations benefit"); *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp .2d 402, 415 (S.D. N.Y. 2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs," as "defendants reap goodwill from the donation of monies to a good cause"); *see also Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting existing corporate donations to many proposed *cy pres* recipients and support on cases and issues those recipients often give to donating corporations). This may help explain why *cy pres* recipients often drift far from the subject of the action, *see infra* at Section II.A,

and why "groups have now started lobbying for cy pres distributions[.]" *Lane v. Page*, 862 F. Supp. 2d 1182, 1234 (D.N.M. 2012); *see also* Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1035–1036 (2009) (noting examples of groups requesting or welcoming *cy pres*).

B. *Cy Pres*-Only Deals Threaten Consumers The Most, Even As Their Supporting Rationale Is Inconsistent With Congressional And Judicial Class Action Standards

Cy pres-only settlement arrangements embody the worst flaws of the class action settlement system and are notable in their disservice to consumers. In *cy pres*-only deals, defendants and class counsel secure their own goals from the litigation while bypassing the class—the class receives no payment, indeed no direct benefit, even as millions change hands in the settlement and class members' claims are extinguished in sweeping numbers. Worse than merely imbalanced *cy pres* settlements, which inherently threaten class members' interests by diverting to third parties (at times substantial) compensation that belongs to the class, *cy pres*-only arrangements circumvent the class completely.

The foundational assumption underpinning a pre-certification, *cy pres*-only deal is that, *ab initio*, there is no way to direct a single dollar of direct value to the absent members of the class that is being offered for certification. Yet acceptance of this foundational assumption calls into question how such a deal, and certification of such a class, could meet the standards that Congress and the courts have placed on the class action procedural tool; indeed, on several

grounds, it appears that such a deal would fail to comport with what the Court and Congress require.

First, inasmuch as *cy pres*-only settlements stem from unascertainability of the class (either because the class cannot be adequately identified to ensure a proper distribution or reached with sufficient confidence to support a distribution), the settlement cannot meet the foundational Rule 23(b)(3) requirement that a class action serve a particular, known, ascertainable class. *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013) (determining whether class is ascertainable is "'an essential prerequisite of a class action ... under Rule 23(b)(3).'"); *see also Marcus v. BMW of North America, LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012) (gathering sources). Ascertainability requires (at minimum) that the class is defined clearly using objective criteria, *see Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015), or that there is an "administratively feasible" method for determining whether someone is in the class, *Carrera*, 727 F.3d at 306. But blessing *cy pres*-only settlements obviates any need for ascertainability because the class contours no longer matter; whether class members can be identified using objective criteria or in an administratively feasible manner is of no consequence to a court that is blessing a deal where no compensation will be distributed to class members directly and the only class effect is a release of the now-aggregated claims.

Second, a class action that cannot provide a direct benefit to the purported class cannot be a superior method of adjudication. Before a court may certify a class under Rule 23(b)(3), the court must find "'that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'"

Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809 (2011). But *cy pres*-only deals (in particular pre-certification *cy pres*-only deals) effectively aggregate consumer claims solely for purposes of accomplishing a single, aggregate release—in such a deal, there is no direct class benefit, just a mass release of now-aggregated claims. This cannot be a superior adjudication method from the perspective of class members. Aggregation of consumer claims through a private class action solely for purposes of releasing the claims without direct class benefit cannot be superior to leaving consumers with their claims, whatever the value of those claims might be. The Rule 23(b)(3) class action procedural mechanism is surely meant to provide a superior means of delivering something directly to the class, not a superior means for defendants to obtain an aggregate release at a bulk-discount price.

Third, certifying a class for which the only feasible relief is a *cy pres* distribution to a third party requires interpreting Rule 23 in violation of the Rules Enabling Act. In certifying a class under Rule 23 (even as part of a settlement), a court must bless both the class's cohesion as well as its desired relief, recognizing that the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Where (as here) class actions are brought under substantive laws that only permit recovery of compensatory damages for the class, it would enlarge the substantive rights of the plaintiffs to certify a class in which all compensation is instead directed towards third parties. This error would essentially "transform substantive law 'from a compensatory remedial structure to the

equivalent of a civil fine.'" *See Klier*, 658 F.3d at 481 (quoting Redish, *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 641 (2010)); *cf. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (procedural rules allowing multiple claims do not violate Rules Enabling Act because they "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights.").

C. Given Its Risks, Courts Have Rightly Criticized *Cy Pres* And Focused On The Need For Direct Class Benefit, But The Ninth Circuit Has Blessed Free Use Of *Cy Pres*

It should be no surprise that judges from across the country have been plainspoken in their appraisal of *cy pres*'s failings. *See, e.g.*, *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1111 (D.N.M. 2012) ("*cy pres* awards are a bad idea and inappropriate, because they inject a third party into the litigation, do not adequately reflect the best interests of absent class members, create an appearance of impropriety, and are not the best use of the Court's time and resources."). Judges are placed in the role of fiduciary for the absent class members. *E.g.*, *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987) ("In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion.'"). And this duty is especially important when settlements are offered prior to formal class certification. *E.g.*, *In re Bluetooth*, 654 F.3d at 946 ("Courts have long recognized that

'settlement class actions present unique due process concerns for absent class members.'"); *id.* ("Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement.").

Reflecting this duty toward the class, and the dangers of *cy pres*, even where courts have stopped short of *per se* rejecting *cy pres*, they have rightly focused on ensuring a direct class benefit in connection with any class settlement with a proposed *cy pres* component. Most notably, the Third Circuit has introduced as a specific *cy pres* consideration "the degree of direct benefit provided to the class," while emphasizing that "*cy pres* awards should generally represent a small percentage of total settlement funds." *In re Baby Prods.*, 708 F.3d at 174.

Notwithstanding these criticisms, and the necessary focus on the direct class benefit, the Ninth Circuit has blessed free use of *cy pres*-only distributions whenever there is a large class, which relegates the class to an afterthought and is exactly the type of approach to *cy pres* that is inconsistent with congressional and judicial class action requirements. *See* Section I.B. In weighing *cy pres*, the Ninth Circuit asks only whether the *pro rata* distribution of the proposed settlement fund over the full class would result in a *de minimis* amount, and is clear that *cy pres* is to be blessed in such a circumstance even if there are alternative options that would provide a direct class benefit; put simply, the Ninth Circuit requires only that a court turning to *cy pres* reach a determination that "'the proof of individual claims would be burdensome or distribution of damages costly.'" Pet. App. 8 (quoting *Lane v. Facebook, Inc.*, 696 F.3d at 819). But in almost every large

class action, the proof of individual claims will be burdensome in some respect (hence the need to aggregate the claims in the first place), and the distribution of damages costly (because distributions across large numbers of claimants or class members are, by their nature, costly).

II. IF THE COURT DOES NOT BAR ALL *CY PRES*, IT SHOULD CONFIRM THAT *CY PRES*-ONLY DEALS ARE *PER SE* INVALID AND *CY PRES* AMOUNTS CANNOT SUPPORT A RULE 23 FAIRNESS DETERMINATION OR FEES

Given the numerous risks that *cy pres* as a whole presents, the Court may well determine that all uses of *cy pres* in the class action settlement context are impermissible under Rule 23(e)'s "fair, reasonable, and adequate" inquiry. But, to the extent the Court does not foreclose all uses of *cy pres*, it should certainly provide clarification that (1) *cy pres*-only deals under Rule 23(b)(3) are *per se* invalid because *cy pres* provides no direct class benefit, and (2) given the lack of direct class benefit from *cy pres*, Rule 23 prevents using any *cy pres* sums to reach a fair, adequate, and reasonable determination or award attorneys' fees for cases settled under Rule 23(b)(3).

A. THE COURT SHOULD BAR *CY PRES*-ONLY DEALS, CONFIRMING THAT A RULE 23(B)(3) CLASS ACTION MUST DELIVER A DIRECT CLASS BENEFIT

The Court should reject Rule 23(b)(3) *cy pres*-only settlements as *per se* invalid because they lack a direct benefit to the class. "Rule 23 of the Federal Rules of Civil Procedure is meant to provide a vehicle

to compensate class members and to resolve disputes." *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d at 1105. And Rule 23 is to be "applied with the interests of absent class members in close view." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). It is therefore critical that any class action settlement under Rule 23(b)(3) include a direct benefit to the class—otherwise, the class action being certified and judicially approved serves only to allow defendants to aggregate claims solely for purposes of extinguishing them.[4]

Yet *cy pres* distributions themselves do not directly benefit the class; in the place of the traditional direct benefit to the class in exchange for the extinguishment of their claims, *cy pres* deals substitute an indirect benefit. *See, e.g., Lane v. Facebook, Inc.*, 696 F.3d at 819 ("A cy pres remedy ... is a settlement structure wherein class members receive an indirect benefit ... rather than a direct monetary payment").

And courts have readily noted that the "indirect benefit" received by the class from *cy pres* in place of direct compensation "is at best attenuated and at worse illusory." *In re Baby Prods.*, 708 F.3d at 173. Even setting aside the foundational concern that "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else," *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004), the *cy pres* distribution is often so tenuously connected to the class's claims that it can

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[4] Rule 23(b)(3) class actions present different considerations than those under (b)(1) and (b)(2). Rule 23(b)(3) actions are focused specifically on "individualized monetary claims," whereas under (b)(1) or (b)(2), "individual adjudications [are] impossible or unworkable" or "the relief sought must perforce affect the entire class at once." *Dukes*, 564 U.S. at 361-62.

hardly be said to provide any benefit to class members. For example, a *cy pres* distribution to "a scholarship program" named after the defendant, "two museums," and "a local history and genealogy library" have been offered to resolve a suit relating to an agrochemicals plant, exposure to arsenic, and contracting cancer. *Klier*, 658 F.3d at 473. In another example, a *cy pres* distribution to Family House Toledo—a charitable organization that offers emergency family housing in Toledo—was used in resolving a multidistrict class action alleging antitrust violations relating to foam in consumer products, even though the district court acknowledged that "few class members likely reside in Northwest Ohio." *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621, 625 (N.D. Ohio 2016). And the list goes on. *See e.g. Schwartz v. Dallas Cowboys Football Club Ltd.*, 362 F. Supp. 2d 574, 577 (E.D. Pa. 2005) (awarding a *cy pres* remainder in an antitrust case, even after noting that such distribution "would not further the goals of the antitrust laws"); *In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1395–99 (N.D. Ga. 2001) (approving *cy pres* distribution to Georgia-based charities, including The Make-a-Wish Foundation of Greater Atlanta and North Georgia as well as the American Red Cross's Atlanta chapter, in a multidistrict, price-fixing class action over NASCAR race souvenirs).

In the absence of a direct benefit to the class, a proposed *cy pres* settlement cannot pass muster under basic conceptions of fairness, much less Rule 23's specific requirements. A tenuous, illusory benefit from a third-party distribution does not match the purposes of Rule 23, and should not be blessed as serving the interests of the class or being fair, adequate, and reasonable. The solution is

simple: require a direct benefit to the class for actions under Rule 23(b)(3) and reject the use of *cy pres*-only arrangements that by their nature cannot satisfy this basic consumer protection requirement.

B. The Court Should Further Confirm That Because *Cy Pres* Does Not Provide A Direct Class Benefit, It Cannot Support A Rule 23(e) Fairness Determination Or The Award Of Fees

Because *cy pres* amounts do not provide a direct class benefit, they cannot be treated as providing an adequate basis for approving a settlement or awarding fees in a class action—it is critical that any settlement purporting to use *cy pres* is able to stand on its own, without considering the *cy pres* sums. This will ensure consumers are protected from imbalanced settlements where *cy pres* dwarfs the direct class benefit, and that the interests of class counsel and defendants are aligned toward the key goal of class action settlements: ensuring that class members receive the benefits bargained for in exchange for the release of their claims.

Even where a settlement contains class member awards beyond *cy pres*, the class (or even just a subset of the class) can often receive at most a nominal direct benefit and effectively suffer all the harms of a *cy pres*-only deal. For example, when claims-made structures are paired with a *cy pres* provision for unclaimed funds, the resulting settlements can direct almost all funds to *cy pres*. The Ninth Circuit recently heard oral argument in such a case, where, after the close of the claims process, the proposed distribution would send over 90% of the claims-made settlement fund to *cy pres*. *In re Easysaver Rewards*

Litigation, No. 16-56307, Dkts. 21, 76, 77 (9th Cir.) (detailing distribution plan featuring ~$4 million to *cy pres*, ~$8.5 million in fees, and only ~$250,000 to consumers). And this case is not unique. *See, e.g.*, *Zeisel v. Diamond Foods, Inc.*, No. 10-01192, Dkt. 243 at 2 (N.D. Cal.) (distributing ~$2.2 million worth of donations to *cy pres* recipient where the class only recovered ~$370,000); *Hartless v. Clorox Co.*, No. 06-cv-02705, Dkts. 137 at 1, 138 (S.D. Cal.) (approving distribution of ~$3.9 million to *cy pres* recipients after only ~$2.3 million was received by the class).

These types of settlements no more comport with Rule 23 than *cy pres*-only deals; if a settlement cannot stand absent consideration of *cy pres* amounts (whether because it is *cy pres*-only or an imbalanced *cy pres*-focused deal), then it cannot be deemed fair, adequate, and reasonable by a federal court. These imbalanced arrangements are judicially blessed only when a court commits the error of treating the *cy pres* award as adequate compensation for the release of class members' claims (in lieu of a direct benefit). But, as noted above, the direct class benefit is central to the fairness of a settlement. And the question is not just whether there is *any* direct class benefit, but whether there is *adequate* direct class benefit to warrant the release of the class members' claims and approval of the proposed settlement.

The Court should confirm the need for an *adequate* direct benefit by clarifying that, given the lack of direct class benefit from *cy pres*, Rule 23 prevents using any *cy pres* sums to reach a fair, adequate, and reasonable determination or award attorneys' fees in cases settled pursuant to Rule 23(b)(3). This analytical framework would properly acknowledge the

failure of *cy pres* to directly benefit the class, ensure that settlements are only approved with adequate direct class benefit, and do so without preventing courts from relying on *cy pres* to address the complex question of what is to be done with relatively immaterial remainder amounts in claims-made settlements, where the costs of distribution would exhaust the available funds: *e.g.*, where $25,000 remains available but additional direct notice or distribution costs would total $45,000.[5]

Put simply, this guidance would confirm that *cy pres* cannot be used to circumvent the class and create the illusion of fairness; it can only be used (if at all) if it is wholly ancillary to an otherwise fair, adequate, and reasonable settlement arrangement. This guidance would also serve the overarching goal of aligning the often-divergent interests in the class action settlement process by giving class counsel in particular an incentive to resort to *cy pres* only for amounts that are immaterial to the settlement as a whole. *Cf. Pearson v. NBTY*, 772 F.3d 778, 781 (7th Cir. 2014) ("Basing the award of attorneys' fees on [the ratio of fees to the fees plus what class members actually receive] ... gives class counsel an incentive to design the claims process in such a way as will maximize the settlement benefits actually received by the class"); *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 406 (D. Mass. 2008) ("tying the award of attorneys' fees to claims made by class members ... will not only encourage more

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[5] Practically, this may require a two-step (or more) fee award in some cases, with the final fee analysis and award only coming after the claims process has ended and *cy pres* amounts (to the extent proposed) are fully known and calculable.

realistic settlement negotiations and agreements, but also will drive class counsel to devise ways to improve how class action suits and settlements operate"). And we know that when parties are properly incentivized to direct would-be *cy pres* distributions to class members, consumer-positive outcomes follow. For example, in *Fraley v. Facebook Inc.*, the court rejected a *cy pres*-only deal, leading counsel to turn to a claims-made process that distributed ~$20 million amongst class members. 966 F. Supp. 2d 939, 943 (N.D. Cal. 2013).

As a district court explained in connection with an analogous set of class action settlement concerns:

> At bottom, class action litigation should benefit the individuals who have been harmed. To be sure, class action lawsuits have a valuable deterrent role to play, and there is therapeutic and punitive value in requiring defendants to pay for wrongful conduct, regardless of to whom those monies are transferred. But these considerations ought not cause courts complacently to abide an institution that fails efficiently and effectively to deliver relief into the hands of those in whose name it was established—the class.

TJX Cos., 584 F. Supp. 2d at 406.

* * *

"Whatever the superficial appeal of *cy pres* in the class action context may have been, the reality of the practice has undermined it." *Klier* at 481. To the extent *cy pres* serves any place in the class action settlement process, it is in handling relatively immaterial, remainder amounts in claims-made settlements, where the costs of additional notice and

distribution would literally exhaust the available funds. State Attorneys General are repeatedly engaged in the class action settlement process, looking out for the interests of their consumers and speaking against imbalanced settlements. Based on that experience, amici believe it is important for the Court to confirm that Rule 23(b)(3) *cy pres*-only deals are *per se* invalid in light of *cy pres*'s lack of direct class benefit, and a proposed Rule 23(b)(3) settlement must stand or fall on its direct class benefit, without consideration of *cy pres* amounts.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AND AMERICANS FOR PROSPERITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 12, 2018

QUESTION PRESENTED

Federal Rule of Civil Procedure 23(e)(2) requires that a settlement that binds class members be "fair, reasonable, and adequate." Here, the Ninth Circuit upheld approval of a settlement that disposed of absentee class members' claims while providing those class members no relief at all. Breaking with the Second, Third, Fifth, Seventh, and Eighth Circuits, the Ninth Circuit held that the settlement's award of $5.3 million to six organizations that had prior relationships with class counsel and/or defendants was a fair and adequate remedy under the trust-law doctrine of *cy pres*. The question presented is:

Whether the Fifth Amendment's Due Process Clause, the First Amendment's Free Speech Clause, and Rule 23(e)(2) require courts to reject proposed *cy pres* class action settlements that deprive class members of their legal remedies and compel speech approved of by class counsel, defendants, and the court without meaningful consent by class members.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books, studies, and the *Cato Supreme Court Review*, and conducts conferences and forums.

Americans for Prosperity ("AFP") exists to recruit, educate, and mobilize citizens to promote a free society, helping every American live their dream—especially the least fortunate. AFP's 3.2 million activists nationwide promote limited and accountable government, lower taxes, and more freedom.

This case concerns *amici* because the ruling below undermines the basic ideas that government may not take citizens' property without due process or to compel them to fund speech with which they disagree. It is also a threat to the integrity of the adversarial legal system and thus to constitutional due process.

SUMMARY OF ARGUMENT

The use of *cy pres* awards in class-action settlements violates the constitutional rights of absent class members. Specifically, the Fifth Amendment's Due Process Clause protects class

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[1] Rule 37 Statement: All parties were timely notified of and have consented to the filing of this brief. Further, no party's counsel authored this brief in whole or in part and that no person or entity other than *amicus* funded its preparation or submission.

members' right both to adequate representation and to pursue their legal claims against the defendant, while the First Amendment's Free Speech Clause protects the right of class members to be free from compelled speech—including being forced to fund charitable organizations to which class members might be opposed.

The Constitution protects the right to property, including the legal right to seek redress through the courts. At the very least, that right includes the legal claim, itself, and the amount of the judgment attributable to the injury giving rise to the claim. Those rights are the personal property of individual plaintiffs, and class members are guaranteed due process through adequate representation in pursuing their claims. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The aggregate nature of class action lawsuits inherently interferes with the individual nature of class members' rights, but wrongs against class members may remain unredressed without the class action mechanism. In order to achieve balance and maintain due process for class members in the protection of their individual rights, the law permits class actions but the Constitution requires courts to engage in a "rigorous analysis" under Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2552 (2011).

The opt-out default mechanism for class formation creates a greater need for judicial oversight than do most procedural rules because it creates perverse incentives. Allowing class counsel to generate a class without affirmative consent from class members

involuntarily transfers individual rights to counsel's control, who have no incentive to safeguard individual property rights. Instead, class counsel have strong incentives to enrich themselves at the expense of absent class members, engaging in self-dealing and collusion with defendants.

Introducing *cy pres* awards into class actions makes things even worse. *Cy pres* awards take property from class members, transform it into monetary value, and then give it to someone else, all without the meaningful consent of the property owners. Moreover, *cy pres* awards—particularly *cy pres* only settlements—allow class counsel and defendants to appear publicly charitable with money that rightfully belongs to the class. Cy *pres* awards effectively reduce defendants' cost of settling and increase class counsel's total compensation by operating as near-perfect substitutes for existing or planned charitable giving. Even more troubling, *cy pres* settlements threaten the judiciary's neutrality, as awards can be tailored in an attempt to curry favor with the judges who must approve settlements.

Notwithstanding due process concerns, *cy pres* might be justified if necessary to preserve and defend class members' individual rights, but that is not the outcome of most class action settlements, especially *cy pres*-only settlements. Instead, class counsel and defendants further their self-interest through rent-seeking that has been rejected in other contexts. Deterring wrongful future behavior is a legitimate concern, but one separate from protecting property rights, which the Due Process Clause requires.

When the judiciary fails to provide meaningful oversight of the class action settlement process, it shares some responsibility for the deprivation of each class member's Due Process rights. The judiciary also shares some responsibility for the deprivation of class members' First Amendment rights when a court approves a *cy pres* award as part of a class action settlement, because it forces class members to "endorse[] . . . ideas that [the court] approves." *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012). The opt-out system used in the class-action context is problematic because it presumes "acquiescence in the loss of [the] fundamental right" to be free from compelled speech and places the burden on absent class members. *Id.* at 2290.

ARGUMENT

I. WITHOUT MEANINGFUL JUDICIAL OVERSIGHT OF PROPOSED *CY PRES* CLASS-ACTION SETTLEMENTS, CLASS MEMBERS ARE DEPRIVED OF THEIR LEGAL CLAIMS WITHOUT DUE PROCESS

The Fifth Amendment's Due Process clause protects the right of individuals to their liberty and property. Few forms of property are as crucial to a free society as the right to pursue legitimate legal claims, seeking to obtain a redress of wrongs. This right encompasses both the right to bring the claim and, if successful, the right to damages sufficient to make the victim whole. Similarly, while there is no right to counsel in civil litigation, the Court has said that due process includes the right of litigants to have their claims adequately represented by whatever counsel is

bringing claims on their behalf. U.S. Const., amend. V; *Shutts*, 472 U.S. at 812.

The current federal class-action regime raises multiple due-process concerns. First, by their aggregate nature, class actions obscure the individual nature of the rights that justify the legal proceedings. Second, the opt-in mechanism for forming a class involuntarily transfers property from class members and to class counsel, who can then enrich themselves through self-dealing and collusion with defendants. Third, increasingly-common *cy pres* awards are used by class counsel to justify increased fee awards while providing benefit only to class counsel and defendants. *Cy pres* settlements can also appear to corrupt judicial neutrality, if award recipients are chosen with an eye to currying favor with the judges who are tasked with safeguarding the rights of individual class members.

District courts are supposed to protect against deprivation of property by approving "proposals [that] would bind class members" only after determining that a settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Without the bulwark of rigorous scrutiny, class counsel and defendants will feel free to collude to the detriment of individual plaintiffs, whether alone or aggregated in a class.

A. Although treated in the aggregate, the legal claims at issue in class actions are personal and must be protected as individual rights.

The right to pursue legal claims against a defendant is a property right that pertains to each class member, individually. A claim that is successful

yields damages, and those damages are the property right of the victim. Some claims are insufficiently valuable to make them financially viable outside of a class-action context, but the only foundation of a class action is a set of rights that are individual and personal to the class members.

When the class action results in judgment or settlement, each class member has a property right to her share of the damages award. Indeed, once defendant has paid those damages, the victim no longer has a legal right to bring the claims, so the right to seek redress becomes the right to whatever damages the litigation process has determined is necessary to make the victim whole. Notwithstanding the size of the individual class member's share of damages, the right to those damages is a property right that may not be taken from individual class members and given to another without violating due process. Protection of those individual rights is why the Court has held that class members—not "the class"—are entitled to adequate representation in a class action. *Shutts*, 472 U.S. at 812.

Unfortunately, class actions' aggregate nature obscures the individual nature of these rights. By aggregating individual property rights into one lump sum, the personal nature of the right is more easily ignored. If the total settlement is high enough, the requested fee award could be viewed as justified, even if each individual property right is sold for mere pennies on the dollar. The simplicity of the rule makes it appealing, but it obscures whether individual rights are being protected. It also gives perverse incentives

for class counsel to focus on aggregate measures of "success," rather than on whether their clients, individually, are being well-served. Defendants will also concern themselves only with the aggregate view, hoping to settle many claims at a low total cost.

The Court has already held that individual rights to speech and free exercise are not surrendered even when presented in aggregate form. *Citizens United v. FEC*, 558 U.S. 310, 349 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768 (2014). The individual right to seek redress of wrongs through the courts should be treated in like manner, especially when the threat comes from the right-holders' agent, class counsel.

The dangers of class actions are well known but the benefits to individual class members—having their low-value claims prosecuted—are believed to outweigh those costs. A "rigorous analysis" by courts, *Dukes*, 131 S.Ct. at 2552, is essential to assuring that result, making sure that class members' rights are protected. That rigorous analysis should look askance at the increasingly aggregate nature of class actions: bulk mail distribution of notices to class members; settlements measured in aggregate amounts; reasonableness of attorneys' fees assessed by aggregate and not per-client measures. Some lower courts seem untroubled by these trends and abdicate their responsibility to safeguard individual rights.

B. Present opt-out mechanisms eliminate the most effective method of protecting individual rights.

Erosion of individual rights in class-action

lawsuits is facilitated by opt-out mechanisms for class action formation. In *Shutts*, the Court rejected the claim that only an opt-in system could protect absent class members' Due Process rights, holding that meaningful consent could be obtained through an opt-out mechanism. 472 U.S. at 812. The Court was attentive to individual rights, but the lower courts have often failed to zealously safeguard those rights, resulting in a class-action system without meaningfully consent. Unlike the Kansas opt-out statute praised by the Court in *Shutts*, the process has become entirely "pro forma." *Id.* at 813. Given the incentives facing class members, class counsel, and defendants, this evolution was inevitable.

Having suffered relatively small injuries—or perhaps only de minimis technical "harm" as defined in statute—class members have little incentive to learn of the existence of class actions in which they may have legal interests. Once class counsel assemble their named plaintiffs, there is no incentive to provide meaningful notice to the rest of the class. Why would class counsel want potentially disruptive class members to interfere with their litigation plans, especially if that involves selling off class members' individual rights at pennies on the dollar? Notices are thus likely to resemble little more than the piles of junk mail that most people receive on a daily basis and will be disposed of by class members who are unaware of class action "opportunities" and that they will have forfeited their right to opt out. This is not "consent" in any meaningful sense. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071-72 (2013) (Alito, J., concurring) (non-response to class-arbitration opt-out

form is not consent). Class counsel, having engineered a class unable to meaningfully participate, can then treat members' individual rights as bargaining chips in the pursuit of lucrative fee awards.

An opt-in mechanism, by contrast, better secures class members' due process rights by better aligning incentives and reducing opportunities for self-dealing and collusion. First, an opt-in mechanism is voluntary in fact, rather than by presumption, so each class member must choose to employ class counsel to pursue legal claims. Competition among aspiring class counsel would advance class members' interests on price (lower fee award) and quality (better responsiveness, higher damages) dimensions.

Fully participatory class members could then provide meaningful oversight and take whatever actions necessary to protect their own rights. Or, they could acquiesce to the abuses of class counsel and defendants. Either way, they would be exercising their right to choose regarding her claim, a right required by due process, *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 799 (1996) ("the right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest").

Thirty-three years ago, when the Court declined to mandate an opt-in mechanism in *Shutts*, 472 U.S. at 812, opt-in costs were much higher, leading to a concern that "[r]equiring a plaintiff to affirmatively request inclusion would . . . impede the prosecution of those class actions involving an aggregation of small

individual claims." *Id.* at 812-13. The Court may also have presumed that good faith and professionalism were sufficient to protect the due process rights of individual class members. The court should reconsider its decision because time has disproven both of those assumptions.

First, technological advances have reduced the transaction costs of obtaining voluntary consent, so that small-value claims can more easily be aggregated through opt-in mechanisms. Second, class actions have become more abusive of individual rights in the years since *Shutts*. Modern class-action lawsuits reduce class members to mere data points, rather than the owners of important rights. Given modern trends in the class-action realm, due process demands an opt-in mechanism and technological innovations have made it feasible to require it.

C. Failure to preserve class members' rights to meaningful participation leads to principal-agent problems and conflicts of interest.

The attorney-client relationship is a classic principal-agent arrangement, subject to the standard dangers that the agent (class counsel) will look out for its own interests, rather than those of the principal (each class member). Due process, professional standards, and economic efficiency all demand that the incentives of class counsel and individual members of the class be aligned, but current practice falls short of that goal. As discussed *supra*, the aggregate nature of class actions and the use of an opt-out mechanism remove class counsel's incentive to

safeguard class members' individual rights. That leaves class members protected only by standards of professional ethics and the judiciary's obligation to safeguard due process rights.

Sadly, as shown by the number of disciplinary actions commenced each month, professional standards are often not enough to assure proper behavior by counsel. Courts can—and should—serve as a bulwark against behavior that deprives class members of their due process rights, but many lower courts have abandoned that responsibility. Class counsel understand that they are essentially unconstrained, and are therefore likely to ignore individual class members and their rights and use the class as an instrumentality in pursuing class counsel's own interests. The Court has previously stated that due process is violated when the named plaintiffs' interests are in line with those of the defendant, rather than the absent class members. *Hansberry v. Lee*, 311 U.S. 32, 45-46 (1940). Self-dealing by class counsel, especially in collusion with defendants, violates the due-process rights of absent class members in precisely the same way.

Self-dealing by class counsel typically takes the form of pursuing a larger fee award. The primary focus when determining the reasonableness of a fee award is the aggregate dollar amount of the settlement; meaningful compensation for class members is secondary, at best. One way that class counsel can inflate fee awards is to be over-inclusive when identifying the class. A larger class means more aggregated damages and, consequently, a larger fee

award. It also means that the individual rights of class members fade further into the background.

The emergence of *cy pres* awards in the class-action context provides circumstantial evidence of this phenomenon. *Cy pres* was initially proposed as a way of disposing of the unclaimed portion of the damages fund. *See generally* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010). Most scholars account for the disparity between awarded and claimed damages by arguing that the damages to be claimed did not justify each class member's cost of obtaining his share. *See id.* It may be, however, that many of those whose alleged injuries went into the damages calculation were not actually harmed but were only included to increase the total size of the class, making their failure to claim damages not only reasonable but ethical.

The incentive to increase the size of the class is also the primary point at which the incentives of class counsel and defendants are aligned with each other and against individual class members. Class counsel want to inflate the size of the class in order to maximize damages awards. Defendants want to inflate the size of the class so that a settlement will eliminate more potential legal claims at a discounted rate. Class counsel can agree to the discount and still increase their payoff due to the increased class size. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("Would it be too cynical to speculate that what may be going on here is that class counsel

wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?"). Individual class members suffer from this collusion because their injuries are compensated at a discounted rate, to say nothing of those outside of the legitimate class, who suffer because their separate claims have been improperly categorized and disposed of through settlement.

Class counsel are faced with strong incentives to violate the standards of professional ethics, engaging in self-dealing and collusion. If they act on those incentives, they fail to provide adequate representation to absent class members as required by due process. *Shutts*, 472 U.S. at 812. The Court has previously dealt with two such examples of self-dealing by class counsel. In *Dukes*, the Court rejected an attempt to limit damages to back-pay claims in order to make the class action mandatory. *Dukes*, 131 S.Ct. at 2559. The Court rejected this self-interested attempt by class counsel because it would have precluded class members' compensatory damages claim. In *Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1348-49 (2013), class counsel attempted to stipulate to less than $5 million in damages, in order to avoid federal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). While the Court decided that case on other grounds, it acknowledged that the attempted stipulation would have reduced the value of class members' claims. *Knowles*, 133 S.Ct. at 1349.

Lower courts have also rejected selective pleading,

waiver, or abandonment of claims in order to achieve certification of the class, even though doing so would impair class members' ability to raise abandoned claims at a later date. *See, e.g., Arch v. Am. Tobacco Corp., Inc.*, 175 F.R.D. 469, 479-80 (E.D. Pa. 1997); *Pearl v. Allied Corporation*, 102 F.R.D. 921, 922-23 (E.D. Pa. 1984); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602 (S.D.N.Y. 1982); *Kreuger v. Wyeth, Inc.*, No. 03-cv-2496, 2008 WL 481956, at *2-4 (S.D. Cal. Feb. 19, 2008).

The judiciary must be the final guarantor of individual class members' due process rights, by engaging in a "rigorous analysis" of the plaintiffs' claims. *Dukes*, 131 S.Ct. at 2552 ("Rule 23 does not set forth a mere pleading standard . . . certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied") (internal quotation marks omitted). While the Court in *Dukes* only needed to address the due process requirements of the certification process, due process violations are possible at all points in class-action litigation, and especially in the settlement context. The Court should therefore apply its "rigorous analysis" standard to the entirety of Rule 23.

Some lower courts have declined to engage in the rigorous analysis, presumably because it is difficult or is viewed as an unnecessary intrusion into the results of settlement negotiations between class counsel and defendants. This view is flawed for two reasons. First, Rule 23 provides only a bare-minimum check on abuses by class counsel, and any shortcomings in a

court's analysis leaves individual class members protected only by the good will and ethics of class counsel. It bears asking what other constitutional rights would be considered "protected" with only the good will and ethics of fellow citizens or government agents. Second, a hands-off posture by the courts is inappropriate in a class-action context; given the strong incentives for self-dealing and collusion that class counsel face, any settlement reached is far more likely to preserve class counsel's personal interests than that of the individual class members.

Courts should be aware of the strong potential for self-dealing by class counsel and the general tendency to ignore individual rights, which are the sole basis for the cause of action. Courts must turn a skeptical eye to all settlement agreements and refuse to condone those that appear self-serving or neglect individual class members' interests. Only in that way can courts preserve due process in the class-action context.

D. Use of *cy pres* awards further exacerbates due process concerns.

Any residual chance of maintaining a proper focus on the individual rights of class members is further diminished if *cy pres* awards are introduced. *Cy pres* awards give class counsel and defendants an additional tool for enriching themselves, one that cloaks them a socially-acceptable veneer of philanthropy. And yet, it is philanthropy with someone else's money and obscures the uglier reality that it comes through self-dealing and collusion.

1. Class counsel use *cy pres* to increase their personal take at the expense of class members.

The reasonableness of a requested fee award is typically judged, in large part, on how large it is relative to the total amount gained for the class. Higher fee awards, therefore, require a larger settlement, which can be achieved by increasing either the number of class members or the per-class-member damages. Individual class members receive direct benefit from the latter, so it is preferred. Defendants will prefer the former because it increases the number of potential legal claims disposed of and reduces the risk of future litigation. Either one will benefit class counsel, but class counsel will have strong incentives to align with defendants and choose the former, as a way of facilitating a settlement and an agreement not to oppose the fee request.

At best, this is class counsel pursuing self-interest instead of that of individual class members whose claims, it must be remembered, have been involuntarily commandeered by counsel. At worst, class counsel and defendants will further collude, discounting each class member's individual claim and further expand the class in order to achieve a high fee award and manage defendant's litigation risk.

This is a standard due process risk from class actions, and trial courts must be alert in order to identify and reject settlements exhibiting signs of this type of self-dealing. *Cy pres* awards go one step further, providing class counsel with an additional form of compensation that falls outside the fee award

process and can easily avoid scrutiny. In addition to whatever effect *cy pres* awards have on total settlement value and, consequently, the fee award, they also allow class counsel to effectively send a sizeable check to a charitable organization. In other words, *cy pres* awards supplement class counsel's normal compensation with the praise—and corresponding public relations benefits—they receive for their benevolence to a charity.

The use of *cy pres* awards also offers administrative benefits to class counsel, bypassing the sometimes complicated determination of how to process damages payments to class members. By reducing costs while maintaining the same settlement amount, class counsel increases the net payout to themselves. As a foundational matter, then, class counsel prefer *cy pres* awards because total compensation is raised in ways that are hidden from view, but in ways that relieve them of their fiduciary responsibility of safeguarding the rights of each individual in the class.

This case exhibits a classic example of the type of self-dealing that arises with the use of *cy pres* awards—choosing award recipients that have direct ties to class counsel. Three of the *cy pres* recipients are the alma maters of class counsel, a fact dismissed out-of-hand by the Ninth Circuit in violation of its own precedent and common sense about the "nascent dangers" of the practice. *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737, 749-50 (9th Cir. 2017) (Wallace, J., concurring in part and dissenting in part). If the proposed *cy pres* award is approved,

class counsel will surely receive a benefit above and beyond the already-high fee award, particularly if class counsel regularly donate to their alma maters, as the *cy pres* award likely covers their charitable giving for some years to come.

This case demonstrates that many lower courts refuse to police self-dealing in the class-action context. If the Court sanctions this *cy pres*-only settlement, it will lead to more brazen self-dealing in the future, as it is unlikely that lower courts will suddenly rediscover their fidelity to due process. The Court should make clear that *cy pres* deprives individual class members of their property without due process.

2. Defendants use *cy pres* to lower the overall cost of any settlement.

Defendants face strong incentives to collude with class counsel and against the class as a general rule, but particularly when *cy pres* awards are used. As discussed *supra*, defendants would prefer—given that the lawsuit has already commenced—to expand the class in order to dispose of as many claims as possible, especially if class counsel agree to heavily discount each class member's damages. When *cy pres* awards are in play, the incentives for collusion are even stronger, as defendant can help choose the award recipients in a way that maximizes the public relations benefit. The defendant—accused of inflicting harm on a high number of plaintiffs—can lessen any public relations harm from the lawsuit by casting itself as the source of funds to charitable organizations. *See SEC v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("In general,

defendants reap goodwill from the donation of monies to a good cause.")

In other words, defendant burnishes its philanthropic credentials using individual class members' property. This is a perverse reversal of the traditional workings of the judicial system, where plaintiffs are supposed to *receive* funds from a defendant who has wronged them. Additionally, if class counsel is willing to go along, "defendants may also channel money into causes and organizations in which they already have an interest." *Id.* Rather than donate its own funds, defendant spends class members' funds, using the court and the settlement agreement as an intermediary. In an extreme case, total philanthropic donations by defendant might remain constant, meaning the settlement costs the defendant nothing. Here, defendant and class counsel appear to have engaged in precisely this type of collusion, as defendant has a pre-existing relationship with four of the recipient organizations.

Cy pres awards reduce the cost to the defendant of settling. There is nothing inherently wrong with defendant negotiating a lower-cost settlement amount, if doing so facilitates a resolution that improves the position of the individual class members. In the case of a *cy pres* settlement, however, class members receive nothing in exchange for the benefits to defendant and class counsel.

3. *Cy pres* erodes judges' neutrality through awards that benefit them.

As troubling as self-dealing and collusion are, even worse is the potential for outright corruption of the

judicial process. Class counsel have a strong incentive to attempt to subvert the neutrality of judges by choosing *cy pres* award recipients with ties to the trial judge, nudging the judge to approve the settlement. In *Fairchild v. AOL*, LLC, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009) (class action settlement agreement), for example, the *cy pres* award included payment to the Legal Aid Foundation of Los Angeles, a charity on whose board the trial judge's husband sat. Such an award might normally be a great benefit to society, but "the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety." *Bear Stearns*, 626 F. Supp. 2d at 415. In other contexts, this strong interest by the judge in the outcome could be cause for mandatory recusal. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("[T]he Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case. This rule reflects the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'") (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1948); The Federalist No. 10). This due-process concern typically arises in the context of settlement approval, however, so the defendant has already approved and will not challenge the settlement. If the trial court fails to engage in a rigorous analysis, as was the case here, absent class members' rights will go unprotected in yet another way.

4. *Cy pres* settlements benefit many parties, but provide nothing to individual class members, the owners of the claims.

Class action lawsuits are often defended because, notwithstanding the perverse incentives inherent in the aggregate nature of the system, they are necessary to make good on the promise of justice to aggrieved class members. Unfortunately, our system falls short of that ideal, with many class members receiving pennies on the dollar, if anything. The claims process is often set up in a way that virtually guarantees a low percentage of class members will obtain any relief. *Sullivan v. DB Investments*, 667 F.3d 273, 329 n.60 (3d Cir. 2011) (en banc) (finding that response rates "rarely exceed seven percent"); *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 296 (6th Cir. 2016) (Clay, J., dissenting) ("the median response rate in a study of consumer class actions was 5-8%"). In other cases, the settlement includes only coupons for the discounted future purchase of goods from the defendant who has wronged the individual class members. The risk of due process violations are why the Court has mandated that lower courts engage in rigorous analysis to assure that any settlement is fair, reasonable, and adequate.

All concerns about shortchanging individual class members are heightened in the context of a *cy pres* settlement because the value of class members' claims is given to charitable organizations, rather than to the owners of the claims. In a very real sense, class members—whose claims provide the *only* justification

for the entire proceeding—are the only ones who receive nothing as their claims are sold. Class counsel use the claims to justify higher fees. Defendants receive a discounted cost of settlement. All litigation participants, save the claims' owners, are praised for their role in generating extra funding for charities. Even society potentially receives some additional deterrence benefit, but individual class members *qua* class members, receive nothing. "There is no indirect benefit to the class from the defendant's giving the money to someone else." *Mirfasihi*, 356 F.3d at 784.

The substitution of *cy pres* for actual compensation to class members calls into question the raison d'être of class action lawsuits. "A consumer class action is superior to individual suits because it allows people with claims worth too little to justify individual suits-so called negative-value claims-to obtain the redress the law provides. But if the consumer class action is likely to provide those with individual claims no redress . . . the consumer class action is likely not superior to individual suits." *Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 603 (S.D. Tex. 2007).

5. *Cy pres* awards are never the only option available to resolve a class action.

Cy pres awards are not simply inappropriate in this case but in every case; there are no circumstances under which *cy pres* awards are the only option. Indeed, our judiciary functioned well enough for most of its history without needing to resort to *cy pres* awards, and it is peculiar that they would gain popularity with class counsel in an era of advancing

technology—with corresponding reduction in the cost of notifying and facilitating disbursement to the class. Peculiar, but not surprising, given the ability of class counsel and defendants to use *cy pres* awards for self-enrichment at the expense of class members.

The Ninth Circuit, below, approved a *cy pres* only settlement because the settlement fund was "non-distributable." *In re Google*, 869 F.3d at 742. The reason it was non-distributable, however, is that class counsel and defendants agreed to a small enough settlement amount, returning "a paltry 4 cents in recovery." *Id.* If affirmed, this would set a troubling precedent, that class counsel and defendant need only discount class members' individual claims even more if they want certainty that their *cy pres* settlement will be approved. More importantly, however, the Ninth Circuit also hinted that the claims which formed the foundation of the class action were likely frivolous. *Id.* Most class actions that are "non-distributable" likely fall into the same category, with non-existent harms that naturally yield de minimis damages (although any number of non-frivolous claims might be included in an expanded class, as described *supra*, in order to eliminate real legal liability at frivolous prices). Rather than invite a degradation of due process by sanctioning a *cy pres* settlement, a court could dismiss the class action as, indeed, the District Court attempted to do twice.

It is worth mentioning that *cy pres* only settlements, while increasing in frequency, are still the minority of class action settlements where a *cy pres* award is used. More common are those in which

disbursement to the class is attempted, but any unclaimed funds are distributed to charitable organizations. The dangers of self-dealing and collusion are still present, however, because most claim rates are already low, and class counsel and defendants can easily guarantee that number remains low—so most of the fund remains and they can obtain nearly all the benefits of a *cy pres*-only settlement.

The Court should recognize the wide range of available alternatives and reject the use of *cy pres* awards in the class-action context.

E. Class Actions Have Become a Haven for Judicial Rent-Seeking, Posing a Significant Threat to the Rule of Law

Lobbying for special benefits—known as "rent-seeking" to public choice economists—has plagued the executive and legislative branches for some time. The Court faced an example of administrative rent-seeking in *N.C. State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015), in which the Court rejected North Carolina's attempt to shield the Board's decisions from antitrust scrutiny because the Board was made up of "market participants" who stood to gain from the decisions they made. *Id.* at 1114. *See also St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013) (rejecting a state regulation restricting sale of caskets as rent-seeking by market participants who could charge higher prices). The Court has also rejected a form of judicial rent-seeking, in mandating recusal of a state Supreme Court Justice whose main campaign contributor had a case pending before the state Supreme Court. *Caperton*, 556 U.S. at 876.

Our class action system is rife with opportunities to rent-seek, all of which act to the detriment of those who come before the courts of the United States and the individual States, seeking redress. Class counsel and defendants seek benefits (rents) for themselves, and they will seek out courts most likely to reward them. They will also seek out tools that increase their chances of obtaining the special favors they seek. *Cy pres* awards are the perfect rent-seeking vehicle for class counsel and defendants, as it both increases the total return they can obtain as well as masks their rent-seeking in a cloak of philanthropy. But, it does so at the expense of individual class members and due process and, potentially, at a cost of subverting judicial neutrality. The Court should therefore reject this expansion of judicial rent-seeking and prohibit the use of *cy pres* awards in class actions.

The Court should also begin to curb judicial rent-seeking throughout the class action system, by enforcing the Court's previous mandate of a "rigorous analysis," *Dukes*, 131 S.Ct. at 2552, for the entirety of Rule 23.

F. The Ninth Circuit's Abuse of Due Process in Class Actions Must Be Curbed to Protect Due Process Nationwide

The requirements of Rule 23 are easily understood, and the Ninth Circuit acknowledged its responsibilities, *In re Google*, 869 F.3d at 741 ("we scrutinize the proceedings to discern whether the [lower] court sufficiently 'account[ed] for the possibility that class representatives and their counsel have sacrificed the interests of absent class

members for their own benefit"), 742 ("we benchmark whether the district court discharged its obligation to assure that the settlement is 'fair, adequate, and free from collusion.'"), but without once mentioning the requirement of a "rigorous analysis." That fact is unsurprising, given the Ninth Circuit's previous abuse of due process in the class-action context. *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (refusing to inquire rigorously into an abusive settlement because to do so would be "an intrusion into the private parties' negotiations [that] would be improper and disruptive to the settlement process.")

Here, the Ninth Circuit maintained its perverse standard by "quickly dispos[ing]" of claims that a *cy pres* only settlement appropriated the class members' legal claims for the personal benefit of class counsel and defendant, *In re Google*, 869 F.3d at 741, failing to uphold the due process rights of individual class members. The Ninth Circuit has shown an unwillingness to acknowledge the due process risks of class actions generally, and the particular dangers of collusion present when *cy pres* awards are used. The Ninth Circuit did acknowledge that "*cy pres* only settlements are considered the exception, not the rule," *id.*, but still approved the settlement in cursory fashion merely because the district court had found the settlement fund to be non-distributable. *Id.* By so doing, the Ninth Circuit failed in its review responsibilities and established a troubling precedent that will encourage class counsel and defendants to both maximize class size and reduce per-member compensation. As long as the per-member amount is low enough, the Ninth Circuit has effectively declared,

cy pres only settlements will be approved "quickly" and without meaningful review. This will result in wholesale deprivation of those members whose claims should not have been included but were, as well as those whose claims should have been included but will have been heavily discounted.

The Ninth Circuit correctly articulated the fundamental risk associated with using *cy pres* awards—the process of selecting award recipients might "answer to the whims and self-interests of the parties, their counsel, or the court." *Id.* at 743 (citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038-39 (9th Cir. 2011)). Once again, however, what began in promising fashion degraded rapidly. The Ninth Circuit never engaged in a rigorous analysis, failing to uphold due process or even circuit precedent requiring a "higher level of scrutiny for evidence of collusion or other conflicts of interest." *Id.* at 749 (Wallace, J., concurring in part and dissenting in part) (citing *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).) This, even after acknowledging that "the district court cannot as effectively monitor for collusion and other abuses." *Id.* at 741. To summarize, even though the Ninth Circuit knew that collusion was more likely in this case, that the district court was ill-equipped to prevent collusion, and that prevention of collusion was a fundamental responsibility, it refused to look for collusion.

Evidence of collusion was apparent to any good faith examination, but the Ninth Circuit chose to remain ignorant of it. As approved by the district court, the settlement transferred the value of

individual class members' claims to class counsel's alma maters and four previous recipients of defendant's charitable largesse. This type of self-interested and collusive behavior had previously been described by the Ninth Circuit as "unseemly," *Nachshin*, 663 F.3d at 1039, but was accepted in this case without a moment's hesitation. The reason? It wasn't as bad as the *cy pres* award in *Lane*, where the class members' property was handed over to an entity controlled by defendant. *Lane*, 696 F.3d at 817. Compared to that appalling approval of naked self-dealing by—and collusion between—class counsel and a defendant, almost anything would appear mild, but such a cursory reference hardly satisfies the due process to which class members are entitled.

The precedent established by the Ninth Circuit in *Lane*, and expanded in this case, will lead to ever increasing levels of self-dealing by class counsel, greater levels of collusion between class counsel and defendants, and greater rent-seeking pressures on judges to corrupt their rulings for personal gain. If district courts in the Ninth Circuit are freed from their responsibility to police self-dealing and collusion, there will be no more due process for individual class members, who will see their property handed over to whomever offers class counsel and defendants the best return. Given the national nature of class actions, class members nationwide will soon suffer the same deprivations of due process, as class counsel will choose to file in the Ninth Circuit, where their self-dealing and collusion will receive minimal-to-no scrutiny. Only the Court can stop this dangerous trend.

II. USE OF *CY PRES* AWARDS IN CLASS-ACTION SETTLEMENTS COMPELS CLASS MEMBERS TO SUPPORT SPEECH WITH WHICH THEY MAY DISAGREE, IN VIOLATION OF THE FIRST AMENDMENT

When a class action is settled, the damages funds represents the value of the claims of the individual class members, and the class members each own a portion of the award. *Klier v. Elf Atochem N. America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). Anything short of a direct transfer of those funds to class members, therefore, is a diversion of property from its rightful owners. Some transfers of this type—reasonable attorney fees and court costs, for example—may be justified as the costs of transforming an intangible property interest into spendable funds. When a court approves a *cy pres* award, however, it gives class members' property to a charity without the meaningful consent of those who own the funds. That organization will then use the funds provided by the settlement agreement to pursue its own goals, including (understandably) by engaging in various forms of speech. Individual class members have no way to abstain from funding that speech, so courts in effect compel them to speak in the voice of those charitable organizations. *See Knox*, 132 S. Ct. at 2289 ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups.").

This type of *cy pres* imprimatur is problematic because the Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288. "First

Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). *See also Janus v. Am. Fed. of State, County, and Municipal Emp. Council*, 585 U.S. ___ (2018) (16-1466) (slip op. at 8) ("Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command [that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion].").

Only a narrow class of speech can be compelled without violating the First Amendment: mandated association among a defined group as part of a comprehensive regulatory scheme, and then only if the required contributions are for the benefit of the association. *United Foods, Inc.*, 533 U.S. at 411-14. And even then, the contribution can only be sustained insofar as it is "a necessary incident of the larger regulatory purpose which justified the required association." *Id.* at 414. (discussing *Keller v. State Bar of California*, 496 U.S. 1 (1990)).

There is no part of a *cy pres*-only settlement that meets the *United Foods* test. Class actions arise from a myriad of state and federal laws, not a comprehensive regulatory scheme. The only uniform rules for class actions in federal court are procedural—Rule 23—not substantive. Likewise, association among class members is voluntary, even if not based on full and meaningful consent.

The Court has also expressed doubts about the use of opt-out systems given compulsory subsidies. *See Knox*, 132 S. Ct. at 2290-96. While there are significant differences between the context here and that of *Knox*, certain principles are the same, such as that courts "do not presume acquiescence in the loss of fundamental rights." *Id.* at 2290. "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Id.* Similarly, class members should not be forced to subsidize class counsel's, defendants', or the judges' charitable goals.

Whether or not an opt-out mechanism is proper for a traditional class action, once a *cy pres* award is introduced, an opt-in mechanism is needed because courts can no longer presume acquiescence by class members in the loss of their First Amendment rights.

A. Class Members Are Likely to Be Diverse in Their Political and Social Views, while *Cy Pres* Award Recipients Are Likely to Share the Views of Class Counsel, Defendants, and the Court

In order for a class action to be certified, the class has to be "so numerous that the joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The only required commonality between members of the class pertains to their legal claims, not their personal preferences, or political persuasion. It would therefore be truly extraordinary if members of the class were uniform in their preferences for charitable giving,

especially in a class as large as this one, where nearly half the U.S. population is involved. To take an obvious example, it is quite likely that half the class voted for Donald Trump and half for Hillary Clinton in the last presidential election. Likewise, there are likely significant differences of opinion in a class so large regarding appropriate internet privacy policy.

In light of the certain diversity of views among class members, it is inappropriate for class counsel and defendants to presume to select a "worthy" charities to be the recipients of funds that represent damages owed to class members. This is particularly true in light of the strong incentive for class counsel and defendant to choose *cy pres* recipients that fit their preferences, rather than the indeterminable preferences of class members.

That a trial or appellate court sanctions the choice is immaterial to the question of class members' First Amendment rights to be free from compelled speech. Such a government imprimatur does not render the nature of the speech voluntary.

B. If *Cy Pres* Funds Are at All Controlled by Defendants, Class Members Will Be Forced to Support the Views of the Those Who Caused Their Injury, and May Even Be Compelled to Support a Repetition of the Actions That Resulted in That Injury

One thing that class members must have in common is an injury caused by the defendant. Fed. R. Civ. P. 23(a)(3); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The result of a fair and just trial should be a transfer of wealth from perpetrator to

victim, not the other way around. As a result of the settlement, the defendant admits—impliedly or explicitly—that the victims have a legal right to restitution. To compel the class members to, in effect, further the views and interests of the party that injured them is repugnant to basic principles of justice and fairness and is a particularly pernicious example of Thomas Jefferson's adage that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Irving Brant, James Madison: The Nationalist 354 (1948) (quoted by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 n.31 (1977)).

To add insult to injury—quite literally—the money that should have made the class members whole is, instead, used to burnish the image of the one who inflicted the damages that gave rise to the lawsuit.

From a more practical perspective, if the defendant is thus rewarded for its role in damaging class members, it will feel less reluctance to engage in future activities in the same vein, creating the perverse possibility that the class members will be forced to fund their future, repetitive victimization. This peculiar form of unconstitutional compelled speech can be avoided if courts fulfill their responsibilities under Rule 23, for it cannot be argued that forcing victims to fund their victimizers is fair, reasonable, or adequate.

The use of *cy pres* awards in class action settlements, particularly those that enable the defendant to control the funds, are an emerging trend, one to which courts must attend in order to preserve

the due-process and free-speech rights of class members. Rule 23's "rigorous analysis" requirements should be enforced.

CONCLUSION

The use of *cy pres* in class-action settlements, particularly those that enable the defendant to control the funds, are an emerging trend to which courts must attend in order to preserve the due-process and free-speech rights of class members. If not prevented by proper application of Rule 23's rigorous analysis requirements, class counsel, defendants, and judges benefit at great cost to absent class members.

The Court should reverse the court below.

Respectfully submitted,

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No. 17-961

In the

Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether, or in what circumstances, a class-action settlement that provides a *cy pres* award of class-action proceeds but no direct relief to class members comports with the requirement that a settlement binding on class members must be "fair, reasonable, and adequate" and supports class certification.

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INTEREST OF AMICI CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental separation of powers principles implicated by this case. The Center has previously appeared before this Court as *amicus curiae* or counsel of record in several cases addressing compelled speech issues similar to those at issue here, including *Janus v. Am. Fed. of State, County, and Mun. Employees*, 138 S. Ct. 2448 (2018); *National Institute of Family and Life Advocates*, (*NIFLA*) 138 S. Ct. 2361 (2018); *Harris v. Quinn*, 134 S. Ct. 2618 (2014); and *Knox v. Service Employees International Union Local 1000*, 567 U.S. 298 (2012).

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

and sound science. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice; accordingly, Atlantic Legal Foundation promotes sound thinking in the resolution of legal disputes and the formulation of public policy.

Atlantic Legal Foundation has an abiding interest in the protection of property rights, as one of the essential elements of a democratic and productive society.

Atlantic Legal Foundation has an abiding interest in the appropriate balance between vindication of rights of persons with modest claims through the class action mechanism and the protection of the due process and equal protection rights of defendants in class actions. To that end, Atlantic Legal has appeared as amicus or as counsel for amici in numerous cases in this Courts, various federal courts of appeal, and state appellate courts in cases involving class actions and the procedural rights of litigants, including, for example, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *American Express Company v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

SUMMARY OF ARGUMENT

The court below approved a settlement that deprived the class plaintiffs of the remedy provided by Congress and that authorized the defendant to continue to engage in the conduct that was the subject of the litigation. Assuming that the conduct at issue actually violated the statute, the approval of the settlement by the court below permitted private parties to rewrite federal law in order to deny the benefits of that law to the very individuals Congress sought to

protect, while protecting conduct that Congress sought to prohibit. All of this was done in the context of a settlement that awarded no relief to the plaintiff class.

While a federal court may have broad powers to shape appropriate remedies, it can only do so in in a case that triggers its jurisdiction under Article III of the Constitution. This requires an active case or controversy which is not apparent where class members – the individuals who allegedly suffered a harm – receive no relief and are barred from seeking relief from similar conduct in the future. If the plaintiff class members are to receive nothing, then the court cannot redress the alleged injury and the court cannot certify a class where the class members would have no standing. Further, the *cy pres* award recipients in this case have no standing because they have not suffered any injury. The requirements of Article III have not been met.

The settlement also violates the First Amendment rights of the unnamed class members. By directing the settlement funds away from unnamed members of the injured plaintiff class to advocacy groups such as AARP, Inc. and the World Privacy Forum, the courts below forced the plaintiff class to provide financial support to organizations with which they may not agree in violation of the First Amendment's prohibition on compelled speech. Compelling the plaintiff class to subsidize the speech of others raises similar concerns to compelled speech, *Janus*, 138 S. Ct. at 2464, and compelling individuals to speak a particular message "violates ... [a] cardinal constitutional command," *id.*; *see NIFLA*, 138 S. Ct. at 2371.

ARGUMENT

I. The Lower Court's Interpretation of Rule 23(e)(2) Is in Opposition to Article III Case or Controversy Requirements.

Article III "confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1982)). To determine whether there is actual case or controversy, courts look to standing doctrine to see "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' "as to warrant his invocation of federal-court jurisdiction to justify exercise of the court's remedial power *on his behalf.*" *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (*Baker v. Carr*, 369 U.S. 186, 204 (1962). Standing will only be found if "[plaintiff] can show that he himself has suffered or will suffer injury whether economic or otherwise." *Sierra Club v. Morton*, 405 U.S. 727, 728 (1972).

Injury alone, however, is not sufficient. The plaintiff must also show that a favorable ruling by the court will actually redress the injury. *Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 286-87 (2008). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). This is part of the "irreducible minimum" that is required for federal courts to exercise jurisdiction under Article III. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

This Court has recognized standing in some instances where the plaintiffs themselves will not receive any financial relief. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), this Court ruled that a plaintiff had standing to sue for civil penalties that would be paid to the federal government if such a sanction "effectively abates ... [the] conduct and prevents its recurrence." *Id.* at 185-86; *see Sprint Communications*, 554 U.S. at 287. The key requirement, however, is that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. The relief at issue in this case, however, does not meet this irreducible constitutional minimum.

The class action settlement approved by the Ninth Circuit below does not involve the exercise of the court's remedial power on "behalf" of unnamed class members, because it provided no relief to them. Indeed, the settlement in this case permits defendant to continue to engage in the conduct complained of in the complaint *and* precludes the plaintiff class from bringing a complaint against that conduct under the federal law in the future. Assuming that there was a violation of the federal law, the settlement essentially nullifies that law. Private parties used the federal court to preclude those injured from taking advantage of the remedy that Congress provided and immunized conduct that Congress sought to prohibit. This in no way "redresses" the claimed injury that is the basis for this action.

Nor did the *cy pres* recipients of the settlement funds have a "personal stake in the outcome" of the litigation, because they were not even parties to it and

had alleged no injury. The Ninth Circuit's interpretation of Rule 23(e)(2) to allow such a settlement therefore exceeds the court's authority under Article III.

These *cy pres* award settlements violate the adversarial model of adjudication and the requirements of Article III by granting relief to nonparties who have suffered no injury. As Northwestern University Law Professor Martin Redish has correctly observed, the distribution of *cy pres* awards to nonparties transforms the "judicial process from a bilateral private rights adjudicatory model into a trilateral process." Martin H. Redish, *et al.*, *Cy Pres & the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L.Rev., 617, 641 (2010). The settlement approved in this case actually deprived the court of jurisdiction – it had no power to certify a class whose members would receive no relief. The class members received no damages and the alleged illegal activity was not halted.

II. Interpreting Rule 23(e)(2) to Permit a Binding Settlement that Redirects Class Action Settlement Funds from Class Members to Third Parties (Often Advocacy Groups) Violates the First Amendment.

The federal statute at issue in this case provides for minimum damage awards of $1,000 per person. 18 U.S.C. § 2707(c). Members of the plaintiff class, all 129 million of them, receive nothing in this settlement. Instead, the *cy pres* settlement redirects class action settlement funds away from the unnamed class members to outside organizations, including advocacy organizations, that admittedly were not injured by the defendant's conduct.

In the context of a case such as this, the redirecting of compensatory funds (rather than just excess funds) from class members to nonparty entities effectively appropriates damages rightly due to the class members for injuries they suffered, to advocacy organizations that had no such harms and that are committed to advocating for causes that particular class members might not approve. Money belonging to the members of the plaintiff class is, by force of law, redirected to groups whose advocacy some (or all) members of the plaintiff class oppose.

The settlement at issue here compels class members to support causes advocated by AARP and the World Privacy Forum with which class members disagree. As this Court ruled in *Janus*, compelled subsidization of the speech of private groups is a serious infringement of First Amendment rights. *Janus*, 138 S. Ct. at 2464. Although *Janus* was decided just last term, the notion that the First Amendment protects against compelled speech is nothing new. Indeed, such compelled speech is contrary to the original understanding of the First Amendment.

The founding generation voiced its concerns through debates over compelled financial support of churches in Massachusetts and Virginia, the Virginia debate being the most famous. And this Court has often quoted Jefferson's argument that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), in 5 The Founders Constitution, University of Chicago Press (1987) at 77 (quoted in, *e.g.*, *Keller v. State Bar*, 496 U.S. 1, 10 (1990); *Chicago Teachers Union v. Hudson*,

475 U.S. 292, 305, n.15 (1986); *Abood v Detroit Board of Education*, 431 U.S.209, 234-35 n.31 (1977); *Everson v. Board of Education*, 330 U.S. 1, 13 (1947)). Jefferson went on to note "[t]hat even forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." Jefferson, Religious Freedom, *supra* at 77.

Although these statements were made in the context of compelled religious assessments, this Court has noted their applicability to compelled subsidies of private political speech as well. *Janus*, 138 S. Ct. at 2464. These same principles can be applied to compelled financial support of court-endorsed *cy pres* recipients. The Petitioners in this case objected to the recipients of the *cy pres* award because "[t]he AARP takes political positions opposed by many class members, including" Petitioners. Pet. App. 131. Requiring Petitioners to give their settlement funds to AARP to engage in advocacy with which Petitioners disagree violates their First Amendment rights. *Janus*, 138 S. Ct. at 2464. Accomplishing the same thing by way of a *cy-pres*-only settlement does not obviate the First Amendment violation.

CONCLUSION

This Court should rule that federal district courts have no power under Article III to approve class settlements that do not redress the injury claimed in the complaint and that redirect funds away from the allegedly injured members of the class to advocacy groups with which some class members may disagree. The decision of the Ninth Circuit below should be reversed.

July 2018

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No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK, ET AL., PETITIONERS

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CENTER FOR DEMOCRACY AND TECHNOLOGY, THE ELECTRONIC FRONTIER FOUNDATION, AND THE NATIONAL CONSUMERS LEAGUE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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ON WRIT OF CERTIORARI
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INTEREST OF AMICI CURIAE[1]

The Center for Democracy and Technology (CDT) is a non-profit public interest organization focused on protecting privacy and other civil liberties. For almost 25 years, CDT has represented the public's interest in an open, decentralized internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT's team is comprised of experts with deep knowledge of issues pertaining to the internet, privacy, security, technology, and intellectual property, with backgrounds in academia, private enterprise, government, and nonprofits. This diversity of experience allows CDT to

[1] All parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

translate complex policy into action: CDT convenes stakeholders across the policy spectrum, advocates before legislatures and regulatory agencies, and helps educate courts. CDT has regularly received *cy pres* awards that it has used to advance the public's privacy interests.

The Electronic Frontier Foundation (EFF) is a member-supported, non-profit organization that works to protect civil liberties and human rights in the digital world. Through impact litigation, direct advocacy, and technology development, EFF's team of attorneys, activists, and technologists encourage and challenge industry, government, and courts to support privacy, free speech, and innovation in the information society. Founded in 1990, EFF has nearly 40,000 dues-paying members. EFF regularly receives *cy pres* funding that has been used to advance the privacy interests of technology users.

The National Consumers League (NCL), founded in 1899, is the nation's oldest consumer organization. NCL has a long history of fighting for the public interest on a variety of issues. In support of its mission, NCL routinely advocates for privacy reform through petitions to federal agencies, promotion of consumer privacy legislation, and litigation. NCL is a vocal advocate for consumer privacy rights, and NCL's work in the privacy realm is aimed at ensuring that consumers are educated on their rights and encouraged to be vigilant in insisting that their personal privacy is protected. Through its website, NCL also provides updates on recent, verified data breaches, provides ongoing one-on-one fraud counseling through Fraud.org, and keeps consumers abreast of the latest scams and phishing tactics through their

monthly fraud alerts. NCL has received critically important *cy pres* awards that are used to further consumer rights and protections in privacy, data security, and consumer education.

SUMMARY OF THE ARGUMENT

In class action lawsuits, *cy pres* awards ensure that funds that would be impractical to distribute to individual class members are nevertheless used to benefit the class.[2] The policy behind the *cy pres* doctrine is to aggregate *de minimis* payments that otherwise would be economically or administratively infeasible to distribute to class members—particularly in the privacy context—into a charitable contribution that will ultimately have a much greater impact on all class members. The wide variety of organizations that receive *cy pres* awards—including CDT, EFF, and NCL—use these funds to pursue causes that directly benefit class members' interests related to the subject of the lawsuit. *Cy pres* awards constitute an important source of funding for these charitable organizations, and make possible many initiatives benefiting class members.

Cy pres awards are not—as petitioners claim—unfettered windfalls to recipients unrelated to the interests of the class. Rather, beneficiaries are chosen based on their demonstrated policy goals aligning with the interests of the class (such as, in the privacy context, preventing future privacy abuses), their prior accomplishments and charitable initiatives in the pertinent policy

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[2] "Cy pres" is a Norman French term that translates to "so close" or "as near as possible." *Nachshin* v. *AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

area, and detailed proposal submissions when requested by courts or counsel.

CDT, EFF, and NCL (collectively, "amici"), which regularly receive *cy pres* awards in privacy class actions, respectfully submit this brief to provide information about how appropriately designated *cy pres* recipients have used and will continue to use *cy pres* awards to provide tangible benefits to class members in privacy lawsuits. The Court should decline to impose restrictions on *cy pres* awards to organizations that further the interests of class members related to the claims at issue in the lawsuit, and the judgment of the court of appeals should be affirmed.

ARGUMENT

I. THE *CY PRES* DOCTRINE ENSURES THAT AWARDS BENEFIT CLASS MEMBERS BY AGGREGATING WHAT WOULD OTHERWISE BE COST-PROHIBITIVE *DE MINIMIS* INDIVIDUAL PAYMENTS

A. Class Action Awards Are Often Infeasible To Distribute Directly To Class Members—Particularly In The Privacy Context

The *cy pres* doctrine ensures that monetary awards in class actions actually benefit the class by aggregating what otherwise would be impractical *de minimis* payments to a small portion of the class into an award that ultimately provides greater impact for all class members.

Cy pres awards provide an efficient mechanism for courts to distribute funds for the benefit of the class when funds are difficult or costly to distribute. The *cy*

pres doctrine is often used when it is "economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed," or if individual awards would otherwise be *de minimis*. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013); see also *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) ("Distribution of all funds to the class can be infeasible, for example, * * * when class members' individual damages—although substantial in the aggregate—are too small to justify the expense of sending recovery to individuals."). One of the first courts to apply the *cy pres* doctrine to class actions recognized that *cy pres* could provide a creative solution to the problem of *de minimis* individual awards. *Miller* v. *Steinbach*, No. 66 Civ. 356, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974) (in a shareholders' derivative suit, approving the payment of a settlement fund to a corporation's retirement plan rather than issuing a *de minimis* payment to shareholders).

Courts have applied the *cy pres* doctrine to address two challenges that are particularly salient in the privacy context: (1) the difficulty of monetizing the harm in class action lawsuits, and (2) the costs associated with identifying individual members of a large class. In the privacy context, it can be particularly difficult to attribute a definitive economic value to violations of consumers' privacy rights. See *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 639-640 (3d Cir. 2017) (describing damages for privacy torts as "a quintessential example" of when damages are difficult to measure (quoting *Pichler* v. *UNITE*, 542 F.3d 380, 399 (3d Cir. 2008))); Elizabeth J. Cabraser, *The Class Abides:*

Class Actions and the "Roberts Court," 48 Akron L. Rev. 757, 796 (2015) ("Where class members' privacy rights have allegedly been violated, the right to privacy may be priceless, but is difficult to monetize."). Class action lawsuits—particularly privacy lawsuits against large technology platforms—can involve defendants that have engaged in widespread misconduct that causes significant but difficult-to-measure economic damages to millions of individual class members, often resulting in *de minimis* settlement amounts for each class member despite the significant harm caused. See *Nachshin* v. *AOL, LLC*, 663 F.3d 1034, 1037 (9th Cir. 2011) (distribution of $2 million to approximately 66 million AOL subscribers would be "cost-prohibitive"). This problem of *de minimis* individual awards is exacerbated by the transaction costs associated with notifying a large number of individual class members and distributing their awards—costs that can easily exceed the amount to be distributed. See *In re Pharma. Industry*, 588 F.3d at 34; *Baby Prods.*, 708 F.3d at 169; Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 102-104 (2014). *Cy pres* awards address both of these problems by aggregating what would otherwise be impractical *de minimis* payments to a small portion of the class.

B. By Aggregating These Otherwise *De Minimis* Payments, *Cy Pres* Awards Create A Greater Positive Impact For All Class Members

The collective impact of a *cy pres* award creates greater value for class members than the *de minimis* individual awards distributed to class members. Both as a group and individually, class members often benefit

more from *cy pres* awards to organizations that further their interests than they would from receiving a *de minimis* payment of a small percentage of the award. Awarding funds to an organization that furthers the interests of the class also impacts *all* class members—not just the relatively few who would actually receive and cash their checks. Indeed, as petitioners (Br. 44-45) admit, their proposed distributions in this case would likely ultimately provide small payments to fewer than one percent of the class members.

Judge Posner articulated the value of the collective impact of a *cy pres* award in *Hughes* v. *Kore of Indiana Enterprise, Inc.*: "A foundation that receives $10,000 can use the money to do something to minimize violations of the [relevant statute]; as a practical matter, class members each given $3.57 cannot." 731 F.3d 672, 676 (7th Cir. 2013). Judge Posner found that "the award of damages to the class members would have no greater deterrent effect than the *cy pres* remedy, would do less for consumer protection than if the money is given to a consumer protection charity, and would impose a significant administrative expense that handing the $10,000 over to a single institution would avoid." *Id.* at 678.

Furthermore, *cy pres* awards benefit *all* class members—not just the small percentage of the class that would actually collect their *de minimis* distributions. Charitable organizations receiving *cy pres* awards can "more closely tailor the distribution to the interests of class members, including those absent members who have not received individual distributions." *Baby Prods.*, 708 F.3d at 172; see also *Hughes*, 731 F.3d at 676.

While *cy pres* benefits *all* class members, petitioners' proposed solutions—a lottery or claims-made system—would benefit an even smaller portion of the class than typically benefits in class actions. See Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* § 8.1 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (finding an average claims rate of 21% and median of 8% in 105 consumer financial class action settlements requiring claims to be made). In petitioners' proposed systems, less than one percent of class members would actually receive funds—and even when limiting distribution to this sliver of the class, each claimant in a claims-made system would still receive only $7. See Pet. Br. 44-45. By contrast, *cy pres* awards to nonprofit organizations working in the space benefit the entire class by directing funds to support projects that further the interests at issue in the underlying litigation.

In addition to increasing the utility of the award and the number of class members who benefit, *cy pres* awards create an even greater deterrent effect than an award distributed to class members by (1) ensuring that unclaimed funds do not revert to the defendant, and (2) diverting funds to charitable organizations that are actively working to prevent the type of harm that led to the lawsuit. *Baby Prods.*, 708 F.3d at 172; *Hughes*, 731 F.3d at 676.

In sum, the policy behind *cy pres* awards is to create greater positive impact for all class members rather than merely giving small payouts to a fraction of the class—and, consistent with this policy, *cy pres* awards

do, in fact, make such an impact for class members in privacy actions.

II. Consistent With The Policy Behind The Doctrine, *Cy Pres* Awards Benefit Class Members In Privacy Actions

A. *Cy Pres* Recipients Regularly Engage In Advocacy Work That Benefits Class Members

Where direct awards are infeasible, well-structured and properly vetted *cy pres* awards have consistently provided an effective way to channel benefits that directly relate to the underlying lawsuit to the entire class—including absent class members. Organizations that receive *cy pres* awards, including amici, are engaged in meaningful advocacy on privacy issues benefiting class members such as those in this litigation.

Amici receive *cy pres* awards in cases involving significant privacy interests precisely because such interests are fully aligned with the organizations' policy goals and work. For example, amici received *cy pres* awards in settlements of cases involving claims that companies had unlawfully disclosed user information, implemented inadequate data security practices and misrepresented privacy practices to consumers, retained and disclosed the content viewing histories of consumers, and misappropriated the names and likenesses of users to promote products and services. See *In re Google Buzz Privacy Litig.*, No. 10-00672, 2011 WL 7460099 (N.D. Cal. June 2, 2011) (awards to CDT and EFF); *In re Ashley Madison Customer Data Sec. Breach Litig.*, No. 4:15-md-02669 (E.D. Mo. Nov. 20, 2017) (awards to EFF and NCL); *In re Netflix Privacy Litig.*, No. 5:11-cv-00379, 2013 WL

1120801 (N.D. Cal. Mar. 18, 2013) (awards to CDT and EFF); *Fraley* v. *Facebook, Inc.*, 966 F. Supp. 2d 939 (N.D. Cal. 2013) (awards to CDT and EFF), cert. denied, 137 S. Ct. 68 (2016).

Amici have used *cy pres* awards from such cases to advocate for consumers' privacy. While *cy pres* awards vary by year and these organizations do not budget for *cy pres*, *cy pres* funds made up approximately 23 percent of EFF's income in 2015 and 10 percent of EFF's income in 2016, 17 percent of CDT's revenue in 2017, and around 14 percent of NCL's income in 2017—in some years, accounting for nearly 80 percent of NCL's budget. See EFF, *2015 Annual Report* 32, https://www.eff.org/files/annual-report/2015/index.html; EFF, *2016 Annual Report* 45, https://www.eff.org/files/annual-report/2016/index.html; Financials, CDT.org, https://cdt.org/financials/. *Cy pres* funds provide critical support that enables these organizations to undertake consumer privacy-focused efforts that otherwise would not be possible.

For example, EFF has a dedicated team of technologists who build free software tools to help individuals protect their privacy online. See Tools from EFF's Tech Team, EFF.org, https://www.eff.org/pages/tools. EFF's "Privacy Badger" is a browser add-on that stops advertisers and other third-party trackers from secretly tracking where a user goes on the web. See Privacy Badger, EFF.org, https://www.eff.org/privacybadger. EFF's "HTTPS Everywhere" is a browser extension that encrypts communications with many major websites, making browsing more secure. See HTTPS Everywhere, EFF.org, https://www.eff.org/https-everywhere. EFF has also provided how-to guides to help users

adjust their privacy settings to better protect personal data on popular online platforms like Facebook, Twitter, and YouTube. See, *e.g.*, Gennie Gebhart, *How to Change Your Facebook Settings to Opt Out of Platform API Sharing*, EFF.org (Mar. 19, 2018).

NCL used *cy pres* funds it received from the AshleyMadison.com settlement to fund its Fraud.org and #DataInsecurity Project. See NCL, *The Consumer Data Insecurity Report: Examining the Data Breach—Identity Fraud Paradigm in Four Major Metropolitan Areas* (June 2014), http://www.nclnet.org/datainsecurity_report; Fraud.org, a project of the National Consumers League, www.fraud.org. Fraud.org educates consumers on actions to take in the aftermath of a data breach to protect themselves, includes a "latest breaches" section to keep consumers up to date on verified data breaches, and provides one-on-one fraud counseling. NCL also works to keep consumers abreast of the latest scams and phishing tactics through its monthly fraud alerts. In related work, CDT builds tools like online quizzes designed to educate consumers about how to protect their privacy rights. See, *e.g.*, CDT Quiz, Online Security While Traveling, https://cdt.org/bits/cdt-quiz-online-security-while-traveling/.

Amici have also advocated for stronger consumer privacy protections before administrative bodies. For example, in 2016, amici all submitted comments urging the Federal Communications Commission (FCC) to adopt a broad view of the types of data protected by its consumer privacy rules, helping to shape the FCC's technical understanding of how internet service providers access customer information. Comments of the Center for Democracy and Technology, *In re Protecting the*

Privacy of Customers of Broadband & Other Telecomm. (F.T.C. May 27, 2016) (No. 16-106), https://ecfsapi.fcc.gov/file/60002079430.pdf; Comments of the Electronic Frontier Foundation, *In re Protecting the Privacy of Customers of Broadband & Other Telecomm.* (F.T.C. May 27, 2016) (No. 16-106), https://ecfsapi.fcc.gov/file/60002081036.pdf; Comments of the National Consumers League, *In re Protecting the Privacy of Customers of Broadband & Other Telecomm.* (May 27, 2016) (No. 16-106), https://ecfsapi.fcc.gov/file/60002078689.pdf. As another example, in 2015, CDT provided comments to the National Telecommunications and Information Administration advocating for the adoption of Fair Information Practice Principles to limit the collection, analysis, and retention of data gathered by Unmanned Aircraft Systems (*i.e.*, drones) in order to protect individuals' privacy. CDT Comments to NTIA on "Privacy, Transparency, and Accountability Regarding Commercial and Private Use of Unmanned Aircraft Systems" (Apr. 20, 2015), https://www.ntia.doc.gov/files/ntia/cdt_04202015.pdf.

Amici also advocate for consumer privacy in the context of regulatory enforcement. For example, in 2017, CDT submitted a complaint to the Federal Trade Commission (FTC) alleging that the data handling practices of a virtual private network (VPN) provider conflicted with statements the provider had made to consumers. Complaint, *In the Matter of AnchorFree, Inc. Hotspot Shield VPN* (F.T.C. Aug. 7, 2017). Following up on this work, in February 2018, CDT announced a new initiative to create best practices and guidelines for protecting user information transmitted through VPNs. Joseph Jerome, *CDT Launching Effort to Improve Trust in*

VPNs, CDT.org (Feb. 14, 2018). EFF has also submitted comments to the FTC, for example, expressing consumer privacy and security concerns arising from Vehicle-to-Vehicle communications systems. See Comments of EFF to the FTC and NHTSA on Connected Cars Workshop and P175403 (May 1, 2017), https://www.ftc.gov/system/files/documents/public_comments/2017/05/00044-140639.pdf. Similarly, NCL submitted comments to the FTC earlier this year regarding consumer protection issues in communication, information, and media technology networks. Comments of the NCL to the FTC regarding Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201 (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0049-d-1664-155200.pdf.

Amici also regularly advocate for consumers' privacy interests before legislative bodies. As early as two decades ago, CDT urged the adoption of a national privacy policy that would help protect the privacy of consumers online. *Children's Online Privacy Protection Act of 1998: Hearing on S. 2326 Before the S. Subcomm. on Communications*, 105th Cong., 2d Sess. (1998) (testimony of Deirdre Mulligan, Staff Counsel, CDT). More recently, CDT has urged the Senate to update existing laws and enact stronger protections for data (such as location data) on mobile devices. *Protecting Mobile Privacy: Your Smartphones, Tablets, Cell Phones and Your Privacy: Hearing before the Subcommittee on Privacy, Tech. and the Law*, 112th Cong., 1st Sess. 23 (2011) (statement of Justin Brookman, Director, Project on Consumer Privacy, CDT). CDT has also testified before Senate committees regarding the need for strong data

privacy and security for Internet-of-Things devices, and regarding the importance of Do-Not-Track standards that can limit or control consumers' exposure to online behavioral advertising. *The Connected World: Examining the Internet of Things: Hearing before the Comm. on Commerce, Sci., & Transp.*, 114th Cong., 1st Sess. 116 (2015) (statement of Justin Brookman, Director, Project on Consumer Privacy, CDT); *A Status Update on the Development of Voluntary Do-Not-Track Standards: Hearing before the Comm. on Commerce, Sci., & Transp.*, 113th Cong., 1st Sess. 24 (2013) (statement of Justin Brookman, Director, Consumer Privacy, CDT). Similarly, in 2014, NCL testified before a Senate subcommittee, urging passage of a bill that would provide stronger protections for consumers' location data. *The Location Privacy Protection Act of 2014: Hearing Before the Subcommittee on Privacy, Tech., and the Law*, 113 Cong., 2d Sess. 21 (2014) (statement of Sally Greenberg, Executive Director, NCL).

EFF has also been involved in debates over consumer privacy and security in Congress and has worked to educate lawmakers and their staff on consumer privacy issues. For example, earlier this year EFF held a briefing in the Capitol on the technical realities of device encryption, privacy, and security. Andrew Crocker & Nate Cardozo, *Bring in the Nerds: EFF Introduces Actual Encryption Experts to U.S. Senate Staff*, EFF.org (May 3, 2018). EFF also joined many other consumer groups in criticizing major privacy legislation in Congress in 2011. Rainey Reitman, *Well-Meaning 'Privacy Bill of Rights' Wouldn't Stop Online Tracking*, EFF.org (Apr. 14, 2011).

EFF—which is based in San Francisco—is also an active advocate of consumer privacy issues at the state level, and has pursued strong consumer privacy protections before the California legislature. See, *e.g.*, Susan Freiwald, *At the Privacy Vanguard: California's Electronic Communications Privacy Act (CalECPA)*, 33 Berkeley Tech. LJ. 137, 139, 150 (2018) (describing EFF's role as a co-sponsor of the CalECPA, "the most privacy-protective legislation of its kind in the nation"); Letter from Amul Kalia, Analyst, EFF to Sen. Jerry Hill (Mar. 30, 2018), https://www.eff.org/files/2018/04/24/sb_823_supportletter_final_.pdf (encouraging passage of S.B. 823, which allows Californians to place and remove credit freezes at no charge).

CDT regularly authors white-papers promoting consumer privacy, which benefit class members in privacy lawsuits by advocating for stronger privacy rights and providing guidance to policy makers and other stakeholders. In one such white-paper, for example, CDT detailed the ways in which current legal frameworks are insufficient to protect privacy in the workplace, and made suggestions for mitigating workplace privacy risks. Ali Lange et al., *Workplace Privacy: State Legislation & Future Technology Questions*, CDT.org (June 1, 2016), https://cdt.org/files/2016/06/CDTWorkplacePrivacyWhitePaper-Final.pdf. In another white-paper, CDT advocated for updating federal privacy laws and for enacting regulations regarding the data use and sharing practices of educational technology providers. CDT, *Privacy and the Digital Student* (May 2015), https://cdt.org/files/2015/06/Student-Privacy-White-Paper-v.-9_1.pdf.

EFF has also actively advocated for strong student privacy protections and greater awareness by educators about how private companies collect and use student data. EFF submitted a complaint to the FTC regarding the practices of Google's online education services, and submitted comments to the FTC regarding the privacy implication of educational technology. See Complaint and Request for Investigation, Injunction, and Other Relief, *Electronic Frontier Found.* v. *Google, Inc.* (F.T.C. Dec. 1, 2015); Letter from Nate Cardozo, Sophia Cope, Staff Attorneys, EFF to the FTC (Nov. 17, 2017), https://www.ftc.gov/system/files/documents/public_comments/2017/11/00034-141966.pdf.

Amici also regularly file briefs arguing for strong privacy protections for individuals, often in conjunction with other privacy advocates. For example, amici have filed a number of briefs before this Court advocating for individual privacy. See, *e.g.*, CDT Amicus Br., *Carpenter* v. *United States*, 138 S. Ct. 2206 (2017) (No. 16-402) (arguing that warrants should be required to search cell phones for location data); CDT Amici Br., *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2015) (No. 13-1339) (arguing in favor of a private right of action under the Fair Credit Reporting Act so consumers can seek redress when harmed); CDT Amici Br., *Riley* v. *California*, 2014 WL 950808 (2014) (Nos. 13-132, 13-212) (arguing for a narrow application of the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement); CDT Amici Br., *United States* v. *Jones*, 565 U.S. 400 (2011) (No. 10-1259) (highlighting the differences between GPS-based surveillance and standard techniques, in support of stronger privacy protections).

With their consistent advocacy for stringent protections for individuals' privacy, amici have pursued interests closely aligned with those of the class members in the cases in which they have received *cy pres* awards. *E.g.*, *Ashley Madison*, No. 4:15-md-02669 (settlement of claims regarding inadequate security measures and misrepresentation of privacy practices); *Google Buzz Privacy Litig.*, 2011 WL 7460099 (settlement of claims regarding allegedly unlawful disclosure of consumers' personal information); see also pp. 9-10, *supra* (summarizing cases in which amici have received *cy pres* awards). Many of amici's privacy initiatives are made possible by *cy pres* awards, which fund projects both directly and indirectly as significant portions of amici's operating budgets. See p. 10, *supra*. These examples illustrate not only the benefits that privacy organizations provide to consumers, but also the alignment between the specific interests of class members and the work of these organizations.

B. *Cy Pres* Awards Further The Interests Of The Class, Not The Defendant

Petitioners, and certain amicus briefs supporting petitioners, contend that *cy pres* awards benefit class action defendants instead of class members, allowing defendants to exert influence over their selected recipients. These claims are unfounded and demonstrate a misunderstanding of how these advocacy organizations operate.

1. Courts Can Ensure that *Cy Pres* Awards Promote the Interests of the Class

First, *cy pres* awards are often limited by statute or case law to ensure that they actually further the interests of the class. While petitioners (Br. 28) contend that *cy pres* awards are "prone to abuse" and used to promote the interests of defendants or counsel rather than the class, courts can and have implemented measures to ensure that *cy pres* awards benefit class members. For example, in the Ninth Circuit, *cy pres* award recipients must have a close nexus to the nature of the lawsuit and the interests of the silent class members. See *Dennis* v. *Kellogg Co.*, 697 F.3d 858, 865 (2012) (requiring that *cy pres* awards be "guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members, and must not benefit a group too remote from the plaintiff class" (citation omitted)); see also *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33-34 (1st Cir.) (*cy pres* distributions should "reasonably approximate the interests of the class members," and collecting cases), cert. denied, 568 U.S. 932 (2012). Courts can and do police failures to comport with these requirements. See, *e.g.*, *Nachshin*, 663 F.3d at 1040-1041 (remanding for selection of appropriate charities where none of the original *cy pres* recipients had "anything to do" with the underlying claims). Further, *cy pres* awards may be predicated on the submission of detailed proposals, and *cy pres* recipients may be required to agree to conditions that ensure that a *cy pres* award will be used to benefit the class. See, *e.g.*, *Netflix Privacy Litig.*, 2013 WL 1120801, at *2 (describing how *cy pres* funds are to be distributed to organizations for certain purposes, and noting that the parties "have selected

twenty such organizations which will 'spend the funds solely on privacy protection and education efforts'" (citation omitted)); *In re Lupron Mktg. & Sales Practices Litig.*, 729 F. Supp. 2d 492, 494-497 (D. Mass. 2010) (awarding *cy pres* funds to a recipient after considering two competing proposals for the use of the funds). Indeed, such an approach was taken in this case. As the Ninth Circuit recognized, the district court in this case carefully reviewed the recipients' "detailed proposals."[3] Pet. App. 16.

2. Defendants Have No Control over Projects Supported by *Cy Pres* Awards

The mere existence of a relationship between a defendant or class counsel and a *cy pres* recipient does not render a *cy pres* award inappropriate, or undermine the award's benefits for class members. Although amici have received *cy pres* funds from defendants that have also voluntarily donated to these organizations, amici do not receive these awards because of a relationship with defendants. Rather, these awards result from a court finding alignment between the privacy interests at issue in a case and the work of the recipient organization. In fact, independent of any relationships between amici and the defendants, amici have often been suggested as *cy pres* recipients by *plaintiff's* counsel, who recognize that amici are effective leaders in the public policy areas of privacy and consumer protection. Similarly, the existence of a relationship between defense counsel and a *cy pres* recipient does not suggest an attempt to self-deal or steer contributions. Counsel practicing in an area of

[3] For the full text of each proposal, see Class Respondents App. 9a-223a.

law related to the work of these charitable organizations—especially in an emerging area of law like online privacy—may be limited in number.

Furthermore, the mere fact that a *cy pres* recipient shares certain viewpoints with a settling defendant does not undermine a *cy pres* award's benefit to class members. The Lowery amici's claim (Br. 9) that "the Berkman Center, the Center for Democracy and Technology, and Stanford's Center for Internet and Society are also consistent opponents of artists' rights and supporters of Google's interests," ignores the fact that, in the vast realm of internet-related advocacy, consumer-oriented organizations can align with large technology firms in some areas, such as protecting free expression and an open internet, and diverge from those firms in other areas, such as on some privacy issues.[4]

Donations to amici are also subject to gift acceptance policies that prohibit influence or control over the organizations' projects and priorities. See CDT, *Gift Acceptance Policies* (June 2016), https://cdt.org/files/2016/07/CDT-Gift-Acceptance-Policies.pdf. Companies like Google have donated to amici even during years in which amici have publicly criticized their practices. Moreover, none of this is done in secret. Amici accept funds from a variety of sources and are transparent

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[4] Although the Lowery amici argue that their interests are somehow harmed by the court's *cy pres* award as a result of the *cy pres* recipients' work ensuring that copyright does not undermine free expression, the Lowery amici do in fact benefit from the *cy pres* recipients' work in the privacy space—which is the subject of this lawsuit.

about funding. All amici release their financials and annual audits on their websites. See Financials, CDT.org, https://cdt.org/financials/; Financials, NCL.net http://www.nclnet.org/financials; Annual Reports & Financial Information, EFF.org, https://www.eff.org/about/annual-reports-and-financials.[5]

Further demonstrating the independence of *cy pres* recipients from class action defendants, recipients of *cy pres* awards have not hesitated to oppose the practices of defendants from which they have received *cy pres* awards—in the press, in the courts, and before administrative bodies. For example, as mentioned on p. 16, *supra*, EFF filed a complaint with the FTC alleging that Google's "Google for Education" online service violated Google's commitments in the Student Privacy Pledge and Google's representations about its handling of student data. Complaint, *Electronic Frontier Found.*, *supra*. Recently, EFF criticized Google's "Confidential Mode" feature in Gmail, alleging that its name was misleading and claiming that there were privacy and security risks associated with Gmail. Gennie Gebhart & Cory

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[5] CDT raises its annual operating funds from a variety of sources, most notably foundations, corporations, individuals, and *cy pres* awards. All of CDT and NCL's donors over $1,000 are publicly disclosed on their websites. Financials, CDT.org, https://cdt.org/financials/; NCL, *2017 Annual Report*, http://www.nclnet.org/annual_report.

Furthermore, in 2016, EFF received over half of its annual income from individual donors, with the rest coming from a variety of sources including foundations, companies, and *cy pres*. In 2018, EFF has approximately 40,000 members who pay regular dues. See EFF, *2016 Annual Report*, https://www.eff.org/files/annual-report/2016/index.html.

Doctorow, *Between You, Me, and Google: Problems with Gmail's "Confidential Mode,"* EFF.org (July 20, 2018).

As another example, in 2009, both CDT and EFF challenged Google's proposed settlement in *Authors Guild* v. *Google*, a copyright class action, on the grounds that the settlement would inadequately protect the privacy rights of readers of digital books. See 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (denying final approval of the settlement agreement). CDT filed an amicus brief in that case, raising its concerns that the settlement agreement gave Google "a massive centralized repository * * * of information about how people access and read books online" without including adequate privacy commitments from Google regarding its handling of such data. CDT Amicus Br., *Authors Guild*, *supra* (No. 05-8136). CDT urged the district court to include in any approval of the settlement court-ordered mandates requiring Google to protect the privacy of readers. *Ibid.* In the same case, EFF served as counsel to objecting privacy authors and publishers within the class, who urged the district court to deny approval of the settlement agreement because it "include[d] no limitations on collection and use of reader information and no privacy standards for retention, modification, deletion or disclosure of that information to third parties or the government." Privacy Authors and Publishers' Objection to Proposed Settlement, *Authors Guild*, *supra* (No. 05-8136).

As these examples demonstrate, *cy pres* is not a *quid pro quo* between settling defendants and charitable organizations. These organizations' projects and positions are based solely on their own policies and views, regardless of the viewpoints of donors—or defendants from whom they receive *cy pres* awards. *Cy*

pres recipients are not chosen for the benefit of defendants, but rather are selected based on their core values, track records of successful advocacy, and ability to use *cy pres* funds to positively impact members of the class.

CONCLUSION

The Court should decline to impose restrictions on *cy pres* awards to organizations that further the interests of class members related to the claims at issue in the lawsuit. The categorical remedy petitioners seek would undermine the important work of organizations receiving awards in furthering consumers' privacy interests, instead mandating impractical or infeasible distributions of *de minimis* sums to class members who would actually benefit more by the application of the *cy pres* doctrine. For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 2018

No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CENTER FOR INDIVIDUAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

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INTEREST OF THE *AMICUS CURIAE*[1]

The Center for Individual Rights ("CIR") is a public interest law firm. It has represented parties in numerous cases concerning issues related to the First Amendment, including *Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016), *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002). It has also represented *amici* and submitted *amicus* briefs in cases involving important First Amendment issues, including *Janus v. Am. Fed'n of State, County, & Mun. Employees Council 31*, 138 S. Ct. 2448 (2018).

CIR believes that the Ninth Circuit's practice of approving *cy pres* settlement agreements in class action litigation in which the proceeds are awarded to third parties implicates the First Amendment rights of class members because such settlements compel class members to subsidize speech. CIR submits this *amicus* brief to point out the constitutional infirmity of such settlements and to urge the Court to reverse the Ninth Circuit's judgment.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. All parties have consented in writing to this filing.

SUMMARY OF ARGUMENT

Money awarded pursuant to a class action settlement belongs to the class members. Thus, when a court permits a *cy pres* award to third parties, it is endorsing a transfer of value from the class members to the third parties; in this case, charities chosen by class counsel and the defendants. The *cy pres* funds may then be used to engage in speech or political activity with which class members may very well disagree, in violation of their First Amendment rights.

An affirmative opt-out requirement for class members is not carefully tailored to minimize the infringement of free speech rights and does not satisfy the requirements of the First Amendment. To the contrary, class members are required to bear the entire burden of complying with the opt-out procedure or risk subsidizing speech with which they disagree. The desires of class counsel and defendants to settle cases expediently and cheaply do not qualify as compelling interests sufficient to justify this infringement.

ARGUMENT

I. USE OF *CY PRES* AWARDS IN CLASS ACTION SETTLEMENTS COMPELS CLASS MEMBERS TO SUPPORT SPEECH WITH WHICH THEY MAY DISAGREE

All damages awarded upon settlement of a class action belong to the class members. *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). When the court permits a *cy pres* award, therefore, it is ratifying a mandatory transfer of value from class members to a third party. That third party can then use the funds provided by the settlement agreement to pursue goals, including (understandably) by engaging in various forms of speech. In effect, when it permits a *cy pres* award in a class action, the court forces class members to support groups with whose views class members may disagree. *See Knox v. SEIU*, 567 U.S. 298, 309 (2012) ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups."). Here, petitioners objected to being forced to subsidize the AARP's advocacy and lobbying on controversial issues related to privacy. Pet. Br. 12.

This court has held "time and again," that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, County, & Mun. Employees Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977)). *See also Riley* v. *National Fed'n of Blind of N. C., Inc.*, 487 U. S. 781, 796-97 (1988); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 256–57

(1974); accord, *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n of Cal.*, 475 U. S. 1, 9 (1986) (plurality opinion). As this Court recently reiterated in *Janus*: "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and *in most contexts*, any such effort would be universally condemned." *Janus*, 138 S. Ct. at 2463 (emphasis added). And this concept is not new; rather, this Court has often quoted Thomas Jefferson's view that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." *Keller v. State Bar*, 496 U.S. 1, 10 (1990) (quoting I. Brant, James Madison: The Nationalist 354 (1948)). *See also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 n.15 (1986); *Everson v. Board of Education*, 330 U.S. 1, 13 (1947).

As this Court recognized, a law "[f]orcing free and independent individuals to endorse ideas they find objectionable is *always demeaning*. . . . and would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943)) (emphasis added).

Here, the court below awarded *cy pres* funds to Harvard Law School, Stanford Law School, the MacArthur Foundation, and AARP, Inc. The only conditions attached were that the recipients agree to "devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." Pet. App. at 84. The settlement agreement does not otherwise limit the use of the *cy pres* funds, or even define "initiatives." Nor is there any sort of continuing

supervision on the use of funds after they are distributed to the recipients. Under the settlement agreement approved here, an "initiative" could be virtually anything and it could take place many years from now.

Thus, the AARP (or any other recipient) might support an initiative relating to internet privacy which makes internet use marginally more difficult or costly. Under the settlement agreement, AARP could use *cy pres* funds to lobby Congress or state legislatures for that initiative.[2] Should AARP use *cy pres* funds to support a similar initiative in the future, a class member is left completely without recourse.

This type of *cy pres* award raises serious First Amendment problems because the Court has held that the government "may not . . . compel the endorsement of ideas that it approves." *Knox*, 132 S. Ct. at 2288. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). "Because the compelled

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[2] This concern is not imaginary. For several years, AARP has lobbied Congress and the F.C.C. in favor of net neutrality, a fairly controversial set of rules regulating internet service providers, with which many disagree. *See* Neil Walters, *The Importance of the Internet to Older Americans*, AARP Public Policy Institute (Oct. 2, 2017), https://www.aarp.org/ppi/info-2017/importance-of-an-open-internet-to-older-americans.html; Anne Broache, *Push for Net Neutrality Mandate Grows*, CNet (March 30, 2006), https://www.cnet.com/uk/news/push-for-net-neutrality-mandate-grows/. While "net neutrality" may not itself be an issue involving internet privacy, the AARP's activities on that topic demonstrate that it does not shy away from controversial political issues. And given that money is fungible, the funding of any privacy "initiatives" will leave more available for overtly political efforts even if the privacy initiatives would not be so characterized.

subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed." *Janus*, 138 S. Ct. at 2464.

The Court has approved a narrow class of compelled speech which might not violate the First Amendment—compelled contributions to a trade or professional association pursuant to a comprehensive regulatory scheme. *Id.* But even then, mandatory contributions are only permitted "insofar as [it is] a necessary incident of the larger regulatory purpose which justified the required association." *Knox*, 567 U.S. at 310 (internal quotation marks omitted).

Forced subsidies to charities resulting from *cy pres* awards in class action settlements are not incident to a comprehensive regulatory scheme. Class actions are governed by Rule 23 along with numerous state and federal laws governing the underlying claims in the litigation, not a single comprehensive regulatory scheme covering a discrete subject matter.

II. REQUIRING CLASS MEMBERS TO AFFIRMATIVELY OPT OUT VIOLATES THE FIRST AMENDMENT

This Court recently held that opt-out systems are unconstitutional in the context of compulsory union subsidies imposed upon government employees. *Janus*, 138 S. Ct. at 2486. In *Janus*, Illinois law permitted an employer to automatically deduct union agency fees from non-members' wages, without first obtaining any form of employee consent. Previously in *Knox*, the Court cast serious doubt on so-called opt-out systems

and pointed out that "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment priciples." *Knox*, 567 U.S. at 311. "Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment?" *Id.* at 312. In *Janus*, the Court came full circle and held that neither agency fees, nor any other payments to the union could be deducted without the employee's prior affirmative consent. *Janus*, 138 S. Ct. at 2486. "By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed." *Id.* In order to be valid, a waiver of First Amendment rights "must be freely given and shown by clear and convincing evidence." *Id.* (quoting *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 145 (1967)) (plurality opinion). *See also College Savings Bank* v. *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U. S. 666, 680-82 (1999) (refusing to find a constructive waiver of sovereign immunity).

The First Amendment rights at stake are identical here to those at stake with regard to compulsory union fees, and courts "do not presume acquiescence in the loss of fundamental rights." *Knox*, 567 U.S. at 312. Class members should not be forced to subsidize class counsel's or the court's preferred charities or the initiatives these charities engage in. Whether or not an opt-out mechanism is sufficient in a traditional class action, once a *cy pres* award is contemplated, particularly of the open-ended kind at issue here, the First Amendment precludes requiring members to opt out or risk supporting political activities with which they disagree.

Put simply, the requirement that a class member affirmatively object to subsidizing a charity's political or ideological activities is in no way "'carefully tailored to minimize the infringement' of free speech rights," as the First Amendment requires. *Knox*, 567 U.S. at 313 (quoting *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 (1986)).

In *Knox*, the Court reviewed the First Amendment claims of dissenting public-sector workers who were charged an "Emergency Temporary Assessment to Build a Political Fight–Back Fund." *Id.* at 304. Because "a special assessment billed for use in electoral campaigns" went beyond anything the Court had previously considered, it declined to simply rely on its prior cases' implicit approval of opt-out schemes for dissenting employees. *Id.* at 314-15. Instead, it considered the question *ab initio*.

The reasoning in *Knox* shows that opt-out schemes like the one here are constitutionally untenable because they violate dissenting class members' free speech rights. The First Amendment requires that "any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." *Id.* at 313 (quoting *Hudson*, 475 U.S. at 303). Accordingly, "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id.* at 314. *See also Janus*, 138 S. Ct. at 2465 ("a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.").

Applying these principles, the Court in *Knox* held that a public-sector union imposing a special assessment or dues increase "may not exact any funds from

nonmembers without their affirmative consent." *Knox*, 567 U.S. at 322. An opt-out scheme, the Court recognized, "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id.* at 312. Against this risk, there is simply no "justification for putting the burden on the nonmember to opt out of making such a payment." *Id.* Instead, any such risk must be borne by "the side whose constitutional rights are not at stake"—in *Knox*, the labor union. *Id.* at 321. Thus, rather than presume non-members' willingness to fund a union's political or ideological activities, the law requires their affirmative consent. After all, the courts do not presume waiver of fundamental rights. *Id.* at 312. Later in *Janus*, the Court extended this rationale to hold that no payments to unions may be deducted from employee's wages unless the employee affirmatively consents. *Janus*, 138 S. Ct. at 2486.

A fortiori, requiring class members in a *cy pres* settlement to opt out of the class or risk subsidizing some unknown "initiative" in the future cannot withstand First Amendment scrutiny. Such "initiatives" could very well include political or ideological activities with which class members may disagree. Worse, class members have no way of knowing what they will be subsidizing—unlike unions, the third parties may have no track record on which the class members could even make such a judgment. The desires of class counsel and defendants to settle the case expediently and cheaply do not qualify as a compelling interest.

Further, the defendants in the class action, meanwhile, have no freedom of speech rights at risk. (On the contrary, they along with class counsel chose the benefiting charities.) The Ninth Circuit's presumption

that these charities are entitled to a presumption of financial support is just wrong.

CONCLUSION

For the reasons given above, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF RESPONDENTS

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IN THE

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No. 17-961

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF RESPONDENTS

The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Respondents before this Court and thus urges that the decision below be affirmed.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 240 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

All of CWC's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*; and other federal employment-related laws and regulations. Collectively, CWC's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, compensation, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comport with these and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or

lawsuit. As large employers, CWC's members are particularly likely targets for broad-based class action litigation. Consequently, CWC has an ongoing, substantial interest in the issue presented in this case regarding the availability of the *cy pres* device in class action settlements, where there exists no better alternative to distribute the settlement fund.

CWC has participated in numerous cases before this Court raising important questions relating to class and collective action litigation in the federal courts. *See, e.g.*, *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

When a Google user conducts an Internet search by entering terms into the search engine, the results are displayed on a separate search results page. Pet. App. 4. Each search results page has a unique Uniform Resource Locator (URL) that includes the search terms entered by the user. *Id.* This URL, including the search terms that the user entered, is then transmitted by the user's web browser to the third-party website to which the user navigates from the search results page. *Id.*

In *In re Google Referrer Header Privacy Litig.*, three Google users filed a putative class action in the U.S. District Court for the Northern District of California, on behalf of themselves and "all persons in the United States who submitted a search query to Google" at any

time between October 25, 2006 and the date of notice to the class of certification (April 25, 2014), a class composed of approximately 129 million people, including Petitioners Theodore H. Frank and Melissa Ann Holyoak, as well as Respondent Paloma Gaos. Pet. App. 45. In essence, the plaintiffs alleged that the transmission of their search terms to third-party websites violated their privacy rights under the Stored Communications Act of 1986 and various state laws. Pet. App. 3. They did not allege that they suffered any harm as a result of the alleged violations. Pet. App. 8.

Following mediation, Google and the plaintiffs agreed to a settlement of $8.5 million, $3.2 million of which would go toward attorney's fees, administrative costs, and payments to the named plaintiffs. Pet. App. 5. Rather than divide the remaining $5.3 million among the approximately 129 million class members – which would have resulted in each individual receiving about $0.04 – the settlement divided the remaining money among six *cy pres* recipients, which would use the money to further projects related to Internet privacy. *Id.* As a condition of receiving a portion of the settlement fund, each of these organizations committed "to devote the funds to promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." *Id.* In other words, instead of distributing negligible sums to each of the class members, the parties agreed to allocate the entire settlement fund, after fees and costs, to recipients who would promote Internet privacy and therefore benefit the class members. *Id.*

The district court preliminarily approved the settlement, and certified the class for settlement purposes. Pet. App. 6. The parties gave notice to the class by,

among other things, setting up a website and issuing advertisements and press releases, which resulted in thirteen class members opting out of the settlement, and five class members filing objections. *Id.* The district court nonetheless granted final approval of the settlement, finding that the funds were non-distributable given that "sending out very small payments to millions of class members would exceed the total monetary benefit obtained by the class." Pet. App. 9.

Two of the objectors, Theodore H. Frank and Melissa Ann Holyoak, appealed the district court's approval of the settlement to the Ninth Circuit Court of Appeals. Pet. App. 6. Although the objectors did not claim that they had been personally injured, they did argue among other things that a *cy pres*-only settlement was not permissible. Pet. App. 8. Instead, the objectors said, the monetary settlement should have been divided among a small portion of the class members, either by lottery or by offering token amounts under the assumption that few class members would make claims. Pet. App. 9.

The Ninth Circuit disagreed, finding that although "direct distributions to class members are preferable," *cy pres*-only settlements "are appropriate where the settlement fund is 'non-distributable' because 'the proof of individual claims would be burdensome or distribution of damages costly.'" Pet. App. 9 (citations omitted). It agreed with the lower court that here, the settlement fund was effectively non-distributable given each class member's *de minimis* recovery amount. *Id.*

The objectors filed a petition for a writ of certiorari, which this Court granted on April 30, 2018. *Frank v. Gaos*, 138 S. Ct. 1697 (U.S. Apr. 30, 2018).

SUMMARY OF ARGUMENT

Under the Federal Rules of Civil Procedure, parties to class-based litigation are free to enter into an agreement settling the dispute, provided that they receive court approval that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). In recognition of the private, negotiated nature of such settlement agreements, courts typically will not disturb the agreement unless it is unfair, unreasonable, or inadequate. Parties therefore have a great deal of flexibility in structuring class action settlement agreements, including both the settlement amounts and the manner in which settlement funds are distributed to class members.

Distribution of the settlement fund can prove especially problematic in certain, rare scenarios. For example, occasionally a fund may be "non-distributable" because "the proof of individual claims would be burdensome or distribution of damages costly," *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (citation and internal quotations omitted), or where, as here, each class member is entitled to only a *de minimis* amount. Where a settlement fund is non-distributable, the parties are left either to proceed to litigation or agree to an alternative means of distribution. One alternative is the *cy pres* device, by which settlement funds are distributed to a third party, often a charity or foundation, which agrees to use the funds to benefit the class as a whole. Use of the *cy pres* settlement device, which has been endorsed by several courts of appeals, is appropriate where there is no better alternative for distributing the settlement funds. Thus, the *cy pres* mechanism addresses uncommon circumstances and accordingly should be the exception rather than the rule. *See In re*

Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013).

However, neither the putative rarity of *cy pres* settlements, nor the extraordinary circumstances giving rise to them, changes the fact that they only must pass muster under Rule 23(e). Although a Rule 23(e) fairness review of a *cy pres* settlement naturally involves consideration of some factors that are different from the ordinary Rule 23(e) fairness review, those factors simply offer further assurance of the settlement's fairness, in light of the uncommon circumstances at play. Given that a *cy pres* settlement need only satisfy a Rule 23(e) fairness review to be approved, such a settlement conceivably could distribute the entire settlement fund using the *cy pres* device, thus entirely foregoing direct distributions. In the end, if the proposed settlement as the parties have structured it is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e), it will pass judicial muster; if it is unfair, unreasonable, or inadequate, the court will reject it.

The Ninth Circuit ruled correctly that under certain circumstances, a class action settlement fund may be distributed by way of a *cy pres* mechanism, in lieu of making direct distributions to class members. Pet. App. 21. Respondents correctly contend that a *cy pres*-only settlement is permissible and appropriate given that only a *de minimis* direct recovery would have been available to each of the 129 million class members. Although the *cy pres* device is to be used sparingly, its mere availability is valuable to employers, as it offers the chance to resolve certain burdensome class actions before they enter costly litigation phases. *Cy pres* settlements give defendants the opportunity to credibly propose a settlement *prior* to

the certification stage, one that provides some form of recovery to class members without requiring unnecessary expenditures on class administration. In avoiding litigation, use of the *cy pres* device offers finality to both parties (and far sooner than if the device were unavailable), allowing class members to receive benefit from the settlement more quickly than they otherwise may have, and encouraging the employer to shift its focus to future compliance.

Cy pres settlements are especially well-suited for some types of class actions that employers may face, including under employment laws such as Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; and the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* To the extent that employment-based class actions give rise to sprawling classes for which "proof of individual claims would be burdensome or distribution of damages costly," *Facebook*, 696 F.3d at 819 (citation and internal quotations omitted), the availability of the *cy pres* device gives employers a chance to resolve disputes while avoiding protracted, potential bet-the-company litigation. The inclusion by federal enforcement agencies of *cy pres*-style devices in settlement agreements further underscores their utility in resolving allegations of noncompliance with employment laws.

This Court's resolution of whether parties to a class action settlement may utilize *cy pres*-only settlements will therefore impact employers' ability to resolve class-based employment disputes in a fair, efficient, and cost-effective manner.

ARGUMENT

I. THE *CY PRES* DEVICE IS A VALID MEANS OF RESOLVING CLASS-BASED LITIGATION IN FEDERAL COURT

The Federal Rules of Civil Procedure permit "[o]ne or more members of a class ... [to] sue or be sued as representative parties on behalf of all members," provided that the class meets certain criteria and has been certified by the court. Fed. R. Civ. P. 23(a). Nevertheless, the class action device remains "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation and internal quotations omitted).

A. *Cy Pres* Settlements Are Permissible Under The Federal Rules Of Civil Procedure

Once a class is certified, the parties may not enter into a binding settlement agreement without court approval that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) (noting that "Rule 23(e) wisely requires court approval of the terms of any settlement of a class action"), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. Nevertheless, "there are few, if any, hard-and-fast rules about what makes a settlement 'fair' or 'reasonable,'" *In re Volkswagen "Clean Diesel" Marketing Litigation*, 895 F.3d 597, 610 (9th Cir. 2018), and a Rule 23(e) review of a proposed settlement "[u]ltimately ... is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice v. Civil Serv.*

Comm'n, 688 F.2d 615, 625 (9th Cir. 1982) (citation and internal quotations omitted).

B. Parties To A Class Action Are Broadly Free To Structure A Settlement Agreement As They Wish, Provided That It Is "Fair, Reasonable, And Adequate"

As long as a proposed settlement agreement "is 'fair, adequate and free from collusion' [it] will pass judicial muster." *Volkswagen* at 610 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). Indeed, a guiding principle of a Rule 23(e) fairness review is that the court will not

> intru[de] upon what is otherwise a private consensual agreement ... [except] to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned.

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d at 625; *see also Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (finding that a Rule 23(e) fairness review determines "whether a settlement is fundamentally fair ... [which] is different from the question whether the settlement is *perfect*") (emphasis added); *Hanlon v. Chrysler Corp.*, 150 F.3d at 1027 ("[T]he question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion").

Because courts are loath to disturb a settlement of class claims unless its terms are unfair, unreasonable, or inadequate, the parties have considerable latitude in fashioning the terms of a settlement agreement in

a manner that takes into account the particular circumstances and context in which the dispute arose.

C. *Cy Pres* Settlements Offer The Best Method Of Settlement Distribution In Certain, Rare Circumstances

The flexibility class litigants possess to freely structure the terms of a settlement extends not only to the settlement *amounts*, but also to the *manner* in which those funds are distributed. Provided that the overall settlement agreement is fair, reasonable, and adequate under Rule 23(e), the parties may choose any number of formulas and methods to determine who, or what entity, should receive which portion of the settlement fund.

1. When a settlement cannot be directly distributed to class members, use of the *cy pres* mechanism is appropriate

Ideally, the proceeds from a class settlement should be distributed directly to class members, *see, e.g., Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011), in direct proportion to the actual damages suffered by each individual. However, proportional direct distribution is not always possible. In the typical class action, for instance, such calculations may be unduly complex and burdensome, given that classes usually include members with similar – but not identical – claims. *See* Fed. R. Civ. P. 23(a)(3) (requiring class members only to have claims that are "typical" as compared to the class, not identical).

In addition, as the size of a class increases, so too do the costs of proving and awarding damages. This can lead to a class action settlement fund becoming "non-distributable, [which occurs] when the proof of

individual claims would be burdensome or distribution of damages costly." *Facebook*, 696 F.3d at 819 (citation and internal quotations omitted). A settlement fund may become non-distributable "if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed," *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013), or if a large class size would result in each member receiving only *de minimis* amounts. *See, e.g., Facebook*, 696 F.3d at 825.

Where a settlement fund is not directly distributable, an alternative approach to distribution is appropriate. One such alternative that the parties may elect to use is the *cy pres* distribution, which "is a settlement structure wherein class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment." *Facebook*, 696 F.3d at 819. The *cy pres* mechanism is properly used "[w]here the only question is how to distribute the damages ...." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

Under circumstances such as these, where there is no better, alternative method of distributing a class action settlement fund, the inclusion of the *cy pres* mechanism is entirely uncontroversial: "'[C]ourts are not in disagreement that cy pres distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds.'" *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009) (quoting A. Conte & H.B. Newberg, 4 *Newberg on Class Action* § 11:20, at 28 (4th ed. 2002)).

2. In the absence of a feasible direct distribution, the other options for distributing the settlement are worse than *cy pres*

The lack of controversy surrounding use of *cy pres* settlements under the narrow circumstance of a non-distributable settlement fund can be explained by the fact that the mechanism is intended to be used only where there is *no better alternative* for disposing of the settlement fund. *See Dennis v. Kellogg*, 697 F.3d 858, 865 (9th Cir. 2012) ("[A] *cy pres* award must qualify as 'the next best distribution' to giving the funds directly to class members") (citation omitted). If a class action settlement fund cannot be directly distributed – as would be the case, for example, if class members cannot be readily identified, or if class members would each receive only *de minimis* recoveries – there in fact remains no better alternative method than *cy pres* for disposing of a settlement fund.

Two other options for distribution that are frequently identified by courts are reversion of the settlement fund to the defendant, or escheat to a governmental entity. *See, e.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d at 172. These options are less preferable than *cy pres* distribution because both deprive the class of any benefit, with one scenario (reversion) providing the settlement fund to the very entity accused of causing the harm in the first place, thus muting any potential deterrent effect on the defendant's behavior. Compared to reversion or escheat, a *cy pres* distribution at least ensures that settlement funds will be used to provide a benefit to the class as a whole. As the Third Circuit observed:

> Reversion to the defendant risks undermining the deterrent effect of class actions .... Escheat to the

> state preserves the deterrent effect of class actions, but it benefits the community at large rather than those harmed by the defendant's conduct. *Cy pres* distributions also preserve the deterrent effect, but (at least theoretically) more closely tailor the distribution to the interests of class members, including those absent members who have not received individual distributions.

In re Baby Prods. Antitrust Litig., 708 F.3d at 172.

Petitioners insist that the settlement fund must be distributed directly to individual class members in some fashion, even though the high costs of distribution relative to the size of the settlement fund render direct distribution completely infeasible and thus make this as an ideal circumstance to apply the *cy pres* mechanism. Perhaps acknowledging the absurdity (and impracticalities) of distributing approximately $0.04 to each of 129 million class members, Petitioners instead propose two options for directly distributing the settlement fund: (1) holding a lottery to determine which class members would be eligible to share in the settlement fund; or (2) promising a token recovery of $5 or $10 to all class members who make a claim, under the assumption that few class members will do so. Pet. App. 9.

Both proposals make far less sense than the *cy pres* settlement to which the parties agreed, and which the district court and Ninth Circuit below ultimately approved. This is because the alternatives proposed by Petitioners would distribute recoveries to only a portion of the affected class while simultaneously introducing unnecessary administrative expenses associated with management of large classes. The agreed-upon and approved *cy pres* distribution, on the other hand, benefits the entire class by providing

money to organizations whose activities would promote the protection of Internet privacy. The *cy pres* distribution also reduces administrative costs as compared to Petitioners' proposals: rather than spend money unnecessarily on administering recoveries to millions of individuals – as would be the likely outcome under either proposal – the only costs associated with administering the *cy pres* distribution are those related to evaluating foundations' proposals to ensure that the money would be used to benefit the class. The *cy pres* method of distribution provides a greater benefit to the class and represents a lower administrative burden, and therefore is by far the superior option of those available under the circumstances presented here.

D. Numerous Courts Of Appeals Endorse The Use Of *Cy Pres* Settlements

The Ninth Circuit properly approved the parties' use of the *cy pres* device to resolve their otherwise non-distributable class claims given the *de minimis* amounts due to each class member, deeming the settlement to be "fair, adequate, and free from collusion." Pet. App. 10. In doing so, it accorded with a line of Ninth Circuit precedent generally approving of the use of the *cy pres* mechanism in class action settlements. *See, e.g., Six (6) Mexican Workers*, 904 F.2d at 1311-12; *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011); *Facebook*, 696 F.3d at 819-20.

In *Lane v. Facebook*, a case that bears a close resemblance to the one at issue, the Ninth Circuit considered a class of 3.6 million individuals claiming that Facebook "had violated [its] members' privacy rights by gathering and publicly disseminating information about their online activities without permis-

sion." 696 F.3d at 817. The parties proposed settling the claims by making a *cy pres* payment of $6.5 million to a charity that would sponsor programs related to protection of personal information online. The appeals court affirmed the district court's approval of the settlement, finding "that it would be 'burdensome' and inefficient to pay the $6.5 million in *cy pres* funds that remain after costs directly to the class because each class member's recovery under a direct distribution would be *de minimis*." *Facebook*, 696 F.3d at 825. Notably, had the *Facebook* settlement been directly distributed to class members, each would have received approximately $1.77. Even though these recoveries would have been approximately 44 times larger than the $0.04 direct recoveries that would have been available to each class member in the case at issue, they were still deemed to be *de minimis*.

The decision below also accords with decisions by other courts of appeals. For example, in *In re Mexico Money Transfer Litigation*, the Seventh Circuit reviewed a class action settlement agreement that, in addition to providing coupons to class members, included a *cy pres* component "in recognition of the fact that many class members will prove to be unidentifiable, will not claim their coupons, or will not use all coupons they receive." 267 F.3d 743, 746 (7th Cir. 2001). The appeals court affirmed the district court's approval of the settlement, finding that it fairly compensated the class. *Id.* at 748-49. Likewise, in *In re Baby Products Antitrust Litigation*, the Third Circuit approved of the use of *cy pres* distributions generally, saying that "a district court does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component[, provided that the third party uses the funds] for a purpose related to the class injury." 708 F.3d at 172 (footnote

omitted). The D.C. Circuit has even gone so far as to suggest that parties to a class action could negotiate a *cy pres* settlement even where "claimants are identifiable and dispersal of funds is feasible," noting that "[t]here is no precedent in this circuit" that would prevent that outcome. *Keepseagle v. Perdue*, 856 F.3d 1039, 1050 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1326 (2018), *and cert. denied*, 138 S. Ct. 1345 (2018).

In short, the inclusion of the *cy pres* mechanism as a negotiated term in class action settlement agreements is neither controversial nor unusual. Because use of this mechanism – which is permissible under the Federal Rules of Civil Procedure and has been endorsed by numerous courts of appeal – gives parties a settlement option that is superior to other available alternatives, the Ninth Circuit's decision, approving of the parties' use of the *cy pres* mechanism, should be affirmed.

II. WHETHER A *CY PRES* SETTLEMENT ALSO INCLUDES DIRECT DAMAGES IS OF NO IMPORT, AS LONG AS THE SETTLEMENT MEETS RULE 23(e)'s REQUIREMENTS

It bears repeating that the *cy pres* mechanism addresses uncommon circumstances and should therefore be the exception rather than the rule. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173. However, these uncommon circumstances do nothing to change the fact that the settlement need only meet Rule 23(e)'s requirement that it be fair, reasonable, and adequate.

Of course, the uncommon circumstances that necessitate a *cy pres* settlement bring with them special considerations that typically are not present in run-of-

the-mill class action settlements. For example, *cy pres* settlements are often appropriate when class members cannot be readily identified, resulting in a class consisting largely of silent, potentially geographically diverse members who lack the ability to influence the settlement. *See Six (6) Mexican Workers*, 904 F.2d at 1307 ("[T]he interests affected are not the defendant's but rather those of the silent class members"). The large number of silent class members can, in turn, increase the potential for self-dealing. *See, e.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d at 173 ("*Cy pres* distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class"); *Nachshin*, 663 F.3d at 1039 (cautioning that selection of *cy pres* beneficiaries must not fall prey to "the whims and self interests of the parties, their counsel, or the court").

To account for these uncommon circumstances, courts pay special attention to settlements that include a *cy pres* mechanism, in order to ensure that they provide appropriate protection and benefit for silent class members whose rights will be impacted by the settlement. *See Nachshin*, 663 F.3d at 1036. However, even though a court may end up considering multiple factors when deciding whether to approve a *cy pres* settlement, in reality it is doing nothing more than conducting a Rule 23(e) fairness review that is tailored to the circumstances of the settlement at hand. As the Ninth Circuit recognized in *Facebook*, where it ultimately approved a *cy pres*-only settlement:

> The district court's review of a class-action settlement that calls for a *cy pres* remedy is not substantively different from that of any other class-action settlement except that the court should not find the settlement fair, adequate, and reasonable unless the *cy pres* remedy 'account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members ....'

696 F.3d at 819-20 (quoting *Nachshin*, 663 F.3d at 1036). *See also In re Baby Prods. Antitrust Litig.*, 708 F.3d at 174 ("To assess whether a settlement containing a *cy pres* provision satisfies this requirement, courts should employ the same framework developed for assessing other aspects of class action settlements"); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33 (1st Cir. 2012) (holding that, in order to be fair, *cy pres* distributions must "reasonably approximate the interests of the class members").

Thus, in terms of judicial review, *cy pres* settlements need do nothing more than satisfy Rule 23(e)'s requirement that they must be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This is true whether they are *cy pres*-only or merely include a *cy pres* component in addition to direct distribution.

III. FOR EMPLOYERS THAT FACE LARGE CLASS ACTIONS, THE AVAILABILITY OF A RANGE OF SETTLEMENT OPTIONS, INCLUDING THE *CY PRES* SETTLEMENT DEVICE, IS CRITICALLY IMPORTANT

Employers derive considerable benefits from the availability of *cy pres* settlements. Although *cy pres* settlements are rare, their mere availability promotes

efficient resolution of class actions as well as future compliance with legal requirements.

A. *Cy Pres* Settlements Promote Prompt Dispute Resolution, And Decrease The Likelihood That Costly Class Procedures Will Be Necessary

Cy pres settlements are a valuable tool for dispute resolution. They offer the opportunity to resolve disputes in lieu of costly litigation on the merits and complex damages proceedings. In short, the availability of *cy pres* settlements promotes prompt resolution of burdensome class actions.

In addition to serving as a useful tool for more efficient dispute resolution, the availability of *cy pres* settlements can serve as a check against abusive tactics aimed at coercing settlement of questionable class claims. If *cy pres* settlements were completely unavailable, plaintiffs would have greater ability to force employers into costlier litigation phases that inch ever closer to ruinously high damages.

Indeed, it is at the certification stage that the playing field begins to tilt in the plaintiffs' favor. As this Court has observed, class actions can entail "the risk of 'in terrorem' settlements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"), *superseded by rule on other grounds*, Fed. R. Civ. P. 23(f), *as recognized in Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); Federal Rule Civil Procedure 23 advisory committee's note to 1998 Amendment, 28

U.S.C. app. Subdivision (f) ("An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

B. *Cy Pres* Settlements Are Beneficial To Both Class Members And Employers

Cy pres settlements provide numerous benefits to both parties to a class action. First, *cy pres* settlements confer finality, to the benefit of all involved. Class members receive some form of redress – albeit indirectly – for the harm alleged, and both parties are given the chance to move past the dispute with certainty. Obtaining final resolution is a critically important objective of litigation, both for the parties and for the courts. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (explaining that the doctrine of collateral estoppel "promot[es] judicial economy by preventing needless litigation") (citation omitted).

Second, *cy pres* settlements can be useful in promoting deterrence. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d at 33-34 ("[T]he cy pres ... distributions serve the objective[] of ... deterrence of illegal behavior") (quoting A. Conte & H.B. Newberg, 3 *Newberg on Class Action* § 10:15, at 513 (4th ed. 2002)). This benefits class members by creating an incentive for future compliance. The employer also benefits from this deterrent effect, which affords it the opportunity to redress harms, address discontent within its workforce, and continue striving toward compliance with legal requirements.

Third, *cy pres* settlements provide class members some form of recovery in instances where otherwise

they may receive nothing. The *cy pres* mechanism is appropriately used where, for example, distribution of a settlement fund is infeasible. *See supra* pp. 11-12. Without the availability of the *cy pres* mechanism, the settlement fund would be disposed of in a manner that would provide no direct *or* indirect benefit to the class, such as reversion to the defendant or escheat to a governmental entity. *See supra* pp. 13-15. Thus, as the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortg. Corp.*, "In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement ...." 356 F.3d 781, 784 (7th Cir. 2004).

Further, a *cy pres* distribution may also permit the class to receive an indirect benefit from a settlement even though "the shakiness of the plaintiffs' claims," Pet. App. 9, could well prove fatal if the dispute were to proceed to litigation.

Moreover, it is highly unlikely here that the class of 129 million individuals could possibly have obtained class certification and maintained it through litigation. As this Court held in *Comcast v. Behrend*, "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" 569 U.S. at 33 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)). Included among these requirements is "ascertainability," which is "an implicit requirement ... that a class must be defined clearly and that membership be defined by objective criteria ...." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015). Classes have failed to meet this requirement "when they were too vague." *Id.* The

class here is the very definition of vague, as it includes *anyone* who used Google during a seven-and-a-half year period. In sum, had this case proceeded to litigation rather than ended with a *cy pres* settlement, it is likely that, due to weaknesses in the underlying claims and questionable ability to maintain class status, class members would have received absolutely nothing, compared to the myriad benefits they would gain as a result of the parties' *cy pres* settlement.

C. *Cy Pres* Settlements Are Particularly Well-Suited For The Types Of Disputes That Employers Face

Employers, especially those with large workforces, can expect to face class action lawsuits, and the *cy pres* mechanism is particularly well-suited to helping them reach satisfactory resolution of at least some such disputes. This is because certain claims may give rise to sprawling classes for which proof of specific harm is extremely difficult to establish, or for which direct distribution to individual class members would cost more than the settlement fund itself. Direct distribution, in other words, may be infeasible for some specific types of class claims that employers can expect to face.

For example, the ADEA prohibits an employer from "refus[ing] to hire ... any individual ... because of such individual's age." 29 U.S.C. § 623(a). One potential claim that may arise under the ADEA is that an employer intentionally discouraged older workers from applying for jobs by targeting younger job applicants, either through the language contained in a job advertisement itself (for instance, by expressing a preference for "recent college graduates"), or through its targeted distribution of job advertisements exclusively to younger workers. *See, e.g., Bradley v. T-*

Mobile U.S., Inc., 5:17-cv-07232 (N.D. Cal, Dec. 20, 2017) (complaint filed). In such a case, the plaintiffs likely would face considerable difficulty proving collectively that they would have applied for the job had they seen the advertisement, or had it been worded differently. Faced with such a claim, the *cy pres* mechanism could enable the employer to settle the threatened collective action in a manner beneficial to the plaintiffs without resort to protracted and uncertain collective litigation.

Employers also regularly face class-based ("collective") actions under the FLSA, which requires payment of overtime to any employee who works more than forty hours during a given workweek, unless he or she is exempt from the FLSA's requirements. 29 U.S.C. § 207. *See also Kempen v. Matheson Tri-Gas, Inc.*, No. 15-cv-00660-HSG, 2017 WL 475095, at *4 (N.D. Cal. Feb. 6, 2017) (approving settlement of FLSA claims using *cy pres* mechanism and noting that "[c]ourts generally apply the [Rule 23(e) fairness] standard to FLSA collective action settlements"). A common FLSA claim involves allegations that an employer failed to pay wages for work done "off-the-clock" – that is, before clocking in or after clocking out. For example, a non-exempt employee may occasionally spend a few minutes answering emails in the evening, which work generally must be compensated unless it is *de minimis*. 29 C.F.R. § 785.47. Because "off-the-clock" work typically must be compensated, employees could file a collective action, 29 U.S.C. § 216(b), alleging that their employer violated the FLSA by failing to pay them for such work; however, class members likely would have difficulty proving when they performed the work and how much of it they did. In other words, in such a circumstance, "proof of individual claims would be burdensome," which would

make it ideal for application of the *cy pres* mechanism. *Nachshin*, 663 F.3d at 1038 (citation and internal quotations omitted).

Furthermore, *cy pres* settlements, which provide a beneficial deterrent effect, are especially appropriate for settling certain types of employment disputes where deterrence is a primary statutory goal. For instance, prevention of harm is a chief aim of many equal employment opportunity laws, such as Title VII of the Civil Rights Act of 1964. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) ("[T]he primary objective [in enacting Title VII] was a prophylactic one"), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The *cy pres* mechanism therefore may be particularly suitable for settling some workplace discrimination claims brought under such laws, because the deterrent effect of *cy pres* settlements aligns neatly with such laws' aim of keeping workplace discrimination from occurring in the first place.

Given that the *cy pres* mechanism deters future violations, using it to settle certain employment class actions in turn promotes the underlying purpose of such laws. For example, in *Powell v. Georgia-Pacific Corporation*, the Eighth Circuit considered a settlement between Georgia-Pacific and a class of African American employees alleging that the company had discriminated against them in violation of Title VII. 119 F.3d 703, 706 (8th Cir. 1997). Following direct distribution of the settlement fund to class members, there remained more than $1 million that had gone undistributed, and the Eighth Circuit approved a *cy pres* distribution of the funds to a scholarship program that would help African American students improve their employment prospects. This approval served as

tacit recognition that *cy pres* settlements can indeed dovetail with the underlying aims of federal workplace nondiscrimination laws.

Even federal enforcement agencies, such as the U.S. Equal Employment Opportunity Commission (EEOC), often utilize *cy pres* or similar mechanisms in resolving public enforcement actions. *See, e.g., EEOC v. Ruby Tuesday, Inc.*, No. 2:09-cv-01330-MRH (W.D. Pa. Dec. 9, 2013) (Consent Decree at 6) (stipulating that if any portion of the settlement fund were to go unclaimed by class members, the EEOC would distribute such funds to "a non-profit entity that advocates for older workers or assists in the job placement of older workers"). The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) also has utilized *cy pres*-style components in its settlement agreements. One such agreement required the employer, after making payments to class members, to "use any uncashed funds to conduct [equal employment opportunity] training at the Corporate office." Conciliation Agreement Between The U.S. DOL-OFCCP and Humana Inc., at 8 (Mar. 2018).[2] In another settlement, OFCCP included a *cy pres*-style device that was to be used only in the event that redistributing unclaimed funds among the class would have resulted in *de minimis* payments to class members. In the settlement, OFCCP required uncashed funds to be redistributed to class members who had cashed checks, unless "the total amount of uncashed funds would result in a payment of *less* than $40.00 to each Eligible Class Member," in which case the remaining funds were to be used "to provide training in equal employment

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[2] *Available at* https://www.dol.gov/ofccp/foia/files/Humana_CA_Redacted.pdf.

opportunity to its personnel ...." Conciliation Agreement Between The U.S. DOL-OFCCP and Tyson Foods, Inc., at 9 (Sept. 2016).[3]

The *cy pres*-style devices that the EEOC and OFCCP routinely include in resolving agency-initiated enforcement actions serve the same function as the *cy pres*-only settlement at issue here: in the absence of some discernable way to distribute settlement funds to those who were otherwise entitled to receive them, the settlements provide some means of public relief rather than reverting the funds to another party. Such settlements help enforcement agencies maximize the deterrent effect of the laws they enforce, by ensuring all settlement funds – even the remnants that remain after distribution – are used for the benefit of the class. The settlements also help the parties manage their limited resources by resolving allegations at the administrative stage, avoiding costly litigation. This finality has the added benefit of freeing up the employer's resources to focus on achieving future compliance. In short, federal enforcement agencies' use of a *cy pres*-style mechanism in settling alleged violations of equal employment opportunity laws underscores the mechanism's utility in supporting the underlying prophylactic aims of federal workplace nondiscrimination laws. Because the *cy pres* mechanism is permissible and has clear utility in settling certain employment disputes, it must remain a viable settlement option.

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[3] *Available at* https://www.dol.gov/ofccp/foia/files/TysonCA_Redacted.pdf.

CONCLUSION

For the reasons set forth above, the *amicus curiae* Center for Workplace Compliance respectfully submits that the decision below should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMAS GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community, including cases involving important issues of class-action practice and procedure. Businesses are frequent targets of class-action lawsuits, including abusive suits where cy pres settlements are often used. The Chamber's Institute for Legal Reform has published a white paper that discusses in detail the practical and constitutional concerns raised by the increasing use of cy pres settlements in the class action context. *See* John Beisner et al., *Cy Pres: A Not So Charitable Contribution to Class Action Practice* (2010) ("Beisner"), *available at* http://bit.ly/2zJEFWO. The

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[1] All parties have consented to the filing of this amicus brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than amicus, its members, and its counsel contributed money that was intended to fund the preparation or submission of this brief.

Chamber's interest in these issues reflects its broader interest in ensuring that courts rigorously and properly enforce the requirements of Rule 23 and Article III of the Constitution of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

Both the petitioners and the defendant below recognize that cy pres settlements in the class-action context raise serious concerns and require close judicial scrutiny. The parties dispute whether the particular cy pres settlement reached in this case is appropriate notwithstanding those concerns. But on that issue the Chamber takes no position.

Instead, the Chamber is submitting this brief in support of neither party to urge the Court that the first solution to the concerns raised by cy pres settlements is to police rigorously the requirements for class certification at the front end. More fundamentally, the Chamber seeks to highlight that the explosion of cy pres settlements in class-action litigation is symptomatic of a much deeper problem—the failure of lower courts to comply with this Court's precedents and rigorously police the requirements of Rule 23.

In a line of important decisions, this Court has emphasized that class actions are supposed to be the exception to the general rule that litigation should be pursued on an individual basis. It has held that a class should not be certified if absent class members have not suffered a concrete injury-in-fact. It has rejected class actions that would strip defendants of their rights to litigate every available defense. And it

has recognized the extraordinary settlement pressures that defendants face even in meritless cases when confronted with potentially massive class-action liability, emphasizing that courts must perform a rigorous analysis at the outset of a case to determine whether Rule 23's exacting requirements are satisfied.

But there is a yawning gap between this Court's class-action precedents and how the lower courts have applied those precedents in practice. The unfortunate reality is that lower courts in plaintiff-friendly venues are routinely failing to apply the law. Many courts view the class-action device as an expedient for clearing cases from their dockets, recognizing that placing a heavy thumb on the scale in favor of class certification will often prompt settlement. As a result, courts often certify a class no matter how negligible class members' alleged injuries may be and with no concern for defendants' individualized defenses. Outside of the most egregious cases, courts are unwilling to discipline class-action abuse and, as a result, every potential misstep or regulatory violation, no matter how insignificant or how inventive a theory of liability may be required to plead a claim, becomes another opening for enterprising class counsel. Even defendants who are inclined to vigorously defend these cases are placed in an untenable position. Because courts that take a lenient approach to class actions rarely impose reasonable limits on the award of class counsel fees, the harder a defendant fights in its defense, the more it can ultimately expect to pay out in settlement. The result is that every year American business are forced to defend and settle

thousands of meritless class actions that benefit no one except class counsel.

In light of these trends, it may be unsurprising that defendants have more frequently resorted to cy pres settlements. Whatever one thinks of cy pres settlements as a matter of first principle, they have become an unfortunate safety valve—a way for defendants to manage their exposure to meritless cases filed in venues where courts are unwilling to enforce Rule 23. Indeed, the resort to a cy pres settlement is almost inevitably a sign that the underlying class claims are of dubious merit. Here, for instance, the defendant reasonably elected to negotiate an early end to weak and meritless claims brought by class counsel given the notorious challenges and expense of defending against class actions in courts within the Ninth Circuit.

However this Court views the appropriateness of the settlement negotiated in this case, there is an urgent need for it to take this opportunity to reiterate—clearly, forcefully, and unequivocally—the essential principles of class-action law that it has previously articulated and signal to the lower courts its commitment to ensuring that they are properly enforced. Unless the Court takes this crucial step, any guidance it provides on the use of cy pres settlements may be of only limited value—a temporary balm that may ameliorate a troubling symptom, but does little to address the underlying cause of the serious and growing class-action abuse that infects our nation's legal system.

ARGUMENT

I. The Best Way To Police Cy Pres Settlements Is At The Front End, By Denying Certification Of Unmanageable Classes.

Cy pres settlements of class action lawsuits have significantly increased in the past two decades. *See* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 653 (2010) ("Redish"). This growth is a direct consequence of lower courts' refusal to police compliance with Rule 23's essential requirements. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987) ("[U]nwarranted relaxation of the manageability requirements [of Rule 23] . . . induce[s] plaintiffs to pursue 'doubtful' class claims for 'astronomical amounts' and thereby 'generate . . . leverage and pressure on defendants to settle.'") (last alteration in original) (quoting *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974)).

The most powerful tool for limiting the growth of cy pres settlements is strict adherence to Rule 23 and this Court's class-action precedents. Unfortunately, many lower courts continue to disregard this Court's instructions, treating them as at best hortatory—principles to be dutifully recited but rarely applied to curtail class-action abuse in any meaningful fashion. Because the Court has granted certiorari to address the problems of cy pres settlements, it should take this opportunity to reiterate the basic principles that are supposed to govern the lower courts'

consideration of class certifications motions under Rule 23.

A. Lower Courts Continue To Certify Classes Where Some Or All Of The Absent Class Members Suffered No Actual Injury.

Emblematic of lower courts' refusal to apply Rule 23 correctly is the growing prevalence of "no-injury" class action settlements, circumventing the bedrock requirements of Article III and Rule 23. That no-injury class actions run counter to Article III standing should be obvious: A Rule 23 class action is nothing more than the sum of the individual class members' claims. Packaging claims in a class vehicle does not enlarge the power of federal courts to hear claims they would not otherwise have jurisdiction to hear. As the Chief Justice recently noted, "Article III does not give federal courts the power to order relief to *any* uninjured plaintiff, *class action or not*." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (emphases added).

These lawsuits also raise serious due process concerns, because there is little incentive for unnamed class members to monitor and participate in litigation where they have sustained or will sustain no actual damages. Due process requires that the class representative "fairly insures the protection of the interests of absent parties who are to be bound by" the outcome of the litigation. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). In turn, absent class members must receive adequate notice and an opportunity to be heard and participate in the class proceedings. *See Phillips Petrol. Co. v. Shutts*,

472 U.S. 797, 811-12 (1985). The adequate representation requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

In a no-injury class action, however, the class representatives—to say nothing of absent class members—have little incentive to monitor the litigation and hold their class counsel accountable, since they "have individually too little at stake to spend time monitoring the lawyer—and their only coordination is through" counsel. *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.*, 834 F.2d 677, 681 (7th Cir. 1987). The practical result is that "class counsel effectively appoint themselves as agents for the class, wielding a power to transact in class members' rights." Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 150-51 (2003). And class members can have "their future claims devalued and decided before they even accrue," long before it is "obvious that the settling of future plaintiffs' claims—essentially without their knowledge—is desirable, necessary, or worthwhile." Jeremy Gaston, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 Tex. L. Rev. 215, 237-38 (1998).

Despite these fundamental due process concerns, lower courts have disregarded this Court's directive that a class plaintiff must suffer harm that "actually exist[s]" and is not "'abstract.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). For example, the Ninth Circuit recently held that a class

representative had standing to seek injunctive relief under California consumer protection law because she had purchased flushable wipes with an allegedly false or misleading label, since they were not "flushable" according to her standards. The disgruntled consumer threw the wipes away and vowed never to purchase them again. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 966-67 (9th Cir. 2018). Although there was no possibility that the plaintiff would ever be injured by the allegedly false label because *by her own admission* she would never purchase the product again, the Ninth Circuit found that she had standing to pursue injunctive relief for the class. Rather than dismissing the case for lack of jurisdiction, the Ninth Circuit concluded that the class claims could be litigated because the plaintiff "will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to," or "might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." *Id.* at 969-70. This holding—replete with "mights" and "mays"—runs directly contrary to this Court's express statement that mere "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief,'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (alteration in original) (citation omitted), and that to demonstrate standing a plaintiff must show that she is "realistically threatened by a repetition" of past wrongful conduct, *id.* at 109; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528

U.S. 167, 180-81 (2000) (to maintain a claim for forward-looking relief, plaintiff must show that she faces an "actual or imminent," not "conjectural or hypothetical" harms).

Davidson is a recent example of lower courts bending the rules of standing and Rule 23 to save specious class allegations in no-injury cases. But it is not the only one. The Third Circuit recently held that a class had Article III standing to bring suit against an eye-drop manufacturer because the dropper dispensed the fluid in a way that caused some of it to roll out of the user's eye. *See Cottrell v. Alcon Labs.*, 874 F.3d 154, 159 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 2029 (2018). Plaintiffs alleged they were injured financially because manufacturers did not use alternative, supposedly more efficient product packaging that would have enabled them to get more doses from the same volume of medicine. The district court denied certification, holding that the putative class did not meet the rigorous requirements of Rule 23, because there was no concrete allegation that the product packaging change would have resulted in lower prices. *Id.* at 161, 168. The Third Circuit reversed, holding that plaintiffs had shown a concrete and particularized injury by alleging that they "would have paid less for their course of medication if they were able to extract more doses of medication . . . out of the same bottle." *Id.* at 168. But plaintiffs presented no concrete allegation that the manufacturers priced their medicine based on the volume of fluid in the bottle and not the number of doses the bottle contained, or that manufacturers would have passed marginal cost savings on to consumers instead of pocketing them.

Similarly, a district court in Wisconsin certified a class and approved a settlement where plaintiffs alleged that the fast food restaurant Subway was defrauding consumers by selling "Footlong" sandwiches that were sometimes slightly shorter than twelve inches. *See In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 553 (7th Cir. 2017). There, the district court found that the plaintiff class had standing to pursue injunctive relief, despite it being undisputed that the sandwiches rarely fell short of twelve inches, and even when they did, the variations were due to natural variability in the baking process—the unbaked bread sticks were uniform, so all customers received the same amount of food. *Id.* at 554. The settlement provided no monetary recovery, only injunctive relief by which Subway bound itself to implement new measuring tools and a beefed-up inspection regime, but the settlement also explicitly acknowledged that Subway "'will never be able to guarantee that each loaf of bread will always be exactly 12 inches or greater in length after baking.'" *Id.* at 556-57 (quoting the settlement). After hearing from the same settlement objector that is petitioner in this case, the Seventh Circuit reversed, calling the injunctive relief "'worthless'" and holding that the district court improperly certified a "'settlement that yields zero benefits for the class'" in a case where "[p]roof of injury was nigh impossible." *Id.* at 554, 556 (citation omitted). "The settlement enriches only class counsel and, to a lesser degree, the class representatives." *Id.* at 557.

What is troubling about these examples is that the Seventh Circuit's decision appears to be a rare

outlier in a much broader trend of abusive class-action litigation that courts are unwilling to police. Lower courts all too often treat class certification as an easy threshold to satisfy in any litigation involving businesses and consumers, leaving business defendants with no reasonable option except to seek settlement or else find themselves confronting large legal bills and facing potential disastrous liability for even the most meritless claims.

B. Lower Courts Continue To Circumvent The Commonality And Predominance Requirements.

Courts also promote cy pres settlements by certifying classes that do not satisfy the threshold requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This inquiry requires courts to "conduct a 'rigorous analysis' to determine whether" plaintiffs have carried that burden, "even when that requires inquiry into the merits of the claim." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). Class-action plaintiffs must offer "a theory of liability that is . . . capable of classwide proof." *Id.* at 37-38. It is not enough that a class propose "*any* method[ology] . . . so long as it can be applied classwide." *Id.* at 35-36. Nor can the answers generated by that methodology be "arbitrary" or "'speculative.'" *Id.*

Despite this Court's clear admonitions, courts continue to certify classes even though "the validity

of each one of the claims" cannot be resolved "in one stroke." *Dukes*, 564 U.S. at 350. For example, the Sixth and Seventh Circuits allowed plaintiffs to circumvent the strict commonality requirement set forth in *Dukes* by certifying classes of consumers who bought certain washing machines, even though it was admitted that very few of the purchasers experienced any actual problems. *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), *judgment vacated*, 569 U.S. 1015 (2013), *on remand, reinstated*, 727 F.3d 796, 802 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 414 (6th Cir. 2012), *cert. granted, judgment vacated, sub nom, Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013), *aff'd*, 722 F.3d 838 (6th Cir. 2013). In those cases, consumers sued washing machine manufacturers based on an alleged design defect that resulted in mold. When both classes were certified, the manufacturers appealed, arguing that the classes were overbroad as it was undisputed that most of the consumers experienced no problems with their washing machines and the consumers had all purchased different models and configurations. *See Butler*, 702 F.3d at 361-62; *Whirlpool*, 678 F.3d at 418, 420. Both circuits affirmed. The Sixth Circuit held that certification is appropriate "'if class members complain of a pattern or practice that is generally applicable to the class as a whole,'" even if application of this theory means that the class would include many uninjured plaintiffs. *Whirlpool*, 678 F.3d at 420 (citation omitted).

This Court remanded the decisions to the Sixth and Seven Circuits to consider in light of *Comcast*

and *Dukes*. *See Sears, Roebuck & Co. v. Butler*, 569 U.S. 1015 (2013); *Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013). Both the Sixth and Seventh Circuits affirmed their earlier rulings, based on a supposedly common question of whether the machines had a propensity to cause mold, even though, as the Sixth Circuit noted, it was undisputed that the machines "were built over a period of years on two different platforms, resulting in the production of twenty-one different models during the relevant time frame." *Whirlpool*, 722 F.3d at 854; *see also Butler*, 727 F.3d at 798 (approving class certification even though the manufacturer "made a number of design modifications, and as a result different models are differently defective").

The failure to adequately police the commonality requirement has a direct connection to the rise of cy pres settlements. One of the factors courts are supposed to consider in determining whether commonality exists is "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). Cy pres settlements are often resorted to when the normal means of providing "compensation of individual victims . . . through use of the class action device is [thought] infeasible," because directly compensating the class is not manageable. Redish, *supra*, 62 Fla. L. Rev. at 639-40. But the proper course for a district court confronted by an unmanageable class is not to find some "next best" alternative. Instead, it should decline to certify the class on the ground that "resort to the class action procedure is improper." *Id.* at 640.

C. Lower Courts Increasingly Permit The Use Of Unrebuttable Presumptions Of Injury.

The requisite "rigorous analysis" of putative classes has also been frustrated by the lower courts' practice of employing presumptions that class members have been injured. *See Waggoner v. Barclays PLC*, 875 F.3d 79, 106 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1702 (2018); *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 931 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1582 (2017).

Because "actual, *not presumed*, conformance" with Rule 23's requirements is "indispensable," *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982) (emphasis added), plaintiffs are supposed to have the burden to "'affirmatively demonstrate'" their compliance with Rule 23. *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350). In light of these stringent requirements, this Court has applied presumptions in the class action context only in very limited circumstances, where the market to which the presumption is applied is one that is "impersonal, well-developed," and "information-hungry," meaning that the presumption is "supported by common sense and probability." *Basic Inc. v. Levinson*, 485 U.S. 224, 245-47, 249 n.29 (1988).

Lower courts have nonetheless expanded the use of these presumptions of injury to markets that are not impersonal, well-developed, and information-hungry. For example, in *Waggoner*, the Second Circuit allowed a class suing under Rule 10b-5 to rely on a presumption of injury to establish an element of its claim, despite the fact that the econometric model

used could not disaggregate whether declines in stock prices were caused by defendant's alleged conduct or state regulatory action. 875 F.3d at 106. The court also disregarded evidence that the defendant put forth to rebut the showing of market efficiency, holding that defendants must meet a burden of persuasion rebutting the presumption even though the burden on class certification rests with plaintiffs. *Id.* at 101-03.

Similarly, in *Kleen Products*, the Seventh Circuit approved a presumption of class-wide injury based on price increases in an unrepresentative price index. 831 F.3d at 927. The court ignored evidence demonstrating that the index price did not reflect the prices that individual plaintiffs actually paid, which were driven by a variety of non-price inputs and were often individually negotiated. *Id.* at 927-29. The presumption was thus treated as essentially irrebuttable, further lowering the threshold of what putative classes need to prove to meet the requirements of Rule 23.

Lower courts' increased willingness to depart from this Court's statements about care in the use of presumptions to demonstrate injury threatens to invite even more meritless class actions, which, in turn, will inevitably yield more cy pres settlements.

II. Cy Pres Settlements Should Be Subject To Close Scrutiny.

The best solution to the problems presented by cy pres settlements is for lower courts to enforce the requirements of Rule 23 at the front end—and thus to relieve the pressure for opportunistic cy pres

settlements at the back end. But where plaintiffs establish Article III standing and a class is properly certified, cy pres settlements may serve as a safety valve for defendants facing costly and burdensome class-action litigation and, thus, tremendous pressures to settle, even where they have meritorious defenses and the class allegations are specious. Cy pres settlements may enable defendants to end meritless class actions quickly and allow defendants to avoid the risks and burdens of abusive litigation.

Nonetheless, cy pres settlements may present serious ethical quandaries. For example, class counsel often prefer cy pres settlements, as they allow counsel to puff up their overall "recovery" in cases where class members have suffered at best only nominal injuries. Similarly, both class counsel and the court may value the reputational benefits that arise when cy pres settlements shower favored schools and charities with windfall distributions. Given these conflicting incentives, there is a serious risk that cy pres settlements may prejudice the rights of absent class members. That risk can be managed only by ensuring that certain features of cy pres settlements are subject to exacting scrutiny.

A. Cy Pres Settlements Are A Response To Meritless But Costly Class Actions.

Even apart from the risks of potential massive damages liability, the cost of defending class actions can be substantial, putting enormous pressures on defendants to settle even specious class actions. These cases can drag on for years even before the court takes up the question of class certification. *See* U.S. Chamber Institute for Legal Reform, *Do Class*

Actions Benefit Class Members? An Empirical Analysis of Class Actions, at 1, 5 (Dec. 2013), *available at* http://bit.ly/2upAR80. ("Approximately 14% of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). Indeed, the cost to defend a single large class action can run as much as $100 million. *See* Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011). Class-action litigation costs in the United States totaled a staggering $2.24 billion in 2017, continuing a rising trend that started in 2015. *See The 2018 Carlton Fields Class Action Survey*, at 2 (2018) ("Class Action Survey"), *available at* http://bit.ly/2upBY7G.

Given the potentially enormous costs of defending against even a meritless class action, a business defendant will often choose to settle instead of rolling the dice on further litigation, even if it expects to (and under the law should) prevail on summary judgment or at trial. This Court has long recognized the power of class-action lawsuits to induce settlement. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23) ("[A] class action can result in 'potentially ruinous liability.'")). As the Court noted 40 years ago, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may

find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

The pressures today are even greater than they were then. In 2017, companies reported settling 71 percent of class actions, up from 63 percent the year before. *See* Class Action Survey, *supra*, at 26. Just 4 percent of class actions go to trial, and most cases settle before a class is even certified—a reflection of the power of certification to extract settlement. *Id.*

In this litigation environment, the benefits of settling class-action lawsuits has given rise to an increased use of cy pres settlements. They have become one of the only ways for defendants to compromise and escape the burdens of meritless and costly class-action litigation, especially in venues where courts have been unwilling to apply the rigorous scrutiny to class certification that Rule 23 requires.

B. Conflicts Between Class Counsel And The Absent Class Are Inherent In Cy Pres Settlements.

This Court has long recognized that Rule 23's requirements protect the rights of both defendants and absent class members, by ensuring that the procedures for aggregating claims and streamlining litigation are employed only in appropriate circumstances. *See Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008). One of those procedural protections is Rule 23(e)'s fairness inquiry, which "protects unnamed class members 'from unjust or unfair settlements affecting their rights.'" *Amchem*, 521

U.S. at 623 (quoting 7B Wright, Miller, & Kane § 1797, at 340–41); *see also Hansberry*, 311 U.S. at 42 (courts must "fairly insure[] the protection of the interests of absent parties").

Any class action settlement may present ethical quandaries, as class counsel have an incentive to negotiate a recovery that prompts settlement while maximizing their fee award. *See Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("From the selfish standpoint of class counsel and the defendant, . . . the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees."); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) ("there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own"). One structural safeguard that is supposed to counteract that incentive is class counsel's duty of loyalty "'to absent class members whose control over their attorneys is limited.'" *Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012) (citation omitted). With their individual claim turned over to the class representative, absent class members must rely on the good faith of class counsel to obtain fair recompense for their injuries. In short, "the law relies upon the 'fiduciary obligation[s]' of the class representatives and, especially, class counsel, to protect those interests." *Dry Max Pampers Litig.*, 724 F.3d at 718 (alteration in original) (citation omitted).

Class counsel have struggled to toe this line in many settlement contexts. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class*

Action, 95 Colum. L. Rev. 1343, 1347-48 (1995) (noting that "non-adversarial settlements have all too frequently advanced only the interests of plaintiffs' attorneys, not those of the class members"). But cy pres settlements in particular can strain the duty of loyalty to a breaking point. "By disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members." Redish, *supra*, 62 Fla. L. Rev. at 650. Cy pres awards drive a wedge between class counsels' interest in a generous fee award and the amount recovered by individual class members. Class counsel are thus able to "reap exorbitant fees regardless of whether the absent class members are adequately compensated." Beisner, *supra*, at 13. As courts have noted, decoupling the financial incentives of class counsel and absent class members creates potential conflicts of interest, for "[c]lass members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013).

The result of this inherent conflict has been the creation of what one commentator has called the "cy pres industry," an unseemly scramble to be first in line when cy pres funds are disbursed. Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1035 (2009). State and local bar associations, for example, have published manuals encouraging members to steer cy pres funds to their legal services departments. *Id.* at 1035-36. Law school clinics have appeared at settlement hearings and "requested that a portion of

the unexpended funds be set aside to fund their clinics." *SEC v. Bear, Stearns & Co. Inc.*, 626 F. Supp. 2d 402, 409 (S.D.N.Y. 2009). And class counsel have not neglected the opportunity to use cy pres settlement funds—supposedly provided to recompense injured class members—as pots of money for dispensing gifts to favored causes. *See* Pet. Br. at 29-30 (recounting instances where cy pres funds went to non-profit and educational organizations affiliated with class counsel); *see also Bear Stearns*, 626 F. Supp. 2d at 414–15 (collecting cases where cy pres awards in class action settlements "stray[ed] far from the 'next best use'").

Unfortunately, some courts have embraced their newfound role as public charities, taking on duties normally associated with foundation grant officers. *See Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911(HB), 2007 WL 1944343, at *11 (S.D.N.Y. July 5, 2007) ("After the initial distribution, additional distributions will be contingent upon achievement. Each entity will provide the Court in an annual report with information detailing what the project has accomplished."), *vacated*, 315 F. App'x 333 (2d Cir. 2009). While oversight of the distribution of cy pres funds is necessary, this grantmaking role can place "judges in ethically compromising situations . . . [i]ntroducing cy pres into the adjudicatory process transforms supposedly impartial decision makers into grant supervisors." Jennifer Johnston, *Cy Pres Comme Possible to Anything is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J. L. Econ. & Pol'y 277, 287–88 (2013). In fact, in some cases, courts have used cy pres funds to benefit their own

preferred charities. *See In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099, at *1 (N.D. Cal. June 2, 2011) (district court *sua sponte* "nominat[ing] the Markkula Center for Applied Ethics at Santa Clara University," where the district judge taught, for a cy pres distribution); *Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788, at *1 (M.D. Ga. July 10, 2012) (approving cy pres award to the presiding judge's *alma mater*).

C. Cy Pres Settlements Should Be Subject To Strict Standards.

Federal court reviews of proposed class settlements for fairness under Rule 23(e) are not intended to be "appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 521 U.S. at 621.

The Chamber therefore urges the Court to impose strict standards on the use of cy pres settlements. These standards are consistent with Rule 23(e) and a district court's "special duty to act as guardian for the interests of absent class members," which arises because "they are not present but will be bound by the disposition of the case." 2 *McLaughlin on Class Actions* § 6:4 (14th ed. 2017).

Cy pres distributions should not be approved if it is feasible to reliably identify and then distribute funds to absent class members. The Seventh Circuit has held that cy pres distributions should not be approved if economically feasible means of identifying class members and

compensating them remain. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). The Court should adopt this rule. In *Pearson*, the court noted that "the claims process could have been simplified" to increase the response rate, or the defendant could "have mailed [settlement fund distributions] to all" consumers that it knew had purchased its product. *Id.* Cy pres distributions of the unexpended settlement funds should be considered only when those funds "can't feasibly be awarded to the intended beneficiaries," because the administrative or other costs of finding class members and making distributions to them are disproportionately high. *Id.*

Where absent class members can be identified, the simplest solution to the problem of undistributed settlement funds—the one adopted by the Eighth and Fifth Circuits—is to make additional distributions to identified class members, unless the court determines that their claims have been fully satisfied. "Because the settlement funds are the property of the class, a *cy pres* distribution to a third party of unclaimed settlement funds is permissible 'only when it is not feasible to make further distributions to class members.'" *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (citation omitted). Where class members have already been identified and fully compensated, there is no need to divert settlement funds to third parties; the court should order the funds returned to the defendant. *Id.* at 482. ("The preferable alternative . . . is to return any excess funds to the defendant."); *see also In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015) (where "class members who received and cashed prior distribution checks

exist and would form the basis of a further distribution to the classes," it was an abuse of discretion to order cy pres distribution to third party).

If cy pres distributions are warranted, courts must carefully scrutinize conflicts of interest and "next best use." In limited circumstances, cy pres distributions may be warranted, but only when it is not "logistically feasible and economically viable" to make further distributions because the amounts to be distributed are too small. *Klier*, 658 F.3d at 475. But in that instance, the court must ensure that the settlement funds have been put "to their next-best use by providing an indirect benefit to the class." *Id.* Cy pres distributions should be made "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated." *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002). And the court must be especially vigilant to surface conflicts of interest that might raise a reasonable inference that third parties have been selected for improper reasons.

Cy pres distributions should not be considered in determining fee awards. In determining a fee award for class counsel, "[o]ne fundamental focus is the result *actually achieved for class members* . . . [even for] a percentage approach to fee measurement." Rule 23(h) Advisory Committee Comments to 2003 Amendments (emphasis added). Through cy pres awards, class

counsel are able to inflate the "recovery" to the class and "reap exorbitant fees regardless of whether the absent class members are adequately compensated." Beisner, *supra*, at 13. But a distribution of settlement funds to third parties is not a result "actually achieved" for class members. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else."). There is no justification for awarding fees to class counsel on the basis of cy pres distributions that achieve no more than an indirect benefit for the class members whose claims, in the aggregate, created the settlement fund in the first place. As a result, disregarding cy pres distributions when considering fee awards is the only way to align class counsel's financial incentives with its duty of loyalty to the absent class. *See Pearson*, 772 F.3d at 781 (disapproving fee award based on $20.2 million settlement fund where actual distributions to the class totaled "a meager $865,284").

* * *

No matter what the Court decides with respect to this particular settlement, the overall significance of this case will depend on whether the Court is willing to exercise its authority to discipline the lower courts and require compliance with its precedents on class certification. At a minimum, the Court should make clear that district courts are required to scrutinize proposed cy pres settlements at the front end by rigorously applying this Court's decisions to deny certification of specious class actions. And for those class actions that do make it

through that initial screen, district courts should police the distribution of class-settlement amounts at the back end to ensure that payments are fair and free of conflicts of interest. Above all, the Court should emphasize the importance of lower courts' abiding by this Court's precedents on class action certification.

CONCLUSION

The Chamber takes no position on whether the judgment below should be affirmed, but urges the Court to reaffirm the important procedural protections that are essential to preventing abuse of the class-action device by the plaintiffs' bar.

Respectfully submitted,

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No. 17-961

In The Supreme Court of the United States

THEODORE H. FRANK AND
MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CIVIL JUSTICE RESEARCH INITIATIVE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

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INTEREST OF *AMICUS CURIAE*[1]

The **Civil Justice Research Initiative** (CJRI) is a joint think tank of Berkeley Law School and the UC Irvine School of Law. CJRI's mission is to systematically identify and produce highly credible, unbiased research on critical issues concerning the civil justice system, including expanding access to justice. Research of CJRI focuses on the growing limits on access to the courts, including inadequate funding of state and federal courts, increased use of compulsory arbitration clauses, and restrictions on class-action lawsuits. The Initiative also examines potential remedies to help level the playing field between well-funded and poorer litigants. The ultimate aim of CJRI is to help ensure that leaders, legislators and courts have the research and data they need to set policy that will ensure continued access to the courts.

CJRI appears before the court as an *amicus curiae* in support of Respondents. Given that the institution of *cy pres* has become critical for the ability of those separated from the legal system to gain access to justice through non-profits and legal service organizations, CJRI believes that it has an obligation to highlight the benefits of *cy pres*, while correcting inaccurate statements about *cy pres* that have unfortunately emerged as a part of current legal discourse.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

When class actions resolve, it is common for some or even all funds paid to the class to remain undistributed. This is generally due to an inability to locate all class members, class members failing to do what is necessary to receive the funds owed to them, or, less frequently, the economic infeasibility of class distribution. Over time, the distribution of these funds through the mechanism of *cy pres* has become thoroughly enmeshed in the fabric of American jurisprudence. The American Law Institute has published guidelines for such distribution, *cy pres* has been used within all federal circuits, 23 states and Puerto Rico either have Supreme Court rules or legislative enactments authorizing *cy pres*, another 17 states have judicially approved of its use, and the U.S. Congress has provided for *cy pres* as part of the Class Action Fairness Act. Thus, throughout American jurisprudence, *cy pres* is now acknowledged as a proper tool to further the goal of class actions in advancing justice, while being consistent with state, federal, and Constitutional law.

Yet, despite this now four decades-old use of *cy pres*, and its endorsement by every circuit and virtually every state to consider the doctrine, Petitioners and several *amici* raise certain constitutional, legislative, and administrative challenges to its very existence in the class action context. Generally, these challenges ignore the fact that Congress has enacted Rule 23, approving of the aggregation of private causes of action in class actions and allowing plaintiffs to

recover damages on a collective basis. Many of the provisions of Rule 23, such as notice, the right to opt out and not become a member of the class, and the necessity of a fairness hearing for any settlement to be approved, are safeguards that vitiate the constitutional and other concerns raised. Structural and legislative concerns, such as those regarding the Rules Enabling Act and numerous alleged conflicts, are already addressed through the extensive administrative requirements Congress has enacted as part of Rule 23.

For the most part, the complaints ignore the vital role of the courts in evaluating all aspects of a settlement, including *cy pres*, which requires judicial approval before any proposed distribution can occur. While there are, as always, a few outliers, overall, courts throughout the judiciary closely scrutinize class action settlements along with the distribution of *cy pres* pursuant to their Congressionally-mandated administrative function of evaluating and approving all aspects of class settlements. Indeed, through amended Rule 23(e)(2)(C)(ii) (effective Dec. 1, 2018), Congress will soon be requiring that courts expressly consider the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims."

To the extent that this Court believes that courts below need further guidance, CJRI suggests certain guidelines. First, *cy pres* awards should not be used when the settlement funds can be effectively and fairly distributed to class members. Second, settlement money should not revert to a defendant, because that would undermine the deterrent function of class

actions. Third, instead, residual settlement money should be distributed in a way that would indirectly benefit the class, furthering the purpose of the lawsuit "as nearly as possible" through judicial consideration of the following factors: (1) what the lawsuit is about and the interests of the absent class members; (2) when it is alleged that a statute was violated, the objectives of the statute; (3) the loss suffered by the class members; and (4) the geographic breadth of the class. Fourth, as the custodians of the class settlement, it should be the class representatives and class counsel who select proposed *cy pres* recipients, subject to review and approval by the court. Fifth, organizations with broad access to justice missions and those that help legally underserved populations are appropriate *cy pres* recipients, because the underlying purpose of class actions is to provide access to justice for class members who otherwise would have no recourse against those who have wronged them. Finally, if settlement funds cannot be economically distributed, "*cy pres* only" settlements should be allowed. From the perspective of the aggrieved there is no worse result than the wrongdoer getting off "scot-free."

ARGUMENT

I. The Concept of *Cy Pres* Is Ensconced in American Jurisprudence

The *cy pres* doctrine has its roots in the laws of trusts and estates, operating to modify charitable

trusts when a gift is specified to go to a charitable entity that either no longer exists at the time of the bequest, has become infeasible to distribute to, or whose receipt of funds would be in contravention of public policy. Over time, most courts and now 48 states have institutionalized this elegant solution of transferring these funds to the next best charitable or public interest use in a way that would satisfy "as nearly as possible" the trust settlor's original beneficent intent.

With the advent of class actions, another source of funds has emerged whose allocation has at times proven to be infeasible to distribute. It is universally recognized that there are times when class action settlements cannot be fully distributed due to an inability to locate absent class members, class members failing to do what is necessary to receive the funds owed to them, or, less frequently, when it is "economically or administratively infeasible to distribute funds to class members if, for example, the cost of distributing individually to all class members exceeds the amount to be distributed." Principles of the Law of Aggregate Litigation §3.07 cmt. a (2010) ("ALI Principles"); Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §11:20 (4th ed. 2012) ("Newberg"). *See* Brief of Petitioner ("Pet.") 6.

As procedures involved in class action litigation have matured, it has come to be accepted in federal courts that when cases are resolved and excess funds remain, those funds will be distributed in the form of *cy pres*. Examples within every Circuit can be found where a *cy pres* distribution has been approved: 1) the

First Circuit's *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24,33-36 (1st Cir.2009) (holding trial court didn't abuse discretion in approving settlement that distributed excess funds for cancer research or patient care); 2) the Second Circuit's *In re Holocaust Victim Assets Litig.*, 424 F.3d 132,146 (2d Cir.2005) (distribution to the neediest class members); 3) the Third Circuit's *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163,172-175 (3d Cir.2013) (approved "for a purpose related to the class injury"); 4) the Fourth Circuit's *Jones v. Dancel*, 792 F.3d 395,406, n.6 (4th Cir.2015) (because it was not practical to distribute *de minimis* amounts to the class, the arbitrator ruled that those damages be distributed in equal portions to two *cy pres* recipients, the National Consumer Law Center and the National Association of Consumer Advocates); 5) the Fifth Circuit's *Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468,475 (5th Cir.2011) (permissible when either: (1) infeasible to distribute additional settlement funds to class members; or (2) claimants have been fully compensated and further distribution would be a windfall); 6) the Sixth Circuit's *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621,625 (N.D. Ohio 2016) (approving award to the Family House Toledo); 7) the Seventh Circuit's *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494,502 (7th Cir.1989) (recognizing the court's broad discretion); 8) the Eighth Circuit's *Powell v. Ga. Pac. Corp.*, 119 F.3d 703,706-707 (8th Cir.1997) (approval of minority student scholarship program where most class members lived); 9) the Ninth Circuit's *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121,1129 (9th Cir.2017) (recognizing "courts have

long employed *cy pres* remedies when some or even all potential claimants cannot be identified"); 10) the Tenth Circuit's *Tennille v. W. Union Co.*, 809 F.3d 555,563 (10th Cir.2015); 11) the Eleventh Circuit's *Nelson v. Mead Johnson & Johnson Co.*, 484 Fed. Appx. 429,435, 2012 WL 2947212 (11th Cir. July 20, 2012) (an unpublished decision,[2] affirming a settlement with *cy pres* distribution when class members received "full compensation" under the terms of the settlement); and 12) the D.C. Circuit's *Keepseagle v. Perdue*, 856 F.3d 1039,1043 (D.C. Cir.2017).

Cy pres distributions are widely used after the settlement of state court class actions. In fact, in 23 states (and Puerto Rico), state supreme courts or legislatures have adopted specific rules or statutes that authorize *cy pres*, including to charitable entities that promote access to legal services for low-income individuals. Meanwhile, *cy pres* distributions have also been approved by courts in at least 17 other states where state Supreme Court rules or statutes have not been set forth. (*See* Appendix "A" for a list of state statutes and Supreme Court rules, as well as examples of court decisions in states absent either.)

The U.S. Congress has also expressly authorized the use of *cy pres*. In Public Law 109–2, §1712—Feb. 18, 2005 ("The Class Action Fairness Act" ("CAFA")) Congress included the following language as part of §1712(e): "The court, in its discretion, may also require

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[2] Although *Nelson* is unpublished and not binding precedent, it "may be cited as persuasive authority." 11th Cir. Rule 36-2.

that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties."

Thus, whether promoted by statute, court rules, or court precedent, the use of *cy pres* has become well-established throughout American jurisprudence. The reason is simple. It allows for an effective distribution of residual funds to non-profit entities that when distributed appropriately represent people who are similarly-situated on the whole to the members of the class. This serves to preserve the deterrent effect of class actions, while allowing courts to authorize the distribution of residual funds.

II. *Cy Pres* Awards Are Legal and Constitutional

Petitioners and certain *amici* offer a panoply of reasons, both constitutional and otherwise, as to why this Court should eliminate *cy pres* distributions. For the most part, the intellectual underpinning for these challenges is a law review article written by Professor Martin H. Redish: Redish, Julian & Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010). *See* Pet. *passim*; Brief of CATO Institute and Americans for Prosperity ("CATO") 12; Brief of Center for Constitutional Jurisprudence and the Atlantic Legal Foundation ("CCJ") 8; Brief of Chamber of Commerce of the United States of America ("Chamber") 5,13,20; Brief of Lawyers for Civil Justice ("LCJ")

13,16,20; Brief of United States ("SG") 16-17,20; Brief of the Attorneys General ("AG") 10-11; Brief of Manhattan Institute for Policy Research ("Manhattan") 14,17; Brief of New Jersey Civil Justice Institute ("NJCJI") *passim*. Meanwhile, for case support, heavy reliance is placed upon *dicta* in 3 cases where the courts *actually approved* the use of *cy pres:* the concurrence in *Klier*, 658 F.3d at 474,480-481, cited by Pet. 17,33,37,50, LCJ 13,16,19, SG 17,18,26,27,32, AG *passim*, Manhattan 14, NJCJI 10,11,13; *In re Baby Prods.*, 708 F.3d 163, cited by Pet. 37,51, Chamber 20, LCJ 21, SG 18,19,28,30, AG 5,7,14; and *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir.2004), cited by Pet. 33, CATO 12-13,22, Chamber 25, AG 14, NJCJI 5,7,15, LCJ 13,16,21, SG 17,19,20,24.

A. The Challenge to *Cy Pres* Based upon Article III Misapprehends the Requirements of Standing

One argument advanced is that *cy pres* is really a court-imposed payment of unclaimed class funds from private litigants to a party whose rights are not at issue in the lawsuit. The redistribution of unclaimed funds to charities allegedly then transforms the adversarial two-party judicial process into an unconstitutional trilateral process. CCJ 6; LCJ 14-18. In essence, the position is that *cy pres* recipients have no standing and therefore the requirements of U. S. Constitution, Article III, §2 cannot be met.

However, this ignores the fact that *cy pres*, as will be discussed below, does constitute relief to the class, making it incorrect to say that there is no redressability due to an alleged absence of relief. Moreover, arguing that *cy pres* distributions impermissibly forge a trilateral relationship mischaracterizes what *actually* happens in class action settlements. In order to resolve class action litigation, district courts must first approve any proposed settlement as well as any distribution proposed by class counsel on behalf of the class representative(s). Thus, a court tasked with approving the distribution of any residual funds must first evaluate the settlement proposal that resolves the dispute.[3] Until that approval occurs, the only parties with standing before the court are the adversarial parties, i.e., the class representative(s) and settling defendant(s).

Although a court may be free to elicit information from a prospective recipient, only after this approval does a *cy pres* recipient obtain any interest in any funds, the same way proposed recipients are treated under charitable trust law.[4] Once this interest is

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[3] *See generally* F.R.C.P. 23; Manual for Complex Litigation, Fourth §13.1 at 167–182 ("Manual"); Newberg §10:16; *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682,689 (7th Cir.2013) (remanding district court's order of *cy pres* award as premature, but stating "[o]nce the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied," including potentially ordering a *cy pres* distribution).

[4] In the charitable trust arena, courts acknowledge the standing of potential beneficiaries when they must determine whether to exercise their *cy pres* power. *See, e.g., In re Trustco Bank*, 929 N.Y.S.2d 707,711 (N.Y. Sup.Ct. 2011) ("[T]he issue of

established, *cy pres* recipients may then participate in court actions as of right. At this point, *cy pres* recipients have standing to assert or defend their claims to the funds which in turn satisfies Article III's case-or-controversy requirement. Afterwards, just as in the charitable trust setting, once the *cy pres* recipient accepts the funds, the recipient comes under the court's jurisdiction.

The other case-or-controversy argument raised is an attack on the underlying "standing" of the class itself to have brought the action in the event that there is a "*cy pres* only" settlement. *See* CCJ 3. The assertion is that if the class members receive no direct relief, the lawsuit could not have had standing, because there could not have been a "case or controversy." However, this analysis is based upon fallacious *post hoc ergo propter hoc* reasoning. Under Rule 23, the party seeking certification must have first satisfied Rule 23(a)(1)-(a)(4), which requires the putative class to meet numerosity, commonality, typicality, and adequacy of representation criteria and, as all other litigants, standing.[5] Whether or not class members actually

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standing and who has the right to appear and participate as a party in any given case is commonly addressed at the outset of the litigation . . . to protect the interests of all parties, [and] to avoid prejudice. . . . This approach is all the more appropriate in *cy pres* proceedings, where the issues of whether to apply *cy pres* and how to apply it are interrelated.").

[5] S.G. at 23 conditions standing on whether *cy pres* distributions demonstrate "redressability," advancing a rule requiring the remediation of a "continuing violation" that caused the injury or "the imminence of a future violation" that would inflict the same injury. However, this has nothing to do with Article III standing

succeed in recovering monetary damages has nothing to do with standing or one could argue that every plaintiff who brings a lawsuit unsuccessfully did not have standing *ab initio*.

B. The Rules Enabling Act Does Not Prevent *Cy Pres* Distributions

Another contention is that a court imposed payment of unclaimed settlement funds from a defendant to a third party *cy pres* recipient transforms the class members' private cause of action into a civil fine. As a result, a class is ostensibly granted more rights than its members would have had if they had filed individual lawsuits. This is because, under substantive laws that only permit recovery of compensatory damages for the class, a civil fine cannot be authorized. AG 10; LCJ 6,19; Manhattan 16-17.

Courts have uniformly rejected this argument. In enacting Rule 23, it was Congress that approved of the aggregation of private causes of action in class actions to allow plaintiffs to recover compensatory damages on a collective basis. A class action lawsuit, therefore, does not abridge, enlarge, or modify the substantive right to bring such a collective action nor afterwards to settle the lawsuit. The *cy pres* distribution itself becomes only one part of the administrative

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but really is only an argument regarding what factors should be considered by the court in approving *cy pres* recipients.

function of distributing the settlement proceeds.[6] As the Third Circuit noted:

> Because "a district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action," we do not believe the inclusion of a *cy pres* provision in a settlement runs counter to the Rules Enabling Act.

In re Baby Prods., 708 F.3d at 173 n.8 (citation and quotations omitted). This is in accord with ALI Principles §3.07 cmt. a, which both respect the Rules Enabling Act and conclude that *cy pres* distributions are permissible when it is not feasible to make distributions to the class.

C. Any First Amendment Concern Lacks Merit

Petitioners argue that when class representatives agree to give *cy pres* funds to charitable entities, individual absent class members have no control over which charitable organization will receive the funds. Therefore, when settlement funds are directed

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[6] This administrative function is one basis for the court's power to approve *cy pres*. A second basis is the court's general equitable powers. *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir.1989) (treating *cy pres* distribution as a matter of the federal court's inherent equitable discretion). Finally, there are statutory powers, granted by 23 states and the U.S. Congress as part of CAFA.

to non-profit entities, absent class members may be forced to support organizations with which they may not agree in violation of the First Amendment's prohibition on compelled speech. In essence, they argue this would implicate the Court's proscription against compelled speech, as articulated in *Janus v. Am. Fed'n of State, County, & Mun. Employees Council 31*, 138 S. Ct. 2448,2464 (2018) and *Knox v. SEIU*, 567 U.S. 298,309 (2012) ("Closely related to compelled speech . . . is compelled funding of other private speakers or groups."). Pet. 12,17; CCJ 3; LCJ 7,22; CATO 29-31; Center for Individual Rights ("CIR") 3.

The advocates of this argument skirt over the fact that absent class members would already have been given notice of their right not to participate in the case at all, and, therefore, ultimately its settlement, by opting out of the class action. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797,812 (1985) ("[D]ue process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court. . . ."). As was correctly recognized by the district court below, Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122,1128 (N.D. Cal.2015). Class notice must state: the nature of the action; the definition of the class; the claims, issues, or defenses asserted; the right of a class member to enter an appearance through an attorney;

and the right to have the court exclude the individual from the class, as well as the time and manner for requesting that exclusion. The notice must also inform class members that they will be subject to "the binding effect of a class judgment" and, if they do not exercise their opt-out right, they will be bound by the judgment. F.R.C.P. 23(c)(2)(B).

In failing to opt out, absent class members consent to the representative plaintiff(s) approved by the court acting on behalf of their interests. This includes entering into a settlement and subsequently, if necessary, the designation of *cy pres* recipients. It is settled law that "not every potential disagreement between a class representative and the class members will stand in the way of a class suit." 1 Newberg §3:26. Rather, "only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. . . ." 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* §1768 (3d ed. 2005).

Petitioners challenge this single "opt-out" right as insufficient. Pet. 36-37; *see* CIR 6-7. They argue that the single opt-out right is akin to the illusory rights articulated in *Janus* and *Knox* where this Court found that the funding of political activities was forced in violation of the First Amendment. However, those who fail to opt out of a class action are specifically given notice that they will become members of the class. This is not illusory but rather the result of a Congressional mandate that absent class members be given a right to opt out after receiving the required notice and that, if

they don't, they will become actual "members" of the class represented by the designated class representative. Thus, *Janus* and *Knox* are inapplicable.

Nevertheless, CATO 31 argues that "an opt-in mechanism is needed because courts can no longer presume acquiescence by class members in the loss of their First Amendment rights." However, if Congress wished to require an opt-in requirement as part of Rule 23(b)(3), it would have done so. Instead, it was the judgment of Congress that only a single opt-out right is necessary before one becomes a class member. To be sure, Congress has given the courts a discretionary right to order a second notice and opportunity to opt out. F.R.C.P. 23(e)(4). Even here, though, Congress elected to leave this up to the discretion of the trial court and not make it mandatory. And courts have consistently ruled that the lack of a second right to opt out does not violate due process. *Low v. Trump Univ., LLC*, 881 F.3d 1111,1121 (9th Cir.2018); *see also Denney v. Deutsche Bank AG*, 443 F.3d 253,271 (2d Cir.2006). In essence, in demanding mandatory opt-in or second opt-out rights, *amici* are requesting a reversal of seventy years of this Court's precedents regarding "notice" and the right to opt out, as well as a finding that Congress has violated the Constitution in enacting Rule 23.

This is not to say that absent class members lose their ability to further challenge the designation of a *cy pres* recipient with which they do not agree. Absent class members have the remaining safeguard that a class action can only be maintained if, among other things, "the representative parties will fairly and

adequately protect the interests of the class" as a whole. F.R.C.P. 23(a)(4). If absent class members believe this has not occurred, they may still object as part of the proceedings required by F.R.C.P. 23(e)(5). Indeed, no class settlement may be approved by the court unless notice of the proposed settlement was provided to the members of the class to be bound by the settlement. F.R.C.P. 23(e)(1)(B). Then, a court may approve a settlement that "would bind class members" only "after a hearing and on finding that it is fair, reasonable, and adequate." F.R.C.P. 23(e)(2).

D. The Existing Rules Are Sufficient to Address Petitioner's Concern About Conflicts of Interest and Scandalous Behavior

Inherent in any action, including class actions, is the potential for conflicts of interest and less than ethical behavior by litigants, counsel, or even the courts. In a final attack on the concept of *cy pres*, Petitioner and certain *amici* conjecture about a litany of alleged problems, spinning a lurid tale of ubiquitous corruption on the part of both class counsel and defendants, along with defense counsel.

The most common allegation is that class action litigation is rife with unscrupulous class counsel who have "commandeered" the claims of class members, CATO 16, and are notoriously only concerned about their fees while disregarding the interests of the class. Pet. 7,16, AG 5, CATO 11-12. According to this

argument, to maximize their fees, counsel "game" settlements, Pet. 20-21, in several ways, including: 1) lowering the settlement value by "accept[ing] bargains that are worse for the class if their [fee] share is sufficiently increased," Pet. 22; or 2) inflating the settlement through the use of *cy pres* in order to get defendants to pay more money and hence increase their fees when awarded on a percentage basis. S.G. 19; A.G. 5; Chamber 16. Yet, Petitioner acknowledges that "both class counsel and a defendant have an incentive to bargain fairly over the *size* of a settlement." Pet. 22. And no examples are provided where a defendant was incentivized to pay *more* money than it had to.

These allegations also tend to ignore the way fees are generally requested. As a rule, fees are either based upon hours worked, a percentage of the total payment made by the defendant, or both. Manual §14.121-122. Often these are negotiated separately with the defendant and presented to the court as a separate request for approval. *Id.*, 14.22. At times, fees are contested by defendants, even though the underlying settlement is agreed to. *Id.*, 14.23. While, as in any contingent matter, a total fee earned might be higher as the recovery goes up, the final percentage paid or hours accepted always rests with the discretion of the court. *Id.* As a result, whether based upon hours worked or contingency, there is never a fee-driven incentive to get less money in settlement.

There are four other reasons Petitioner gives to demonstrate that *cy pres* is problematic: 1) *cy pres* leads cases to be brought that have little or no merit

for the single goal of forcing litigation-based cost-driven settlements, Pet. 20-21; 2) class counsel intentionally define classes to have a vast membership in order to achieve a "*cy pres* only" settlement, Pet. 49; 3) *cy pres* recipients are selected in order to force judicial recusal, Pet. 38; and 4) defendants use *cy pres* to hide their misconduct from their customers, because customers will not notice *cy pres* distributions, Pet. 32.

Petitioner's musings are not in accord with actual practice. First, there are significant expenses and high transaction costs for any counsel bringing a class action, engaging in discovery, moving for class certification, or facing an F.R.C.P. 23(f) appeal; given this, betting on a *de minimus* and possibly ephemeral settlement rarely, if ever, justifies advancing the necessary labor and costs. *See, e.g.*, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340,341 (1978) (General rule is representative plaintiff should bear costs relating to sending notice). Second, at the time of settlement it is much too late to artificially inflate the size of a class in order to foster a "*cy pres* only" distribution, because "numerosity" has to be made clear at the time of class certification in order to comply with F.R.C.P. 23(a)(1) and informed notice must already have been given to all putative class members. Third, by the time *cy pres* is considered, the parties generally have had long experience with the trial court and, as a rule, the court has approved the basic settlement; at this point, hoping for a rare discretionary Federal judge recusal makes little sense. As to Petitioners' fourth alleged conflict, defendant's conduct would already have been

subject to a widespread opt-out notice, often attendant media coverage, and then widespread notice of a settlement; after these, there is little left to hide from class members.

Perhaps without intending to, Pet. 20 intimates correctly that the existing rules are sufficient to address self-dealing concerns: "But *in the absence of sufficient judicial scrutiny* under Rule 23(e). . . ." (emphasis supplied). Or, as is echoed by AG 3: "This type of arrangement is precisely why courts are tasked with policing the 'inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees[.](Citation omitted).'" Thus, tacitly acknowledged but lost in all of the hyperbole is the fact that Congress has put in place several safeguards for absent class members. In evaluating the settlement of a class action, the district court has akin to a fiduciary duty to absent class members who were not party to the settlement agreement. *See* F.R.C.P. 23(e); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277,279–80 (7th Cir.2002) (district judges must "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions"). This is why settlements of class actions in all jurisdictions require judicial approval before they can become effective. The issue then is not the rules themselves, but rather the consistency and vigilance of judicial oversight in scrutinizing and, as required, preventing abuses.

Most other settlements of civil cases involving adults do not require judicial review before approval.

The task of a district court under Rule 23(e) is to assess whether the proposed settlement is "fair, reasonable and adequate." F.R.C.P. 23(e)(1)(C). "Reasonable" implies that the settlement should be a product of considered judgment and not arbitrary. "Adequate" implies that the settlement should provide relief to the class sufficient in magnitude and rationally related to the harm alleged. "Fair" implies that the settlement should not discriminate between similarly situated class members, and also suggests that the bargaining process must be at arm's length. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155 (4th Cir.1991); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96,116 (2d Cir.2005); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277,279 (7th Cir.2002) (that the settlement not be the "product of collusion"); *see also Carson v. American Brands, Inc.*, 450 U.S. 78,88 n.14 (1981) ("judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement"). The Manual §21.62 contains a 13-part list of items to consider.

Moreover, in undertaking this review, even greater scrutiny tends to be given under certain circumstances. These include where there is little or no distribution to the class, Manual §21.61, at 309-310, attorneys' fees are high, or when unclaimed funds revert to the defendant whose conduct resulted in the settlement. In fact, in the Ninth Circuit, class action settlements in which the settlement agreement is negotiated prior to formal class certification require "an

even higher level of scrutiny." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,946 (9th Cir.2011); Newberg §11:27.

Finally, it is likely that before the Court generates an opinion in this case, the amended Rule 23(e)(2)(C)(ii) (effective Dec. 1, 2018) will be law. Recently approved, it adds language specifically requiring the trial court to evaluate the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims."

III. Guidance to Consider in Evaluating the Distribution of *Cy Pres*

In *Marek v. Lane*, 571 U.S. 1003 (2013), Chief Justice Roberts' concurring opinion listed a number of questions related to the use of *cy pres* that the Court has never addressed. CJRI believes that the rules, as now amended, are sufficient to address many of these concerns when courts diligently review *cy pres* proposals. However, if this court is intending to provide guidance to the courts below, CJRI makes the following suggestions.

A. Distributing Settlement Funds to Class Members Should Always Be the First Priority

Cy pres awards should not be used when the funds recovered from the defendants can be effectively delivered to class members. Courts should scrutinize these

closely, which indeed numerous federal courts have done. Examples include: the Second Circuit in *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423,434-436 (2d Cir.2007) (noting it appeared the district court was not aware that it could allocate excess funds to class members as treble damages); and the Seventh Circuit in *Pearson v. NBTY*, No.11-07972, Dkt. 213-1 ¶¶7-8 (N.D. Ill. May 14, 2015) (renegotiated *cy pres* to give class members $4 million more).

These examples are the exception rather than the rule. Still, consistent with these, CJRI believes that when money from a settlement can be economically and reasonably distributed to class members, that should always be the first priority. If this can be done by crediting a class member's credit card, bank account, cell phone or other accounts, it should be. If this is not possible, but class members can be sent checks, this should constitute an acceptable method of distribution provided the transaction costs are not greater than the settlement.

On the other hand, virtually all Circuits have correctly recognized that distribution to class members should not result in a windfall to members who have submitted claims and already been fully compensated. *In re Lupron*, 677 F.3d 21,35 (1st Cir.2012); *Klier*, 658 F.3d at 475. *See* Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361,393 (1999).

B. Factors to Be Considered in the Selection of *Cy Pres* Recipients

Despite the fact that class members should always be the primary recipients of settlements, at times settlements will inevitably result in funds that cannot be reasonably distributed. It is for this reason that all Circuits and the vast majority of state court systems have concluded that *cy pres* distributions are necessary.

While reversion to the defendant has been suggested as an alternative to *cy pres*, this has been roundly rejected. Such reversions play havoc with the deterrent function of class action settlements. *In re Lupron*, 677 F.3d at 32-33; *In re Baby Prods.*, 708 F.3d at 172; *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24,35 (1st Cir.2009); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330,1355 (S.D. Fla.2011) (one of the most important functions of the class action device in small-stakes cases is the "deterrence of wrongdoing"). *See* Pet. 6.

The question then is what should be considered by the court in approving *cy pres*. After finding that *cy pres* is necessary, most courts have concluded that *cy pres* should be distributed so that it indirectly benefits the class, consistent with the goals of the underlying case. To this end, courts have rejected proposed *cy pres* distributions which have had no relationship to the underlying case. *In re Airline Ticket Comm'n*, 268 F.3d 619,626 (8th Cir.2001) and *In re Airline Ticket Comm'n*, 307 F.3d 679,683-684 (8th Cir.2002) (*cy pres* recipients should have as close as possible relationship

to the class action suit and reflect the geographic scope of the class).

The Ninth Circuit similarly rejected a number of proposed *cy pres* distributions. *See Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301,1307–09 (9th Cir.1990) (rejection of non-earmarked *cy pres* to humanitarian organization in Mexico where Mexican farm workers sued for violation of Farm Labor Contractor Registration Act); *Nachshin v. AOL, LLC*, 663 F.3d 1034,1040-1041 (9th Cir.2011) (rejection of award to local non-profits with "no apparent relation to the objectives of the underlying statutes, and it is not clear how this organization would benefit the plaintiff class" in case involving internet subscribers receiving wrongfully inserted advertisements in email messages where the court noted that proper *cy pres* recipients would be "organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance"); *Dennis v. Kellogg Co.*, 697 F.3d 858,867 (9th Cir.2012) (rejection of *cy pres* to organizations that feed the poor where allegation was that Kellogg falsely advertised that its cereal improved children's attentiveness with Ninth Circuit holding that "appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising").

The S.G. at 24-25 seemingly requests an affirmative requirement that the distribution must specifically either encourage the recipient to discontinue the current problematic practices of the defendant or deter

the defendant from committing similar future ones. CJRI agrees that recipients who in no way address the practices of concern or deter such practices in the future are generally inappropriate for *cy pres* distribution. However, it would be difficult to parse out at exactly which point the fit between the mission of the *cy pres* entity and the conduct at issue would be sufficient for the S.G.'s proposed standard. Indeed, ALI Principles, *supra* note 3, §3.07(c) appropriately cautions that while *cy pres* recipients should be those "whose interests reasonably approximate those being pursued by the class," there are times when no such recipients exist and still "a court may approve a recipient that does not reasonably approximate the interests of the class." The reason for this is that if too narrowly limited, the scope of the appropriate *cy pres* recipients to the precise claims in the class action may not always be possible or practical and this may unnecessarily complicate the socially desirable settlement of large class action disputes.

In determining whether a *cy pres* remedy is appropriately tailored to the class, CJRI believes that courts should consider the following factors: (1) what the lawsuit is about and the interests of the absent class members; (2) when it is alleged that a statute was violated, the objectives of the statute; (3) the loss suffered by the class members; and (4) the geographic breadth of the class. *See, e.g., In re Holocaust Victim Assets Litigation*, 424 F.3d 132,147 (2d Cir.2005); *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060,1067 (8th Cir.2015), quoting ALI Principles §3.07 cmt. b; *In re*

Airline Ticket Commission, 268 F.3d at 626; *Lane v. Facebook, Inc.*, 696 F.3d 811,819-820 (9th Cir.2012); *Nachshin*, 663 F.3d at 1038; *In re Polyurethane Foam*, 178 F. Supp. 3d at 625; *In re Lupron*, 677 F.3d at 33. Of course, some of these factors may not apply in all cases. However, in their review, courts should always be cognizant of the need to find a *cy pres* recipient that will advance the overall purpose of the class action.

C. Making the Initial Selection of *Cy Pres* Recipients

1. The Defendant Should Not Select *Cy Pres* Recipients

As a rule, defendants should not make the selection of *cy pres* recipients. There are several reasons for this. First, one thing that class members must have in common is an injury caused by the defendant. F.R.C. P. 23(a)(3); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426,1432 (2013). Indeed, implied in any settlement is that a defendant admits that the victims have some legal right to restitution. The result of a successful trial or settlement should be a transfer of wealth from perpetrator to victim, not one that circles the money back to the defendant. *See* CATO 32-33.

Just as a reversion to a defendant is inappropriate, class members should not be compelled to return hard won compensation to the surrogates for the party that injured them or to beneficiaries of their selection. Certainly, the money paid due to a defendant's misconduct should not be used to burnish the public-relations

image of a defendant that inflicted the damage giving rise to the lawsuit. *S.E.C. v. Bear, Stearns & Co., Inc.*, 626 F. Supp. 2d 402,415 (S.D.N.Y.2009) (*cy pres* may "actually benefit[] the defendant rather than the plaintiffs" when "defendants reap goodwill from the donation of monies"). If *cy pres* funds are at all controlled by defendants, the improper result would be that class members will be forced to indirectly support those who caused their injuries, substantially diminishing any deterrent effect of the case's resolution. *See* CATO 19; S.G. 19-20.

CJRI believes that *cy pres* awards designated for organizations that have previously received substantial payments from a named defendant should be looked at closely by the reviewing court. This would be particularly true where the *cy pres* award does not increase the overall contribution by the defendant to the entity in question. *Dennis*, 697 F.3d at 867-68 (raising concerns about a *cy pres* award that allows the defendant to use "previously budgeted funds" to make the same contribution it would have made anyway). While in some cases the selected entities might be the most appropriate recipients, the *cy pres* distribution may also appear to be nothing more than part of the continuous funding by the defendant of the entity in question which makes the court's careful review necessary.

2. The Court Should Not Have a Role in the Initial Selection of *Cy Pres* Recipients; Its Role Should Be the Close, Independent Scrutiny of Proposed Recipients

While there is a strong impetus for courts to select *cy pres* recipients, doing so is problematic because even when the motives underlying the selection are proper, it nevertheless creates the appearance of impropriety. *See Nachshin v. AOL, LLC*, 663 F.3d 1034,1041 (9th Cir.2011) (providing money to a legal aid foundation that though normally a proper choice for *cy pres* was heavily criticized, because the judge's husband sat on the board); *Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788, at *1 (M.D. Ga. July 10, 2012) (approving *cy pres* award to the presiding judge's *alma mater*).

Therefore, CJRI believes that it is best if the court does not involve itself in the initial process of selecting *cy pres* recipients. "The specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety." *Nachshin*, 663 F.3d at 1039; *see also In re Lupron*, 677 F.3d at 38 (affirming, but expressing concern, where the district court, not the parties, chose the *cy pres* recipient); *In re Baby Prods.*, 708 F.3d at 180 n.16 (not reaching the issue, but stating: "we join other courts and commentators in expressing our concern with district courts selecting *cy pres* recipients"). *See* Pet. 37.

Not only does permitting courts to choose the *cy pres* recipient create an appearance of (or actual) impropriety, more importantly it inevitably makes it difficult for the court to properly perform its critical review function over the appropriateness of the distribution. Courts need to make a completely independent determination that is not only based on objective criteria but is without any stigma. Afterwards, a court has a continuing obligation to monitor the disbursal of the class's funds. It is incumbent upon courts to take a hard look at *cy pres* beneficiaries, as well as whether any of the parties involved in the litigation has significant affiliations with or would personally benefit from the distribution to proposed *cy pres* recipients. Such an analysis is not unduly burdensome or challenging for the court, but a court may be compromised (or appear to be compromised) when the court itself is making the selection.

3. The Initial Selection of *Cy Pres* Recipients Should Be Undertaken by the Class Representative and Class Counsel

CATO argues that upon judgment or settlement each member of the class is vested with an individual property right. CATO 6. This is incorrect. To give each member an individually vested right would make settlements impossible to administer, as every settlement would have to be immediately apportioned and the individual's allocated funds placed into escrow. It also would play havoc with the fundamental purpose of the

class action device. *Califano v. Yamasaki*, 442 U.S. 682,700-701 (1979) ("[T]he Rule 23 class-action device was designated to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."). Instead, it is "efficiency and economy of litigation [that] . . . is a principal purpose of the [Rule 23] procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538,553 (1974); accord *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800,1806 (2018). As such, the property obtained immediately upon settlement is not vested individually but rather vested with the class as a whole.

As the settlement property belongs to the class, it should be the role of the class representative along with counsel to suggest the proper distribution of the class's funds. Class counsel has represented the class members throughout the litigation, and has an independent duty to ensure that any distribution, including that of *cy pres*, is proper. *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355,359 (S.D.N.Y.1999) ("Additionally, the distribution preference of class counsel is entitled to deference because class counsel are the only entities with a meaningful equitable stake in the remaining class funds."). Class representatives generally share this responsibility. *Eubank v. Pella Corp.*, 753 F.3d 718,723–24 (7th Cir.2014) (named plaintiffs have ethical obligations as fiduciaries to the class). Once selected by the class counsel and class representative, it becomes the court's obligation to subject the selection to close review. Ultimately, then, it is the court that has the duty to ensure that class counsel and the class

representative(s) have diligently and fairly assessed the need for *cy pres* and then properly chosen the *cy pres* recipient(s).[7]

D. Proper Beneficiaries for the Distribution of *Cy Pres* Funds

"Class actions play a vital role in the judicial system. Often, they are the only way plaintiffs can be compensated and defendants held to account for serious misdeeds with widely diffuse harms." Pet. 20, citing *Amchem Prods. v. Windsor*, 521 U.S. 591,617 (1997). This is particularly true when claims involve only small individual recoveries where the transaction costs for individual litigants are too high to pursue the claim or for counsel to take on the representation. Thus, at their core, the fundamental purpose of every class action is to provide access to justice for people who on their own would not realistically be able to obtain the protections of the judicial system.

Given that the class action device provides litigants access to justice that they would not otherwise have, the use of *cy pres* awards to organizations that make as their mission providing such access has been

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[7] CATO 20 argues that counsel may subvert the process, citing a single case where it contends a *cy pres* recipient was chosen to influence the court. *Fairchild v. AOL, LLC*, No. CV09-03568 CAS (PLAx) (C.D. Cal. 2009). Yet, this possibility occurs in all litigation, and it becomes, here as elsewhere, the responsibility of appellate courts to ferret out.

viewed as a perfect fit.[8] *See, e.g., Lessard v. City of Allen Park*, 470 F. Supp. 2d 781,783-84 (E.D. Mich. 2007) ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (Citation omitted)). Legal aid and access to justice organizations with objectives directly related to the underlying statutes or claims at issue in relevant class actions are, therefore, very appropriate *cy pres* recipients.

This is not to say that *cy pres* even to such organizations should be haphazardly given. In national class actions, *cy pres* recipients should have a nationwide scope. *Cy pres* from settlements related to consumer fraud, securities violations, or discrimination, for example, should go to organizations that assist similarly-situated individuals who have been subjected to such fraud, violations, or discrimination or may be in the future. Finally, cy *pres* should generally not go to newly

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[8] Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice*, Fed. Law, July 2010, at 26,27; Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 Tenn. B.J. 12 (2009); Arthur H. Bryant, "*Cy Pres* Awards Don't Have to Be Complicated," The National Law Journal, February 9, 2015; Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 La. B.J. 248,251 (2011); Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 Va. J. Soc. Pol'y & L. 267,291 (2014).

created organizations—even if there is a "fit"—absent a compelling reason, because such organizations will not have the necessary track record of performance the court needs to evaluate before approving the *cy pres* distribution.

But on the whole, federal and state courts throughout the country have appropriately recognized organizations that provide access to justice for underserved and disadvantaged populations as proper beneficiaries of *cy pres*. This need is widespread. As local, state, federal, and private funding dries up, *cy pres* has become the lifeblood for many organizations that provide many individuals vehicles for any access to justice.

E. There Is a Need for "*Cy Pres* Only" Settlements

Beyond *cy pres* generally, Petitioner and a number of *amici* take particular umbrage with the concept of what they describe as "*cy pres* only" settlements. These are described as unprofitable "strike suits" only brought in order to shake down a settlement with no intention of ever disbursing money to class members. Pet. 35. Any time that it is viewed as not feasible to provide monetary compensation to class members, they assert that one can conclude the lawsuit's only goal was to provide fees for attorneys. Pet. 53-54. CATO even suggests class counsel may agree to a *de minimus* recovery for the purpose of requiring a *cy pres* settlement. CATO 23.

Petitioner and certain *amici's* argument make the flawed assumption that at the time of the initiation of lawsuits that result in "*cy pres* only" settlements, plaintiffs are sufficiently perspicacious to know that the eventual settlement of the litigation will make it infeasible to distribute it to class members. While invariably defendants must argue that they have no liability and will never enter into a settlement, most settlements fall somewhere on a continuum. Settlements as a rule come after a significant amount of information about the action is discovered, either formally or informally. At times, even with ardent discovery the result is a settlement where the costs of distribution to the class do not warrant individual recoveries. Under these circumstances it would be foolish to require the parties to continue to litigate or try the case until the defendant wins or the class gains a recovery sufficient for individual distribution. This would impede the strong public policy of resolving litigation.[9]

Moreover, it is wrong to conclude that "*cy pres* only" settlements provide no benefit to class members. When companies or institutions cheat, harm, take advantage of or discriminate against large numbers of people, class actions are often the only way that those aggrieved can hold the responsible party accountable

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[9] What is often described as the very first *cy pres* settlement was a "*cy pres* only" settlement, *Miller v. Steinbach*, No. 66 Civ. 356, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974) (concluding that the modest size of the settlement fund and the large number of outstanding shares rendered payment unviable).

or lessen the benefits received from its bad conduct. *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326,339 (1980) ("[A]ggrieved persons may be without any effective redress unless they may employ the class-action device."). This does not always require a tangible monetary award. Injunctive relief alone at times can provide an actual benefit to class members. *See In re Volkswagen "Clean Diesel" Marketing, Sales Practices & Prods. Liab. Litig.*, No. MDL 2672, 2016 WL 6248426 (N.D. Cal. Oct. 25, 2016) (replacement or repair for class member vehicles). Even absent effective injunctive relief and a pure "*cy pres* only" settlement, Petitioners' proposed remedy of essentially a dismissal of the action without any payment is the worst of all possible worlds for aggrieved class members. *See Mirfasihi*, 356 F.3d at 784 (*cy pres* awards prevent defendants "from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement [or] judgment").

CONCLUSION

For the foregoing reasons, *amicus curiae* Civil Justice Research Initiative supports Respondents in their request that this Court approve of both *cy pres* awards generally and "*cy pres* only" settlements specifically.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

—v.—

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION AND TECHNET IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Computer & Communications Industry Association (CCIA) represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than $500 billion in annual revenues.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American companies ranging from startups to the most iconic companies on the planet and represents over three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. TechNet has offices in Albany, Austin, Boston, Chicago, Olympia, Sacramento, San Francisco, Silicon Valley, Tallahassee, and Washington, D.C.

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[1] All parties have consented to the filing of this amici brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than amici, their members, and their counsel contributed money that was intended to fund the preparation or submission of this brief.

Amici trade associations represent businesses with billions of users. Given the scale of the services offered by Amici's members, they are prime targets for putative class actions claiming users have been subjected to wrongful conduct under statutes out of step with the complexities of modern online services and the expectations of users. While these cases rarely allege any actual harm to anyone, they threaten Amici's members with substantial liability for statutory damages on behalf of a supposed class that has likely suffered little concrete injury. *Cy pres* settlements are one option Amici's members have for resolving such claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

Technology companies with large user bases often face or are threatened with putative class actions, ostensibly on behalf of some segment of those user bases. These actions result from a number of factors: technology companies' ability to offer innovative products and services at scale to millions of users, outdated and ambiguous statutes that carry the threat of massive statutory damages, and lower courts' reluctance to follow this Court's precedents setting requirements for class certification and mandating that lower courts dismiss cases where no actual harm is shown.

Plaintiffs' attorneys are incented to bring these actions by the theoretical availability of statutory

damages. For their part, defendants are incented to settle these actions given the risk, however remote, of substantial statutory liability and the certainty of millions in litigation costs.

However, settling these cases is complicated by the fact that the putative classes are comprised of unidentified and, in many cases, unidentifiable members, none of whom has likely suffered real harm. Even if identifying and notifying these putative class members were feasible, it would cost millions of dollars and consume most—if not all—of the expected value of the case. A claims process at the required scale would cost millions more.

Cy pres settlements can be a beneficial option in these situations. *Cy pres* settlements allow for resolution of claims involving marginal or inchoate injuries that might otherwise be litigated for years. When targeted appropriately, they can benefit putative class members and society at large by supporting public interest organizations whose objectives are consistent with the policy aims of the litigation. And while these benefits are indirect, in cases like this one, they typically afford more value than an inefficient notice and claims process would yield.

Eliminating or substantially curtailing *cy pres* settlements, as petitioners and their amici urge, unfortunately would not prevent the filing of misguided class actions. Defendants would face the same costs, risks, and settlement pressures, but they would lose a key means of resolving those cases

efficiently to the parties' mutual satisfaction. Not only are defendants worse off when these cases cannot be settled, but putative class members would likewise be worse off in many cases. Instead of the indirect benefits they receive from *cy pres* payments to public interest groups, they may see nothing if a court rejects certification, or they may receive a *de minimis* award when the agreed-upon settlement is consumed by a notice and claims process.

This brief does not address the substantive concerns surrounding class certification or the particular merits of the claims in this case. Instead, Amici argue where class claims likely involve bare statutory violations or allege inchoate harms—which describes many contemporary class actions—*cy pres* settlements can present a valid and workable resolution. In such cases, defendants face claims alleging unproven, nominal injuries for which potential statutory liability and litigation costs may be substantial, but for which putative class members would only receive nominal relief. Amici submit that in the absence of clarification of the scope of this Court's holding in *Spokeo, Inc. v. Robins*, *cy pres* settlements are a critical option for resolving putative class actions based on dubious, but high-stakes, claims.

ARGUMENT

I. Today's Class Action Landscape Is Perilous For Technology Companies.

Technology companies face a challenging environment when it comes to litigating class actions. Many class actions are based on statutes that predate the Internet, featuring statutory damages that do not reflect the realities and scale of modern online services. Further, those actions often allege inchoate harms or bare statutory violations at best. Such claims are seemingly precluded by this Court's dictates in *Spokeo, Inc. v. Robins*, but continue to find purchase in many lower courts. As a result, the propriety of class certification in technology cases is often suspect, but the potential liability can be extreme. In light of the surrounding legal context, *cy pres* settlements are a reasonable means of achieving a mutually beneficial result for plaintiffs and technology company defendants who would otherwise have to resort to costly and fruitless litigation.

A. Outdated Statutes Meant To Address Real Concerns Have Not Been Updated To Consider Advances In Technology.

Neither technology companies nor users are served by Congress' failure to update laws to respond to technological changes. Statutes written decades ago to address legitimate consumer concerns have not been updated to consider advances in technologies that might render their provisions obsolete or

incompatible with how users and companies expect digital services to function. As a result, the applicability of requirements in those statutes to new technologies is uncertain at best. *See, e.g.*, *Microsoft Corp. v. United States*, 829 F.3d 197 (2d Cir. 2016) ("When it passed the Stored Communications Act almost thirty years ago, Congress had as reference a technological context very different from today's Internet-saturated reality. . . . [A] globally-connected Internet available to the general public for routine e-mail and other uses was still years in the future when Congress first took action to protect user privacy."), *vacated as moot by United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (en banc); *see also Pinchem v. Regal Med. Grp., Inc.*, 228 F. Supp. 3d 992, 997 (C.D. Cal. 2017) ("Since Congress enacted the TCPA, however, technological advances have made this definition somewhat obsolete, for modern dialers tend to make calls from call lists rather than from self-generated numbers.").

Plaintiffs' lawyers routinely invoke statutes like the Stored Communications Act (SCA) (as in this case), the Telephone Consumer Protection Act (TCPA), the Video Privacy Protection Act (VPPA), and others in contexts that the statutes' drafters could not have anticipated. *See infra* Part I.B. Indeed, Plaintiffs' counsel in this case admitted that "[t]he primary claim here is for statutory damages under a statute that is hopefully [sic] outdated." JA 143.

These outdated statutes often carry the prospect of statutory damages for each violation. *See, e.g.*, 18 U.S.C. § 2702(c) (statutory damages of $1,000 per violation under the SCA). This incents plaintiffs to bring questionable cases, in the hopes of obtaining windfall settlements. *See Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) ("[I]issues arise from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis—usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws—with the class action mechanism that aggregates many claims—often because there would otherwise be no incentive to bring an individual claim.").

Technology companies are particularly susceptible to such allegations because of the very characteristics that make them appealing to users. Online services utilize the Internet to offer innovative products at scale—reaching billions of consumers. Any perceived slight in their operations, no matter how minor, can trigger a claim alleging some statutory violation untethered to any actual injury, under which a putative class demands enormous statutory damages awards. *See* Brief for eBay Inc. et al. as Amici Curiae Supporting Petitioner at 13–14, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) ("[I]t is the very efficiency and worldwide reach of amici's operations that enable them to deliver such enormous value at such low (sometimes no) cost to their users. At the same time, however, amici's huge

volume of daily interactions with millions of different people renders them particularly vulnerable to putative class actions that allege bare statutory violations and claim statutory damages for enormous putative classes. Any process or practice that applies to a particular user of services or websites provided by any one of the amici may well be alleged to apply equally or similarly to many thousands or millions of other users.").

B. Courts Have Not Consistently Applied *Spokeo, Inc. v. Robins.*

This Court's holding in *Spokeo, Inc. v. Robins* ought to offer technology companies and other defendants some relief from unproven or inchoate claims of injury. For Article III standing, *Spokeo* requires plaintiffs to show that they have suffered an injury in fact that is traceable to the defendant's challenged conduct and is likely to be redressed by a favorable decision in court. *See* 136 S. Ct. 1540, 1547 (2016); Bijan Madhani, *The Supreme Court Clarifies Digital Privacy Harms in Spokeo v. Robins*, Disruptive Competition Project (June 6, 2016), http://www.project-disco.org/privacy/060616-the-supreme-court-clarifies-digital-privacy-harms-in-spokeo-v-robins/#.W4m17M5KiUk. Bare procedural violations of a statute are insufficient. A "concrete injury" is required, which may include some "intangible" harms. 136 S. Ct. at 1549–51. However, many cases are allowed to go forward even when it is not at all

evident whether the plaintiff or putative class members have suffered any actual harm or a concrete injury.

This is the case because courts have applied *Spokeo* inconsistently at best and sometimes have disagreed with its holding outright. *See* Alison Frankel, *3rd Circuit Says* Spokeo *Can't Kill Data Breach Class Actions*, Reuters (Jan. 20, 2017), https://www.reuters.com/article/us-otc-spokeo-idUSKBN1542TN (explaining that "it's looking more and more like appellate courts disagree" that *Spokeo* held that individuals without injury did not have standing); Travis LeBlanc, *A Wake-Up Call: Data Breach Standing Is Getting Easier*, CyberSecurity Law Report (Jan. 17, 2018), https://www.bsfllp.com/images/content /2/9/v2/2995/2018-01-17-Cyber-Security-Wake-Up-Call-Data-Breach-Standing-Is.pdf ("[M]any federal courts post-*Spokeo* (and particularly appellate courts) have found standing for plaintiffs even though the plaintiffs alleged little-to-no pecuniary harm and any future harm was not clearly tied to the defendant's conduct."); Allison Grande, Spokeo *2 Years Later: As Split Grows, High Court Redo Looms*, Law360 (May 18, 2018), https://www.law360.com/articles/1045039/spokeo-2-years-later-as-split-grows-high-court-redo-looms ("For attorneys defending cases brought under the TCPA, *Spokeo* has done little to change their clients' fortunes at the outset of litigation . . . .").

Many courts continue to allow cases to proceed in the absence of any actual injury, leaving

companies unable to rely on the clear standing limitations this Court recognized are inherent in Article III. Courts have outright ignored *Spokeo* or tried to distinguish the plaintiffs' claims before them on factual or statutory grounds. *See, e.g., In re Horizon Healthcare Servs., Inc. Data Breach Litig.*, 846 F.3d 625, 639 (3d Cir. 2017) (holding plaintiffs had standing to pursue purported Fair Credit Reporting Act (FCRA) violations "whether or not the disclosure of th[e] information increased the risk of identity theft or some other future harm"); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340 (11th Cir. 2017) (holding that a putative class plaintiff had standing even though he "d[id] not allege any additional harm beyond the statutory violation"); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 984 (9th Cir. 2017) (distinguishing VPPA claims from *Spokeo* and holding that plaintiff need not allege any further harm to have standing); *Dunham v. Robert Crane & Assocs., LLC*, No. 1:16-cv-2100-SEB-MPB, 2017 U.S. Dist. LEXIS 95492, at *12–13 (S.D. Ind. June 20, 2017) ("*Spokeo* and other cases relying on *Spokeo* involve alleged violations of other statutes."); *Ung v. Universal Acceptance Corp.*, 198 F. Supp. 3d 1036, 1039 (D. Minn. 2016) (holding that a putative class representative had standing to sue under the TCPA even if defendant had manually dialed his number); *Fraser v. Wal-Mart Stores, Inc.*, No. 2:13-cv-00520-TLN-DB, 2016 U.S. Dist. LEXIS 147025, at *12 (E.D. Cal. Oct. 18, 2016) (holding that there was subject-matter jurisdiction to consider the class's claims

under a California state law for the bare procedural violation of allegedly collecting the putative class members' zip codes).

C. The Often Suspect Propriety Of Class Certification In Technology Cases Encourages Companies To Seek *Cy Pres* Settlements.

Technology companies' inability to reliably predict whether claimants alleging inchoate or unproven harms have standing is compounded by uncertainty over certification of classes seeking statutory awards.

While the possibility of losing such marginal cases on the merits is low, the combination of litigation expenses with the extraordinary maximum liability associated with statutory damages is enough to convince any defendant, no matter their resources, to consider settling. The liability associated with statutory damages is often entirely unrelated to the injuries claimed by plaintiffs. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

With what they stand to lose in theory, and with nothing to gain from protracted litigation, technology companies often see prompt settlements

as the most rational response to a putative class action. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 281 (4th Cir. 2010) ("In addition to the risk of bankrupting entire companies for violations in which no identity theft resulted, there is an additional problem with combining statutory damages and class certification. Companies may be forced to settle in the face of such annihilating liability, even if they have a strong defense."); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) ("It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions. If so, such a distortion could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements."); *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (expressing concern with "forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

The facts in this case are representative of the problem. The putative class sought trillions of dollars

for hundreds of millions of potential class members without ever showing (or being able to show) that anyone suffered any real injury. *See* JA 93–94 n.4 ("Plaintiffs point out that the full amount of statutory damages available through the CCAC is likely in the trillions of dollars considering the size of the class. This is an amount in excess of what Defendant could ever pay considering it is much more than its value as a company.").

This case is not unique. There are numerous recent cases that present defendants with a similar economic calculus. *See, e.g.*, *Trans Union LLC v. FTC*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of certiorari) (noting that Trans Union was the defendant in FCRA class actions in which it "face[d] potential liability approaching $190 billion"); *Beaudry v. TeleCheck Servs.*, 579 F.3d 702, 703–06 (6th Cir. 2009) (plaintiff sought to represent a class of millions of Tennesseans requesting statutory damages of $1,000 each); Am. Compl. ¶ 46, Prayer for Relief ¶ D, *In re Netflix Privacy Litig.*, No. 5:11-cv-00379-EJD (N.D. Cal. Sept. 12, 2011), ECF No. 61 (seeking $2,500 in statutory damages for each of "millions of individuals and other entities"); Second Am. Compl. ¶ 73, Prayer for Relief ¶ D, *In re Netflix Privacy Litig.*, No. 1:11-cv-05807 (N.D. Ill. Jan. 31, 2013), ECF No. 61 (seeking $1,000 in statutory damages for each of "thousands, if not millions, of individuals and other entities"); *see also* U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* (Aug. 2017) ("Over 1,000 of the

3,121 cases tracked were brought as putative class actions seeking statutory damages ranging from tens of millions to billions of dollars.").

After recognizing that a putative class action should be settled, parties must determine how to settle the case. Where putative class members are difficult to ascertain, the costs of identifying and notifying those individuals can themselves be prohibitive. Running a claims process thereafter can cost millions more. Together these expenses can exhaust whatever funds that the parties agree is an appropriate value of the putative class's claims, given the remote probability of success. Therefore it is no surprise in these circumstances that parties turn to *cy pres* settlements to eliminate certain transaction costs associated with settlement, thereby preserving some indirect value for the putative class through payments to public interest beneficiaries.

II. Abolishing Or Circumscribing *Cy Pres* Settlements Would Leave Plaintiffs And Defendants Without Recourse And Is Contrary To Public Policy.

Petitioners argue that the Court should eliminate *cy pres* settlements because they are prone to abuse and treat only the symptoms of class action maladies. However, without *cy pres* awards, defendants, putative class members, and the judiciary all would suffer.

With respect to allegations of *cy pres* abuse, Petitioners argue that abuse is inherent in *cy pres* settlements and offer a few anecdotal examples of self-dealing by class counsel. Brief for Petitioners at 28–39. A few cases do not make an epidemic. *See* Christine P. Bartholomew, *Saving Charitable Settlements*, 83 FORDHAM L. REV. 3241, 3270 (2015) ("[C]ollusion concerns in the charitable settlement context are more perception than reality."). Regardless, such concerns can be addressed through careful judicial review of settlement terms. *Id.* at 3270–71. In fact, in this case the settlement was further scrutinized by "an experienced private mediator . . . , a fact which undermines any possible collusion between Plaintiffs' counsel and Defendant." JA 93.

Eliminating *cy pres* settlements would create far more problems than it would solve. Defendants would face potentially ruinous litigation costs and exorbitant potential liability from statutory damages without alternative means of resolving disputes. Defendants would have to incur these massive expenses even in cases where they caused no actual harm, and even where both plaintiffs and defendants agree that the case stands little chance of success on the merits. And defendants would ultimately spend far more on legal fees than the mutually agreed expected value of the case—when the entire limited expected value could otherwise be put toward indirect relief in a *cy pres* settlement. *See, e.g.*, *Lane v. Facebook*, 696 F.3d 811, 825 (9th Cir. 2012) ("[T]here

is no dispute that it would be 'burdensome' and inefficient to pay the $6.5 million in *cy pres* funds that remain after costs directly to the [more than 3.6 million member] class because each class member's recovery under a direct distribution would be *de minimis*.").

Cy pres settlements themselves can have inherent positive impact. If they were generally eliminated, the putative class would lose the public interest benefits of *cy pres* awards, which can include behavioral modifications by defendants, educational resources to help deter future actions by similarly positioned companies, and funding of public interest organizations whose interests and activities are likely consistent with the aims of the litigation.

Eliminating the recourse of *cy pres* settlements would also thwart parties' good-faith, mutual desire to resolve their dispute, contrary to the public interest in amicable settlement of litigation. *See, e.g.*, *Marek v. Chesny*, 473 U.S. 1, 10 (1985) ("[S]ettlements rather than litigation will serve the interests of plaintiffs as well as defendants."); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution.").

And finally, the judiciary's already limited resources would be further stretched with complex, time-intensive class action litigations lingering on dockets far longer than if they had been settled to parties' mutual satisfaction.

CONCLUSION

The issue before the Court is not the substantive concerns surrounding class certification or even the particular merits of the claims in this case. Rather, the question is simply whether *cy pres* settlements have a role to play in the current class action environment. They do.

Technology companies, Respondents included, face a particularly challenging environment when it comes to litigating class actions. Many class actions are based on statutes that predate the Internet, featuring statutory damages that do not reflect the realities and scale of modern online services. Further, those actions are often based on allegations of unproven, inchoate harms or bare statutory violations at best. As a result, the propriety of class certification in technology cases is often suspect, but the potential liability can be extreme.

In light of the surrounding legal context, Amici submit *cy pres* settlements can be an effective means of achieving a mutually beneficial result for plaintiffs and technology company defendants who would otherwise have to resort to costly and fruitless litigation to resolve putative class actions based on marginal, but high-stakes, claims.

* * *

Amici ask that the Court affirm the public interest benefits of *cy pres* settlements, and the judgment below.

Respectfully submitted,

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No. 17-961

IN THE
Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS,
on behalf of herself and all others
similarly situated, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC and several consumer privacy organizations twice urged the district court to reject this Settlement. We stated that the relief to class members contained "obvious deficiencies." Letter from Consumer Privacy Organizations to Hon. J. Davila (Aug. 27, 2014) (docketed in *In re Google Referrer Header Privacy Litig.*, No. 10-4809);[2] Letter from Consumer Privacy Organizations to Hon. J. Davila (Aug. 22, 2013) (docketed in, *In re Google Referrer Header Privacy Litig.*, No. 10-4809).[3]

EPIC seeks to ensure that settlements in privacy class actions advance the interests of the underlying claims, protect the interests of class members, and fulfill the core purposes of the *cy pres* doctrine. In addition to advising courts in several *cy pres* matters, EPIC has proposed objective criteria for courts to consider in evaluating potential *cy pres* awards. *See* Marc

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

[2] https://epic.org/privacy/internet/ftc/google/CPO-ltr-Judge-Davila-re-Gaos.pdf.

[3] https://epic.org/privacy/google/EPIC-et-al-Ltr-Google-Referrer-Header.pdf.

Rotenberg & David Jacobs, *Enforcing Privacy Rights: Class Action Litigation and the Challenge of Cy Pres, in Enforcing Privacy Law, Governance and Technology Series* 307 (David Wrights & Paul De Her teds., 2016) (hereinafter *Enforcing Privacy Rights*).

EPIC has also filed numerous briefs before this Court, over the past 25 years, in cases concerning the protection of privacy. *See, e.g.*, Brief of *Amicus Curiae* EPIC et al., *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (Whether the Fourth Amendment Permits the Government to Obtain Six Months of Cell Phone Location Records Without a Warrant); Brief of *Amici Curiae* EPIC et. al, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); Brief of *Amici Curiae* EPIC et. al, *NASA v. Nelson*, 562 U.S. 134 (2011) (No. 09-530) (arguing that the Court should recognize the right to informational privacy); Brief of *Amicus Curiae* EPIC, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464) (arguing that the Driver's Privacy Protection Act is constitutional and creates a baseline standard for driver privacy).

EPIC fully respects the concerns raised by Chief Justice Roberts in *Marek v. Lane*, 571 U.S. 1003 (2013), regarding *cy pres* only settlements and seeks, by means of this *amicus*, to answer the questions the Chief Justice posed.

SUMMARY OF THE ARGUMENT

Class action litigation is vital to ensure the protection of the public interest—particularly in the privacy field—and class action settlements should be fair to class members. A class action settlement should not permit the continuation of the business practice that provided the basis for the lawsuit. A class action settlement should result in a substantial change in business practice. A class action settlement should provide monetary relief to class members. If it is not possible to provide monetary relief to class members, then a *cy pres* award may be appropriate if the award advances the aims of the underlying litigation and is provided to organizations aligned with the interests of class members.

Unfortunately, lower courts have approved settlements that do not satisfy these criteria. As a consequence, companies have continued to engage in the practices that gave rise to the litigation and class members have received no relief. This has not served the interests of justice.

Chief Justice Roberts stated in *Marek v. Lane*, that the "Court has not previously addressed any of [the] issues" surrounding the fairness of class action settlements involving "*cy pres*" distributions. 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of cert.). Now the Court has the opportunity to address these issues. Given the growing public concern about data breaches, identity theft, and financial fraud it is vitally important that the Court preserve the enforcement mechanism that prevents the misuse of personal data and helps safeguard the American public. But that was not the outcome in the *Gaos* Settlement. The Court should reverse and remand to

ensure that the Settlement in this case, and in other similar cases, provides an actual benefit to class members.

ARGUMENT

Class action litigation is central to the protection of privacy in the United States. Data breaches impact millions of individuals, yet there is little incentive for any single person to pursue a legal action. And the risks to Americans in the misuse of their personal data by commercial firms is significant. As Justice Alito stated recently, "today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans." *Carpenter v. United States*, 138 S. Ct. 2206, 2261 (2018) (Alito, J., dissenting).

But to be effective, class action settlements should "stop business practices that harm consumers, compensate individuals for injuries suffered and deter future misconduct." *Enforcing Privacy Rights*, *supra*, at 307. Without these requirements, settlements provide little actual benefit to class members.

In *Marek v. Lane*, Chief Justice Roberts expressed "fundamental concerns" about the fairness of class action settlements that award *cy pres* funds but provide no monetary relief to class members and fail to enjoin the underlying conduct. *Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of cert.). He asked:

> [1] When, if ever, such relief should be considered; [2] how to assess its fairness as a general matter; [3] whether new

> entities may be established as part of such relief; [4] if not, how existing entities should be selected; [5] what the respective roles of the judge and parties are in shaping a *cy pres* remedy; [6] how closely the goals of any enlisted organization must correspond to the interests of the class; and so on.

Id. (bracketed numbers inserted).

The Settlement here presents many of the same concerns identified by Chief Justice Roberts in *Lane*. Similar to the settlement in *Lane*, the *Gaos* Settlement fails to provide funding for consumer privacy organizations that actually promote the interests of the class members. The *Gaos* Settlement also insulates Google from related claims. All class and subclass members who do not affirmatively request to be excluded will be barred from suing over the released claims.

In response to the questions posed by Chief Justice Roberts in *Lane*, *amici* EPIC states directly:

> 1. *Cy pres*-only settlements provide an actual benefit to class members, ensuring fairness, when the funds are distributed consistent with the purposes of the underlying litigation and advance the interests of class members. So, for example, a university or a social service agency may both be worthy of charitable support, but a *cy pres* award to either requires a showing that the mission of the organization is in fact aligned with the interests of the class members. The American

Law Institute provides clear guidance on this point;[4]

2. Fairness requires that a class action settlement results in a substantial change in business practice. As a matter of logic, a case that alleges unlawful conduct should not settle if the disputed conduct is permitted to continue;
3. New entities should be disfavored in the allocation of *cy pres* funds unless (a) the ALI requirement is satisfied and (b) courts are prepared to exercise ongoing oversight of such new entities to ensure that they advance the interests of class members;
4. When direct monetary relief is infeasible, distribution of *cy pres* should only be permitted when the settlement is otherwise fair to class members and would advance the underlying purpose of the litigation;
5. The court should make an independent determination, based on objective criteria, the purpose of the litigation, and the interests of the class members as to whether the *cy pres* distribution proposed by the parties is fair; and

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[4] "If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class." *Principles of the Law of Aggregate Litigation* § 3.07 (Am. Law Inst. 2010).

6. The *cy pres* doctrine requires that the proposed organizations are "as near as possible" to the interests of the class members. This is reflected also in the ALI standard.

The burden should be on the parties to demonstrate why it would not be possible to distribute *cy pres* funds most aligned with the interests of the class.

I. The lower court's failure to recognize three key deficiencies in the Settlement warrants remand.

The Settlement has three obvious deficiencies. First, the Settlement would permit Google to continue to disclose the Internet search histories of identifiable Internet users to third-parties, in violation of federal and state privacy law. Second, the Settlement provides no direct relief to class members. And third, the Settlement directs monetary proceeds, with one exception, to inappropriate *cy pres* recipients.

EPIC and consumer privacy organizations repeatedly objected to the Settlement in the district court because the proposed Settlement failed to produce any changes in Google's business practices. In 2013, EPIC and the consumer privacy organizations wrote to the court that it is "absurd to argue that a benefit is provided to the Class where the company makes no material change in its business practices and is allowed to continue the practice that provides the basis for the putative class action." Letter from Consumer Privacy Organizations to Hon. J. Davila, (Aug. 22, 2013) (docketed in, *In re Google Referrer Header Privacy Litig.*, No. 10-4809).[5] The groups urged

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[5] https://epic.org/privacy/google/EPIC-et-al-Ltr-Google-Referrer-Header.pdf.

that "[o]n this basis alone, the proposed settlement should be rejected." *Id.* We wrote to the court again in 2014, asserting that, "[o]ur assessment has not changed one year later." Letter from Rotenberg, et al. to Hon. J. Davila, (Aug. 27, 2014) (docketed in, *Google Referrer Header*).[6] "The proposed settlement is bad for consumers and does nothing to change Google's business practices." *Id.* The consumer privacy organizations also wrote to the Federal Trade Commission urging it to intervene and block approval of the Settlement. Letter from Consumer Privacy Organizations to James A. Kohm, Assoc. Dir., Fed. Trade Comm'n., (Jul. 31, 2014).[7]

A. The Settlement resulted in no meaningful change to business practices.

The lower court left a key question unanswered: How do class members benefit from a settlement that offers no material change in business practices and allows the continuation of the practices that provided the basis for the lawsuit? The answer is simple. Class members do not benefit.

Under this Settlement, Google can continue to "intentionally, systematically and repeatedly divulg[e] its users' search queries to third parties" in violation of the Stored Communications Act, 18 U.S.C. § 2702, users' contract rights, and California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* Second Amended Complaint, *Gaos v. Google, Inc.*, 87 F. Supp. 3d 1122 (N.D. Cal. 2015) (No. 5:10-cv-04809). That was the allegation set out by class counsel, yet now counsel

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[6] https://epic.org/privacy/internet/ftc/google/CPO-ltr-Judge-Davila-re-Gaos.pdf.

[7] https://epic.org/privacy/internet/ftc/FTC-Gaos-7-14.pdf.

has agreed to a settlement that allows these practices to continue.

These business practices are hardly inconsequential. A search engine is an equally "pervasive and insistent part of daily life" as a cellphone. *Carpenter v. United States*, 138 S. Ct. 2206, 2210 (2018) (quoting *Riley v. California*, 134 S. Ct. 2743, 2484 (2014)). Google processes 3.5 billion searches per day and 1.2 trillion per year. Internet Live Stats, *Google Search Statistics* (2018).[8] An individual's Internet searches amassed over time, like cellphone location records, can reveal some of the most intimate details of the person's life—including their medical conditions, mental state, travel plans, fears and shopping habits. *See* Molly Wood, *Sweeping Away A Search History*, N.Y. Times (Apr. 2, 2014).[9]

Yet, under the proposed Settlement, Google will make no substantial changes to its business practices: "Google will not be required or requested to make any changes to its homepage www.google.com or to the practices or functionality of Google Search, Google Adwords, Google Analytics, or Google Web History." Pet. App. 40. In fact, the Settlement only requires a modification of Google's privacy policy, which still allows the company to continue the disputed practice. Pet. App. 82.

Privacy notices do not benefit the class members. They paper over an ongoing problem. And privacy notices have been widely recognized as

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[8] http://www.internetlivestats.com/google-search-statistics/.

[9] https://www.nytimes.com/2014/04/03/technology/personaltech/sweeping-away-a-search-history.html.

ineffective. "Researchers have found that typical privacy notices not only fail to help consumers make informed privacy decisions, but are largely ignored by them." Florian Schaub, Rebecca Balebako, & Lorrie Faith Cranor, *Designing Effective Privacy Notices and Controls*, 21 IEEE Int. Computing 70, 71 (2017). Users do not read privacy notices, and for good reason. Reading and understanding all relevant privacy policies would take an unreasonable amount of time, would require familiarity with legal and technological concepts, and would not be useful to the user because the terms are pre-determined by the companies and can be changed at any time. *Id.* at 2–3; *see also* Alexis Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, The Atlantic (Mar. 1, 2012).[10] Privacy policies rarely say much about how data is disseminated, which was a central issue in this case. *See* Maria Temming, *Website Privacy Policies Don't Say Much About How They Share Your Data*, Sci. News (Apr. 27, 2018).[11]

Google's modification of the notice on its website provides no meaningful benefit to the class. Instead, the notice permits Google's unlawful privacy practices to continue.

B. The Settlement does not provide direct relief to class members.

The Settlement here provides no monetary or injunctive relief to the class. Courts have recognized

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[10] https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/.

[11] https://www.sciencenews.org/article/website-privacy-policies-dont-say-much-about-how-they-share-your-data.

that the absence of relief to class members is a sufficient basis for invalidating a settlement. *See* Order Denying Mot. for Prelim. Approval of Settlement, *Fraley v. Facebook*, No. 11-01726, 2012 WL 5838198 (N.D. Ca. Aug. 17, 2012).

The Plaintiffs sued for violations of laws that provide for statutory damages, including the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 *et seq.*, which provides for a minimum of $1,000 per violation. 18 U.S.C. § 2707(c). Given the availability of statutory damages, the failure to provide *any* monetary relief to class members raises a glaring red flag. Absent some alternative remedy, the lack of monetary or injunctive relief leaves class members in no better position than they were in prior to initiating the lawsuit. In fact, they are worse off. Class members can no longer individually sue as their claims are now barred and Google can continue the alleged misconduct with no threat to its practice. Such an arrangement is unfair, unreasonable, and inadequate for class members.

C. The parties did not appropriately select the *cy pres* recipients.

The Ninth Circuit has established clear and reasonable standards for *cy pres* allocations in class settlements, which "allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 1990). But there are important limitations, and a court should not simply approve any proposed *cy pres* recipient. To avoid the "many nascent dangers to the fairness of the distribution process," lower courts have required a "driving nexus between the plaintiff class and the *cy pres* beneficiaries." *Id.* at 1038. As explained

in *Nachshin*, courts have considered two guiding factors when approving *cy pres* funds: (1) the objectives of the underlying statute and (2) the interests of the silent class members. *Id.* at 1039; *see also Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

The *cy pres* recipients in this Settlement were not selected consistent with this standard. Under the first factor, the Settlement does not serve the objectives of underlying statute. The Plaintiffs alleged a violation of the SCA, which prohibits a provider of "an electronic communication service" from divulging "to any person or entity the contents of a communication" stored, carried, or maintained by the provider. 18 U.S.C. § 2702(a). This Settlement closely resembles that in *Lane v. Facebook*, in which Judge Smith found that the missions of the proposed *cy pres* beneficiaries did not align with the purposes of the underlying statutes. *Lane v. Facebook, Inc.*, 709 F.3d 791, 794 (9th Cir. 2013) (Smith, J., dissenting from denial of rehearing *en banc*). As Judge Smith explained, the purposes of the underlying statutes were to "prevent[] unauthorized access or disclosure of private information," whereas the mission of one charity was simply to "educate users, regulators[,] and enterprises' on how to protect Internet privacy 'through user control." *Id.*

The problems with the proposed *cy pres* beneficiaries here are almost identical to those in *Lane*. The SCA prevents unauthorized access and disclosure of private communications. 18 U.S.C. § 2701. Yet the *cy pres* recipients have stated that they will use the funds primarily for public education.

None of the *cy pres* recipients, save the World Privacy Forum, even mention consumer privacy

protection in their mission. In *Dennis v. Kellogg Co.*, the Ninth Circuit rejected a settlement because the *cy pres* recipients were "divorced from the concerns embodied in consumer protection laws" underlying the case. 697 F.3d 858, 866 (9th Cir. 2012). One such law—the Unfair Competition Law (UCL)—was "designed to preserve fair competition among business competitors and protect the public from nefarious and unscrupulous business practices." *Id.* (citing *Wells v. One2One Learning Found.*, 116 Cal.App.4th 515 (2004)). The parties to that settlement selected *cy pres* beneficiaries that sought to distribute funds to feed the indigent, which had "little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved." *Id.* (citing *Nachshin*, 663 F.3d at 1039). Just as the objectives of the fair competition law in *Dennis* were not served by *cy pres* distributions to charities that fed the indigent, the objectives of the privacy statutes are not served by *cy pres* distributions to non-privacy organizations.

Regarding the second factor—the interests of the silent class members—*cy pres* funds must be used "for the aggregate, indirect, prospective benefit of the class." *Nachshin*, 663 F.3d at 1038. While the overarching standard is whether a proposed settlement is fair, reasonable, and adequate, "where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution." *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010); *Six Mexican Workers*, 904 F.2d at 1308; *see also Principles of the Law of Aggregate Litigation* § 3.07 (Am. Law Inst. 2010) [hereinafter *ALI Principles*] ("If, and only if, no recipient whose interests reasonably approximate those

being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.").

The *cy pres* distribution in this Settlement does not provide the "next best" alternative to class relief. Other than the World Privacy Forum, none of the listed organizations have taken on the mission of protecting consumer privacy. They are simply not aligned with the interests of class members. These organizations should be ineligible for a *cy pres* award.

This case is similar to *Nachshin*, where the Ninth Circuit rejected a proposed settlement arising from AOL's alleged misuse of data from users' outgoing emails. The proposed settlement agreement would have given a class of 66 million AOL subscribers zero monetary compensation, would have required minor notice changes and the creation of an opt-out on AOL's part (a substantial change in business practice not present in this case), and would have distributed $75,000 in *cy pres* payments. Class members "claimed they could not identify any charitable organization that would benefit the class or be specifically germane to the issues of the case." *Nachshin*, 663 F.3d at 1037. The district then selected three organizations as recipients: (1) the Legal Aid Foundation of Los Angeles, (2) the Federal Judicial Center Foundation, and (3) the Boys and Girls club of America. *Id.*

The Ninth Circuit found that the settlement was unfair because the groups were "geographically isolated and substantively unrelated charities." *Id.* at 1036. Focusing on the latter issue, the court noted several concerns with *cy pres* distributions that have little

or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs:

> When selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self-interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.

Id. at 1039 (citing *Bear Stearns*, 626 F.Supp.2d at 415). The court held that because the action arose from the alleged online misdeeds of AOL, appropriate *cy pres* relief *must* include organizations that actively work against online misdeeds:

> It is clear that all members of the class share two things in common: (1) they use the Internet, and (2) their claims against AOL arise from a purportedly unlawful advertising campaign that exploited users' outgoing e-mail messages. The parties should not have trouble selecting beneficiaries from any number of nonprofit organizations that work to protect internet users from fraud, predation, and other form so online malfeasance. If a suitable *cy pres* beneficiary cannot be located, the district court should consider escheating the funds to the United States Treasury.

Id. at 1041.

Later, in *Lane v. Facebook*, six Ninth Circuit judges dissented from the denial of a petition for a rehearing *en banc*. *Lane v. Facebook, Inc.*, 709 F.3d 791 (9th Cir. 2013) (Smith, Kozinski, O'Scannlain, Bybee, Bea, and Ikuta, Js., dissenting). "Our precedent," they wrote, "holds that it is not enough to simply identify any link between the class claims and a cy pres distribution, such as whether both concern food (*Dennis*) or the Internet (*Lane*)." *Id.* at 794. The judges emphasized that "[i]nstead, an appropriate cy pres recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain." *Id.*

Here, class members alleged that Google unlawfully disclosed the contents of search queries to third parties. Pet. App. 33. Given the underlying claim, the interest of the class then is to protect against future privacy violations committed by Google. As in *Nachshin* and *Dennis*, the *cy pres* recipients may all pursue virtuous goals, but only one organization—World Privacy Forum (WPF)—has a mission to protect user privacy from corporate misconduct. It is therefore misleading for class counsel to present these organizations as recipients that will benefit the class and it was incorrect for the lower court to uphold this Settlement,

Class counsel also excluded other organizations aligned with the interests of class members—many of whom who have defended consumers against similar practices by the defendant in this case. For example, in 2008, well before this case was filed, 14 organizations wrote to Google CEO Eric Schmidt, urging him to comply with a California law to "conspicuously post its privacy policy on its Web site." Letter from Consumer Privacy Groups to Eric Schmidt, CEO, Google,

Inc. (June 3, 2008).[12] As the groups stated, "Google's reluctance to post a link to its privacy policy on its homepage is alarming. We urge you to comply with the California Online Privacy Protection Act and the widespread practice for commercial web sites as soon as possible." *Id.* And Google, responding to the work of these organizations, did subsequently post a link to the privacy policy as required by state law. *See* Google (2018).[13] But aside from WPF, none of the organizations that defended the privacy interests of users as against defendant Google were named in the *Gaos* Settlement.

The privacy risks arising from Google's referrer heading practices created the risk to Internet privacy and gave rise to this class action lawsuit. Therefore, organizations that advocate for change in business practices that better safeguard privacy are far more appropriate recipients of *cy pres* funds. Their mission, activities, and advocacy are closely aligned with the class members. But only one of the *cy pres* recipients here meets such standards. Thus, the *cy pres* distribution fails the Ninth Circuit's fair and reasonable "nexus" test articulated in *Nashchin* and should be rejected.

Moreover, the recipients have strong ties with the *defendant* Google, having routinely received funds by Google in the past. As the Ninth Circuit has stated, "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties." *Molski*, 318

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[12] *Available at* https://www.privacyrights.org/blog/consumer-and-privacy-groups-urge-google-post-link-its-privacy-policy-its-home-page.

[13] https://www.google.com.

F.3d at 954. Also, such schemes are a "paper tiger" in terms of deterrence. *Dennis*, 697 F.3d at 867-868. But the problems do not end there. There is also a disturbing amount of overlap between the *cy pres* recipients and the *alma maters* of class counsel.

Even the U.S. Federal Trade Commission has expressed increasing concern about class action settlements adverse to the interest of class members. Press Release, Fed. Trade Comm'n, *FTC Files Amicus Brief in U.S. District Court Opposing Proposed Class Action Settlement with Debt Buyer Midland Funding LLC* (May 23, 2011).[14] The Commission wrote as *amicus* in another matter that "[t]he disproportionate breadth of the Class Release and the significant advantages it provides Defendants, as compared to the *de minimis* benefits to the class, cast serious doubts as to the fairness, reasonableness, and adequacy of the proposed settlement." Brief of *Amicus Curiae* Fed. Trade Comm'n, *Vassalle v. Midland Funding*, No. 11-00096, 2014 WL 5162380 (N.D. Ohio Oct. 14, 2011), *aff'd sub nom*, *Pelzer v. Vassalle*, 655 Fed App'x 352 (6th Cir. 2016). That same argument applies equally here.

II. In *cy pres* matters, courts should ensure fairness, prevent collusion, and promote the interests of class members.

A *cy pres* only settlement in a class action requires a court to consider: (1) whether such relief is appropriate in the first instance; (2) whether a "nexus" exists between the recipient organizations and the interests of the class; and (3) the importance of judicial

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[14] https://www.ftc.gov/news-events/press-releases/2011/06/ftc-files-amicus-brief-us-district-court-opposing-proposed-class.

oversight in the selection process–particularly to address the risks of collusion between the parties. *See Marek v. Lane*, 571 U.S. 1003 (2013) (statement of C.J. Roberts respecting denial of cert.).

First, *cy pres* should only be awarded if the settlement is otherwise fair to class members and the chosen organizations would advance the purpose of the litigation. A settlement is fair to class members if it prohibits the underlying conduct that was the basis for the lawsuit and compensates class members directly. Second, the chosen organizations should have the burden of demonstrating that they are sufficiently aligned with the interests of the silent class members. This means that the organization's mission must not merely relate to litigation in the abstract, *see Dennis*, 697 F.3d 858; the organization should demonstrate that it has a track record of service aligned with the interests of the class and that it will use the funds to directly further the underlying interests at issue in the lawsuit. Third, *cy pres* requires vigilant judicial oversight to guard against the risks of collusion and ensure that judges are not rubber-stamping settlements that compensate attorneys while failing to benefit class members.

A. *Cy pres* is appropriate only when the settlement is otherwise fair to class members and it would advance the underlying purpose of the litigation.

Class action settlements should deter unlawful conduct and provide direct monetary relief to class members. *Cy pres* is appropriate only after those two objectives have been fulfilled. *Cy pres* relief may replace direct payments to class members only when, practically speaking, it would be impossible to

compensate class members directly. *See ALI Principles, supra.* But judges should never approve a *cy pres* award where class counsel has agreed to let the defendant continue the conduct that was the basis for the lawsuit. Not only does such a settlement harm consumers, but also it increases the risk of collusion between the defendant and class counsel. There is simply too much incentive for class counsel to bargain away the rights of consumers in pursuit of their own compensation.

Class actions serve a valuable role in protecting consumer privacy. Numerous privacy statutes provide a private right of action,[15] but because individual claims for monetary relief would be small under these statutes, class actions are the only effective way for individuals to vindicate their privacy rights. However, class action settlements can undermine rather than protect consumers' privacy rights if they allow the defendant to continue the challenged conduct. Unfortunately, this has been an all-too-often occurrence in consumer privacy settlements. In *Fraley v. Facebook*, for instance, Facebook was permitted to continue using the names and likenesses of minor users to endorse commercial messages in violation of the privacy laws of seven states. Similarly, in *Lane*, although Facebook had agreed to terminate the "Beacon" program itself, "nothing in the settlement would preclude Facebook from reinstituting the same program with a new name." *Lane*, 571 U.S. 1003.

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[15] *See, e.g.* the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et. seq.*, the Stored Communications Act, 18 U.S.C. §§ 2701 *et. seq.* the Video Privacy Protection Act, 18 U.S.C. § 2710 and the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et. seq.*

More recently, EPIC objected to a settlement in which Google was permitted to continue to "place tracking cookies on the plaintiffs' web browsers in contravention of their browsers' cookie blockers and defendant Google's own public statements." Brief of *Amicus Curiae* EPIC, *In re Google Cookie Placement Consumer Privacy Litig.*, No. 12-2358, 2017 WL 446121 (D. Del. Feb. 2, 2017), *appeal docketed*, No. 17-1480 (3rd Cir., Mar. 7, 2017).[16] Despite substantial evidence of Google's wrongdoing, including a record fine by the FTC,[17] the only relief to the class members other than the proposed *cy pres* award was "Google's assurances that it took actions to expire or delete, by modifying the cookie deletion date contained in each cookie, all third-party Google cookies that exist in the browser filed for Safari browsers." *Id.*

Cy pres should also not replace direct payments to class members. Settlement funds should be provided directly to class members for two reasons: (1) that is the preferred outcome in law, and (2) the risk of collusion among repeat players is too great. *See Enforcing Privacy Rights*, *supra*. Neither the size of the class nor the substantive claims should preclude establishing a claims process for class members. In *Fraley*, the class consisted of 150 million members and yet

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[16] https://epic.org/amicus/class-action/google-cookie/EPIC-Amicus-In-re-Google-Cookie.pdf.

[17] Press Release, Fed. Trade Comm'n, Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser: Privacy Settlement is the Largest FTC Penalty Ever for Violation of a Commission Order (Aug. 9, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented.

the parties reached a settlement that would award "small cash payments to the relatively low percentage of class members who filed claims." *Fraley v. Facebook*, 966 F. Supp. 2d 939, 941 (N.D. Cal. 2013).

According to the American Law Institute, a court should only approve a *cy pres* only distribution if individual class members cannot be identified, individual distributions would not be economically viable, or "specific reasons exist that would make further distributions impossible or unfair." *ALI Principles*, *supra*. The administrative problems of identifying and compensating class members, however, should not hinder a settlement from deterring the unlawful conduct that was the basis for the litigation.

Some charitable organizations, recognizing the harm that collusive settlement pose, have turned down substantial *cy pres* awards rather than ratify a settlement that would be adverse to the mission of the organization. For example, in *Fraley*, the Center for Commercial Free Childhood (CFCC) rejected a *cy pres* award that would have equaled 90 percent of its annual budget because the settlement would have "authorize[d] Facebook to continue to violate laws in seven states" that protect the privacy interests of children, limiting the use of a person's name or likeness for advertising purposes. Letter from Campaign for a Commercial-Free Childhood to the United States Court of Appeals for the Ninth Circuit (Feb. 12, 2014).[18] As CFCC stated, "not only is the settlement bad, it is *worse* than no settlement at all." *Id.* (emphasis in original).

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[18] http://www.commercialfreechildhood.org/sites/default/files/CCFCAmicusLetter.pdf.

The prestigious MacArthur Foundation also asked to be removed from a controversial consumer privacy settlement. The Foundation noted that it was not an appropriate *cy pres* recipient and asked that the funds be "redirected to other non-profit organizations engaged in the underlying issues . . ." EPIC, *MacArthur Foundation Withdraws From Consumer Cy Pres Settlement* (Sept. 25, 2013).[19] "The Foundation, one of the 14 non-profit groups selected to receive money by Facebook and class action lawyers, declined the award on the ground that it doesn't work on issues related to consumer privacy." Jeff Roberts, *Why Privacy Settlements like Facebook's "Sponsored Stories" Lawsuit Aren't Working*, Gigaom (Sept. 19, 2018).[20]

B. Proposed *cy pres* recipients must show a sufficient nexus between the purpose of the litigation and proposed activities that benefit class members.

Cy pres distributions can, in some cases, advance the underlying objectives of the lawsuit where the chosen organizations represent the interests of the class. But courts must engage in a thorough analysis to ensure a sufficient nexus between the purpose of the lawsuit and the organization's proposed activities. Courts should consider: (1) whether the organization has an extensive service record of representing the interests of the class and (2) whether the organization's written proposal will advance the underlying statutory claims.

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[19] https://epic.org/2013/09/macarthur-foundation-withdraws.html.

[20] https://gigaom.com/2013/09/19/why-privacy-settlements-like-facebooks-sponsored-stories-lawsuit-arent-working/.

Courts have often awarded *cy pres* to organizations with no service record at all, or with service records unrelated to the interests of the class. The most egregious example of this was in *Lane*, where *cy pres* funds went to the Digital Trust Foundation ("DTF"), a "bespoke creation of this settlement" with "*no* record of service." *Lane*, 709 F.3d at 793 (Smith, J., dissenting from denial of rehearing *en banc*).

In *In re Google Cookie Placement*, the court approved a *cy pres*-only settlement that included an organization that did not have "privacy" listed in any of the ten practice areas listed on its website.[21] The district court failed to explain how a *cy pres* distribution to the organizations bore a sufficient nexus to the interests of the class, simply concluding that each organization would agree to "devote the funds to promote public awareness and education, and/or support research, development, and initiatives, related to the security and/or privacy of Internet browsers." *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, No. cv-12-md-2358 (SLR), 2017 WL 446121, at *4 (D. Del. Feb. 2, 2017), *appeal docketed*, No. 17-1480 (Mar. 7, 2017). The *cy pres* allocation also excluded several consumer privacy organizations that had directly challenged the conduct by Google that gave rise to the lawsuit. *See, e.g.* EPIC, Complaint, Request for Investigation, Injunction, and Other Relief, *In the Matter of Google, Inc.*, before the Fed. Trade Comm'n (Feb. 16, 2010).[22]

The lower court in this case failed to conduct any inquiry into the service records of the recipient

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[21] http://www.publiccounsel.org/practice_areas/.

[22] https://epic.org/privacy/ftc/googlebuzz/GoogleBuzz_Complaint.pdf.

organizations. The court only mentioned the issue in one cursory sentence, stating "[h]aving carefully reviewed the proposals by counsel, the court is satisfied that the proposed *cy pres* distribution 'bears a substantial nexus to the interests of the class members' as required by the Ninth Circuit." *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1133 (N.D. Cal. 2015), *aff'd*, 869 F.3d 737 (9th Cir. 2017). A *cy pres* award cannot represent the "next best" distribution where the organization's service record bears little or no nexus to the interests of the class.

Courts similarly fail to examine whether the organization's proposed use of the funds will advance the underlying statutory claims. As Judge Smith wrote in his dissent in *Lane*, "it is not enough simply to identify any link between the class claims and a *cy pres* distribution . . . [i]nstead, an appropriate *cy pres* recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain." *Lane*, 709 F.3d at 794 (Smith, J., dissenting from denial of rehearing *en banc*). In consumer privacy settlements, courts often mistakenly assume that educating consumers and challenging misconduct are interchangeable in terms of the benefit they provide to the class. But user education has little to do with the aim of privacy law in the United States, which is "to limit the collection and use of personal data." Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy*, 2001 Stan. Tech. L. Rev. 1 (2001).

Judge Smith highlighted this schism in *Lane*, emphasizing that the purpose the plaintiffs' statutory claims was to prevent "*unauthorized* access or disclosure of private information," while the Digital Trust Foundation would dedicate the funds "to educat[ing]

users, regulators[,] and enterprises' on how to protect Internet privacy 'through user control.'" *Lane*, 709 F. 3d at 794 (Smith, J., dissenting from denial of rehearing *en banc*). Judge Smith underscored the inherent mismatch between the proposal and the aims of the litigation, stating, "an organization that focuses on protecting privacy solely through 'user control' can *never* prevent unauthorized access or disclosure of private information where the alleged wrongdoer *already has unfettered access* to a user's records." *Id.*

So long as organizations exist that actively defend the privacy interests of Internet users and actively challenge the business practices that give rise to these cases, distributions used for education or research cannot represent the "next best" use of settlement funds. *Enforcing Privacy Rights, supra.*

C. To prevent collusion, courts must conduct close oversight of proposed *cy pres* distributions.

Courts must pay special attention to any potential conflicts of interest in *cy pres* settlements to avoid the risks of collusion between the defendant and class counsel. Courts must be on the lookout "not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 749 (9th Cir. 2017) (Wallace, J. dissenting).

In particular, *cy pres* awards designated for organizations that have previously received substantial payments from the named defendant should be subject to exacting scrutiny. Such distributions risk undermining the interests of the class by rewarding

organizations that will advance the defendant's interests at the expense of the class. The ALI has stated that "a *cy pres* remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was on the merits." *ALI Principles*. Courts have raised concerns about *cy pres* awards that benefit organizations to which the defendant has made prior payments. *See Molski*, 318 F.3d at 954 (stating that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"); *Dennis*, 697 F.3d at 867–68 (noting that a *cy pres* award that allows the defendant to use "previously budgeted funds" to make the same contribution it would have made anyway is a "paper tiger" in terms of deterrence).

In *Lane*, the terms of the settlement dictated that at least one of the three board members of the newly-established Digital Trust Foundation would be a current employee of Facebook. *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), *cert. denied* 134 S. Ct. 8 (U.S. 2013). The other two board members of DTF also had financial ties to Facebook. As Judge Kleinfeld noted in dissent, the *cy pres* award would be used to "fund nothing but an 'educational program' amounting to an advertising campaign for Facebook." *Id.* at 834.

Google, in particular, has sought to protect its commercial interests through the strategic allocation of funds to non-profit organizations, researchers, and universities so as to promote views, publications, and scholarship that is favorable to the company. Marc Scott & Nicholas Hirst, *Google's Academic Links*

Under Scrutiny, Politico (May 13, 2018);[23] *Google Spends Millions on Academic Research to Influence Opinion, Says Watchdog*, The Guardian (Jul. 13, 2017);[24] Adam Rogers, *Google's Academic Influence Campaign: It's Complicated*, Wired (Jul. 14, 2018);[25] Brody Mullins & Jack Nicas, *Pay Professors: Inside Google's Academic Influence Campaign*, Wall St. J. (Jul. 14, 2017);[26] Jonathan Taplin, *Google's Disturbing Influence Over Think Tanks*, N.Y. Times (Aug. 30, 2017).[27]

The Ninth Circuit acknowledged this practice but dismissed out of hand the concerns these organizations would then be reluctant to pursue the privacy interests of consumers or take a stand against the practices of Google. 869 F.3d at 745. These concerns merited more substantive consideration. Google is free to allocate resources to defend its commercial interests as it chooses. But when the company takes money that would otherwise go to class members and redirects those funds, by means of a *cy pres* only settlement, to organizations that are routinely aligned with the company's interests, that is an entirely different matter. That is not only unfair. It is also unjust.

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[23] https://www.politico.eu/article/google-campaign-for-accountability-lobbying-humboldt-ceps-astroturfing-oracle/.

[24] https://www.theguardian.com/technology/2017/jul/13/google-millions-academic-research-influence-opinion.

[25] https://www.wired.com/story/googles-academic-influence-campaign-its-complicated/.

[26] https://www.wsj.com/articles/paying-professors-inside-googles-academic-influence-campaign-1499785286.

[27] https://www.nytimes.com/2017/08/30/opinion/google-influence-think-tanks.html.

In fact, this is not the first time that Google has directed funds, via *cy pres*, to its preferred organizations. For example, in the *Google Cookie Placement* settlement, Google funded two of the same organizations that were funded by this Settlement. *See In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 2017 WL 446121, at *4. As in this settlement, those organizations did not propose to use the funds to stop Google's unlawful data collection, but rather to "promote public awareness and education, and/or support research, development, and initiatives, related to the security and/or privacy of Internet browsers." *Id.*

A judicially-administered application process based on objective criteria could resolve these concerns. *See Enforcing Privacy Rights*, *supra*. Courts have utilized objective claims processes in similar consumer privacy settlements. In *In re Google Buzz Privacy Litigation*, for example, the parties initially proposed that Google would identify recipients of *cy pres* funds. Notice of Motion and Memorandum in Support of Motion for Order Granting Final Approval of Class Settlement, Certifying Settlement Class, and Appointing Class Representatives and Class Counsel at 6, *In re Google Buzz Privacy Litigation*, 2011 WL 7460099 (No. 10-00672 JW) (N.D. Cal. entered Feb. 16, 2011). The district court found this process "lacked specificity and oversight required to provide a reasonable benefit to the Class," and instead ordered the parties to nominate *cy pres* recipients based on these criteria:

i. The organization's name and address;
ii. A description of an established program currently undertaking policy or education efforts directed specifically at Internet privacy;

iii. The number of years that the program has been established and focused on Internet privacy;

iv. A short statement as to how the particular program will benefit the Class;

v. The annual operating budget of the organization and the specific Internet privacy or education program; and

vi. The amount received, if any in contributions from Google, Inc. in 2010, independent of the Settlement.

Id. The court made explicit its concern that absent such procedures, worthwhile recipients could be improperly excluded. *Id.* A similar application process was also used in *In re Netflix Privacy Litigation*, 5:11-cv-00379, 2011 WL 7460099 (N.D. Cal. Mar. 18, 2013).

An objective claims process would guard against the risks of collusion, ensure that the organizations have a service record aligned with the interests of the class, and guarantee that the funds will go to a purpose that furthers the underlying statutory claims. The Court should adopt such an approach to ensure that class action settlements are "fair, reasonable and adequate," and *cy pres* awards provide the "next best" distribution.

* * *

For the foregoing reasons, this Court should reject the Settlement and remand with the appropriate guidance.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to reverse the decision of the U.S. Court of Appeals for the Ninth Circuit and remand the case.

Respectfully submitted,

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No. 17-961

In The
Supreme Court of the United States

THEODORE H. FRANK and
MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, On Behalf of Herself
and All Others Similarly Situated, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF FORMER PROFESSOR ROY A. KATRIEL AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amicus will address the following question:

Whether a class member who voluntarily joins a Rule 23(b)(3) class action settlement has Article III standing to appeal a district court's approval of the settlement.

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INTEREST OF *AMICUS CURIAE*[1]

Roy A. Katriel is a former adjunct professor at American University's Washington College of Law and an attorney practicing class action litigation. He teaches and writes about litigation in federal courts, and he has an interest in the sound development of this field.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, of the Constitution provides in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the

[1] The parties have consented in writing to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution intended to fund its preparation or submission.

citizens thereof, and foreign states, citizens or subjects.

Pertinent statutory provisions are reprinted in an appendix to this brief.

SUMMARY OF ARGUMENT

This Court lacks Article III jurisdiction to review this case. Petitioners, absent class members who voluntarily elected to join a proposed class action settlement certified under Federal Rule of Civil Procedure 23(b)(3), lack Article III standing to challenge the very settlement they elected to join. Under Federal Rule of Civil Procedure 23(b)(3), petitioners were provided notice and an opportunity to exclude themselves from the proposed settlement and avoid being bound by its terms. Petitioners elected not to opt out of the class settlement. They now lack standing to appeal the judgment entered under a settlement they voluntarily joined.

A. Petitioners rely only on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), to assert that "[a]s class members who objected to the settlement, petitioners have standing to appeal the final judgment." Pet. Br. at 3 (citing *Devlin*). *Devlin*, however, does not support petitioners' appellate standing. Unlike this Rule 23(b)(3) case, *Devlin* involved an appeal of a mandatory class settlement certified and approved under Federal Rule of Civil Procedure 23(b)(1), and in which absent class members were not provided an opportunity to opt out of the proposed settlement. *Devlin* underscored the

significance of this feature, noting that "in light of the fact that petitioner had no ability to opt out of the settlement, *see* Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate." *Devlin*, 536 U.S. at 10–11. Here, however, the binding effect of the class settlement on petitioners results not from the mandatory terms of Rule 23(b)(1) (as in *Devlin*), but from petitioners' election to remain in a proposed settlement after reviewing its terms and being given a choice to remain in the settlement or avoid it. Petitioners' independent election to remain in the proposed settlement presented for approval to the district court cuts off the requisite causation element of Article III standing.

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.*, at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (other internal quotations and citations omitted). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.*, at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)). Third, it must be

"likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 561 (quoting *Simon*, 426 U.S. at 38, 43)). Because an actual controversy must persist throughout all stages of the litigation, "standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

Petitioners' appeal fails to satisfy the second of these elements because the injury it asserts—the settlement's improper release of petitioners' claims against the class action defendant—was caused by petitioners' choice to join a proposed settlement and be bound by it, as opposed to being fairly traceable to the actions of any defendant, appellee, or court. Petitioners "cannot manufacture standing merely by inflicting harm on themselves." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Had petitioners elected to exclude themselves from the proposed settlement (as several absent class members did),[2] their claimed injury would not have occurred because the settlement would have no binding effect on them.

Just last term, this Court held that appellate courts lack jurisdiction to review claims of individual putative class plaintiffs who voluntarily dismissed

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[2] The district court's Final Judgment And Order Of Dismissal With Prejudice confirmed that "[t]welve individuals timely and validly excluded themselves from the Settlement." Pet. App. 64, ¶ 7.

their case after their class certification motion was denied. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Although the Court's majority opinion grounded its holding on the notion that such a dismissal was not a "final decision" within the meaning of 28 U.S.C. § 1291, *id.*, at 1707, the concurring opinion by Justice Thomas, joined by the Chief Justice and Justice Alito, reasoned that the petitioners lacked Article III standing to appeal a judgment of dismissal with prejudice they had voluntarily requested be entered against them. *Id.*, at 1716–17 (Thomas, J., concurring).[3]

Justice Thomas' concurring opinion in *Baker* explained that:

> When the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties thus were no longer adverse to each other on any claims, and the Court of Appeals could not "affect the[ir] rights" in any legally cognizable manner. *Ibid.* Indeed, it has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it. *See, e.g.*, *Evans v. Phillips*, 4 Wheat. 73, 4 L.Ed. 516

[3] The majority opinion, having found that the appeal did not satisfy the "final decision" statutory requirement of § 1291, explained that "[b]ecause we hold that § 1291 does not countenance jurisdiction by these means, we do not reach the constitutional question, and therefore do not address the arguments and analysis discussed in the opinion concurring in the judgment." *Id.*, at 1712.

(1819); *Lord v. Veazie*, 8 How. 251, 255–256, 12 L.Ed. 1067 (1850); *United States v. Babbitt*, 104 U.S. 767, 26 L.Ed. 921 (1882); *Deakins v. Monaghan*, 484 U.S. 193, 199–200, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988).

Id., at 1717.

The same reasoning applies to petitioners' attempt to appeal the judgment to which they consented by electing to remain in the Rule 23(b)(3) settlement class. Whether consent to the underlying judgment is manifested by filing a notice of voluntary dismissal (as in *Baker*) or by failing to exclude oneself from a proposed Rule 23(b)(3) settlement class (as here) should not matter. The Article III appellate standing inquiry is the same. In each instance, the party who consented to the entry of judgment lacks Article III standing to appeal because entry of the judgment that binds that party is traceable to that party's own action.

B. Federal Rule of Civil Procedure 23(c)(2)(B) and the court-approved class notice permitted petitioners to reject the proposed settlement by excluding themselves from the settlement class. *See* Dkt. No. 56–4 at 86–94 (class settlement notice). Had they made that choice instead of electing to remain in the settlement class, petitioners would be free to continue litigating against Google because "neither a proposed class action nor a rejected class action may bind nonparties." *Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011). Excluding themselves from the settlement class would result in petitioners no longer being part of the then-existing class litigation, and likely would have required them

to pursue their claims individually.[4] But the inability to proceed as part of a class constitutes no cognizable injury, much less an injury-in-fact sufficient to support Article III standing. *See American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234–35 (2013).

C. This Court has never addressed whether *Devlin*'s recognition of appellate standing of an objector who lacked an opportunity to opt out of a proposed class settlement extends to objectors who had such an opportunity but elected to remain in the settlement class. At least two federal appellate courts, however, have suggested *Devlin* may be limited to mandatory class settlements. *See, e.g.*, *In re AAL High Yield Bond Fund v. Deloitte & Touche, L.L.P.*, 361 F.3d 1305, 1310, n.7 (11th Cir. 2004) (noting that the inability to opt out from the Rule 23(b)(1) settlement class is a "feature of *Devlin* [that] has led at least one court to believe that it applies only to mandatory class actions") (citing *Ballard v. Advance America*, 349 Ark. 545, 549 (2002)); *In re General American Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002) ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin*'s holding applies to opt-out class actions certified under Rule 23(b)(3)."). While other federal circuit courts have upheld *Devlin*'s application to Rule 23(b)(3) settlement appeals by

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[4] If enough class members had excluded themselves from the settlement class to satisfy Rule 23(a)(1)'s numerosity requirement, it is conceivable that a separate class comprised of those who had opted out of the initial settlement class could be proposed.

objecting class members, those decisions focus on whether *Devlin* recognized party status for such objectors. *See Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 572 (9th Cir. 2004) (reasoning that *Devlin* extends appellate standing even to objectors to a Rule 23(b)(3) class because "the *Devlin* Court made clear that objectors should be considered parties"); *Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) (objector to a Rule 23(b)(3) settlement class had standing to appeal under *Devlin* because such an objector "is nonetheless a 'party' for the purpose of appealing the district court's approval of the . . . class action settlement"). Party status, however, generally is a necessary but not always sufficient requirement for appellate standing. A litigant who voluntarily dismisses his case lacks standing to appeal the dismissal despite unquestionably having party status.

D. Whether petitioners have standing to appeal the district court's approval of the Rule 23(b)(3) class settlement presents a constitutional question about the power of federal courts of appeals under Article III, section 2. The inquiry does not present a policy choice. Any claim that failure to recognize petitioners' appellate standing would leave nobody with standing to appeal the district court's approval of the settlement should be irrelevant. Time and again, this Court has recognized that, "[o]ur system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop*

the War, 418 U.S. 208, 227 (1974) (quoted in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) and in *Clapper*, 568 U.S. at 420). Further, the question presented—to what extent may *cy pres* class settlements be approved consistently with Rule 23—is not inevitably destined to evade this Court's review if petitioners' appellate standing is rejected. In a future case, when a district court denies approval of a *cy pres* class settlement, the named settling parties would have standing to seek interlocutory appeal under 28 U.S.C. § 1292(b) and ultimately review by this Court.[5]

E. In the context of a mandatory Rule 23(b)(1) class, *Devlin* addressed whether unsuccessful objectors

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[5] 28 U.S.C. 1292(b) provides in relevant part: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order." 28 U.S.C. § 1292(b). The decision whether to approve a proposed class settlement is, by its terms, a "controlling question of law" whose outcome could materially advance the litigation, and petitioners concede that a difference of opinion as to its resolution exists. *See* Pet. at 16 ("The Ninth Circuit's decision conflicts with decisions of the Third, Fifth, Seventh, and Eighth Circuits—and arguably the Second Circuit, as well—on the fundamental question of when it is 'fair, reasonable, and adequate' for a class action settlement to award money not to class members but to third parties unconnected to the litigation.").

to a class settlement could appeal the approval of the settlement if they had not sought first to intervene before the district court. *See Devlin*, 536 U.S. at 6. The Court held that intervention was not required for these objectors to maintain an appeal. *Id.*, at 14. In a Rule 23(b)(3) settlement class, where the absent class member is granted the opportunity to reject the settlement and avoid its binding effect, intervention is irrelevant to the Article III standing inquiry. Whether the absent class member first seeks to intervene to challenge the settlement does not alter that the injury asserted by the unsuccessful objector—the approved settlement's release of his claims—is traceable to the objector's own decision to remain in the settlement class. A prior intervention motion—regardless of its success—does not change this conclusion and therefore does not affect the Rule 23(b)(3) objector's failure to fulfill the causation element of Article III appellate standing.

* * *

Amicus respectfully submits that the Court should dismiss the writ of certiorari and vacate the judgment of the Ninth Circuit for lack of Article III jurisdiction. Appellate jurisdiction is logically antecedent to, and must be addressed before this Court can reach, the merits of the petition. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). In so arguing, *amicus* takes no position on the substantive issue raised by petitioners—the extent to which *cy pres* class settlements may be approved. *Amicus'* sole interest is in the federal

courts' appellate jurisdiction under Article III of the Constitution.

BACKGROUND

1. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotations omitted). Federal Rule of Civil Procedure 23 sets forth the requirements for maintenance of a class action in federal court.

a. Under Rule 23, the party seeking certification must first satisfy Rule 23(a)(1)-(a)(4), which requires the action or the class representative to meet numerosity, commonality, typicality, and adequacy of representation criteria. Second, the proposed class must meet at least one of the three requirements of Rule 23(b).

b. When a district court certifies a class under Rule 23(b)(3), the court must direct to identifiable class members the best practicable notice under the circumstances. The class notice must state the: nature of the action; definition of the class; claims, issues, or defenses asserted; right of a class member to enter an appearance through an attorney; right to have the court exclude from the class any class member requesting to be excluded; time and manner for requesting exclusion; and, binding effect of a class judgment. Fed. R. Civ. P. 23(c)(2)(B).

c. By contrast, when a district court certifies a class under either Rule 23(b)(1) or Rule 23(b)(2), no notice is required and no right to be excluded from the class is provided. Fed. R. Civ. P. 23(c)(2)(A).

2. Settlements involving certified classes or proposed settlement classes require court approval. Fed. R. Civ. P. 23(e). No class settlement may be approved by the court unless notice of the proposed settlement was provided to the members of the certified or settlement class who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1)(B). If the proposed settlement involves a class certified under Rule 23(b)(3), the court may require that members of that class be given another opportunity to exclude themselves from the class before approval of the settlement. Fed. R. Civ. P. 23(e)(4). There is no provision for members of a Rule 23(b)(1) or Rule 23(b)(2) settlement class to be excluded from the class or settlement. These classes therefore are commonly called mandatory classes.

3. Rule 23 provides any member of either a proposed settlement class or a certified class subject to a proposed settlement the right to file objections to the proposed settlement. Fed. R. Civ. P. 23(e)(5)

4. *Devlin* involved a member of a Rule 23(b)(1) settlement class who had objected to the proposed settlement. *Devlin*, 536 U.S. at 3. The district court approved the class settlement and entered judgment that bound the class member despite his objection because he had no opportunity to request exclusion from the settlement class. *Id.*, at 3, 10. By contrast, this case involves

a settlement class certified under Rule 23(b)(3) in which all class members were given an opportunity to request exclusion from the settlement class and avoid being bound by a judgment approving the settlement. Dkt. 52–4, at 86–94 (class notice). Petitioners did not request exclusion from the settlement class. They elected instead to remain in the settlement class, consenting to be bound by the settlement and judgment if their objections were overruled and the settlement approved. After the district court approved the proposed settlement, petitioners appealed from the district court's entry of judgment. They claimed standing to appeal under *Devlin*. Pet. Br. at 3.

5. *Amicus* respectfully submits that the Court should dismiss the petition and vacate the judgment of the Ninth Circuit for lack of Article III jurisdiction. *Devlin* recognized the appellate standing of members of a mandatory settlement class who had no opportunity to request exclusion from a settlement they did not want. Petitioners were given a choice to avoid the binding effect of the settlement by requesting exclusion from the settlement class, but they chose to remain in the class and consent to the settlement's binding effect if it were approved. Any injury petitioners claim, therefore, was not caused by the district court's approval of the settlement and entry of judgment, but by petitioners' voluntary election. Because petitioners' asserted injury is not fairly traceable to the district court's entry of judgment, petitioners lack Article III standing to appeal that judgment.

ARGUMENT

I. PETITIONERS LACK ARTICLE III STANDING TO APPEAL THE APPROVAL OF A SETTLEMENT THEY ELECTED TO JOIN.

This Court lacks jurisdiction to review petitioners' appeal of the district court's judgment approving a class action settlement that petitioners elected to join. Once petitioners were given an opportunity to reject the settlement by opting out of the proposed Rule 23(b)(3) settlement class but, nevertheless, elected to remain in the class, they broke any chain of causation between their claimed injury and the district court's approval of the settlement. Petitioners' sole argument to the contrary—that *Devlin* provides them with standing to appeal—is misplaced because *Devlin* applied in a mandatory class settlement certified under Rule 23(b)(1) where class members had no opportunity to opt out. Properly considered, *Devlin* does not support petitioners' appellate standing in this non-mandatory class setting.

A. *Devlin* Does Not Support Appellate Standing For Members Of Non-Mandatory Settlement Classes.

Petitioners' reliance on *Devlin* is misplaced. *Devlin* considered whether absent members of a mandatory Rule 23(b)(1) settlement class who objected to, but were not provided with any opportunity to exclude themselves from, a proposed settlement could appeal the approval of that settlement. *See Devlin*, 536 at 3.

Although the Fourth Circuit framed the issue as one of standing, *Devlin* clarified that the proper inquiry was not about standing, but about whether the objecting class members were "parties" entitled to appeal. As this Court explained:

> Although the Fourth Circuit framed the issue as one of standing, 265 F.3d, at 204, we begin by clarifying that this issue does not implicate the jurisdiction of the courts under Article III of the Constitution. As a member of the retiree class, petitioner has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability.
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> . . . .
>
> Because petitioner is a member of the class bound by the judgment, there is no question that he satisfies these three requirements. The legal rights he seeks to raise are his own, he belongs to a discrete class of interested parties, and his complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members. Fed. Rule Civ. Proc. 23(e).
>
> What is at issue, instead, is whether petitioner should be considered a 'party' for the purposes of appealing the approval of the settlement. We have held that 'only parties to a

> lawsuit, or those that properly become parties, may appeal an adverse judgment.'

Id., at 6–7 (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*)).

Devlin resolved the question by holding that members of the settlement class were "parties" because, upon certification of the settlement class and approval of the class settlement, they were bound by the settlement and judgment. *See id.*, at 10. The Court explained: "What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Id.*

Devlin, therefore, unquestionably establishes that members of a settlement class have "party" status for purposes of considering their entitlement to appeal. But while being a party generally is a necessary condition to appeal, it is not always sufficient. For example, a party who voluntarily dismisses his case in the district court lacks standing to appeal that dismissal, despite assuredly having been a "party" to the proceedings. *See Baker*, 137 S. Ct. at 1717 (Thomas, J., concurring) (collecting cases). To have standing, the appellant must show not only that it is a party entitled to appeal but also that it meets the injury-in-fact, causation, and redressability triad of constitutional standing. *See Lujan*, 504 U.S. at 560–61.

In *Devlin*, where a Rule 23(b)(1) class was involved, the injury, causation, and redressability elements were uncontroversial, as the Court recognized. *Devlin*, 536 U.S. at 7. Because the *Devlin* objectors had no opportunity to opt out of the settlement, the district court's approval of the mandatory class settlement directly affected these objectors by binding them to a settlement they had no desire to accept but no chance to reject. That is why *Devlin* singled out the mandatory nature of the Rule 23(b)(1) class. *Id.*, at 10. The only remaining question was whether objectors who were not named parties and never sought to intervene could, nevertheless, be considered "parties" entitled to appeal. That is the inquiry *Devlin* resolved in the objectors' favor.

Petitioners' mistake attempts to transpose *Devlin*'s uneventful recognition of redressable injury caused by a district court's approval of a Rule 23(b)(1) mandatory class settlement onto the altogether different context of a Rule 23(b)(3) elective class where no settlement can bind a class member without his consent. In the former, the district court's approval of the settlement creates the injury that may be redressed on appeal by having the approval and judgment reversed. But in the latter Rule 23(b)(3) scenario, it is the absent class member's election to remain in the settlement and be bound by it that results in dismissal of the class member's claims. *Devlin* assists petitioners by confirming that they have party status, but *Devlin*'s recognition of standing to appeal an unwanted mandatory settlement does not confer standing on Rule 23(b)(3) class

members who elect to remain in a settlement class after being given an opportunity to opt out.

K. Petitioners' Election To Remain In The Settlement Class And Be Bound By The Settlement Defeats Their Standing To Appeal The Approval Of That Settlement.

Unlike the *Devlin* objectors, petitioners were provided with an opportunity to exclude themselves from the settlement class and avoid being bound by any judgment approving the settlement. A dozen class members did so. Pet. App. 64, ¶ 7. Their rights are unaffected by the settlement or judgment, and they can continue litigating their claims. The class settlement notice approved by the district court informed petitioners that: "Class Members who do not want to be part of the settlement must complete a form requesting to be excluded" and "[i]f you do not exclude yourself, you forever give up the right to sue Google for all of the claims that this Settlement resolves." Dkt. No. 52–4, at 91 (class notice). Petitioners elected to remain in the settlement class, and never requested to opt out.

By remaining in the settlement class instead of opting out of a settlement they found objectionable, petitioners consented to be bound by the terms of any judgment approving the proposed class settlement. Parties who consent to the entry of judgment lack standing to appeal that judgment. *See Baker*, 137 S. Ct. 1717 (Thomas, J., concurring) (citing cases). This had been the English practice even before the Constitution;

a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. *Webb v. Webb*, 3 Swanst. 658 (1676); *Bradish v. Gee*, 1 Amb. 229; Daniell, Chancery Practice (6th Am. Ed.) 973–974.

That rationale carried over into the American judicial system. For over a century, this Court has recognized the inability of a party to appeal a judgment to which it has consented:

> If the bill is to be regarded as a bill of review (and in its ultimate aspect, at least, it seems impossible to regard it otherwise), the proceedings are clearly objectionable, on the following grounds:—
>
> *First*, The decree sought to be set aside and reversed was a consent decree. It is a general rule that against such a decree a bill of review will not lie.

Thompson v. Maxwell, 95 U.S. 391, 397 (1877).

Whether consent to the underlying judgment is manifested by filing a notice of voluntary dismissal (as in *Baker*) or by failing to exclude oneself from a proposed Rule 23(b)(3) settlement class (as here) should not matter. The Article III appellate standing analysis is the same. In each instance, the party who consented to the judgment lacks Article III standing to appeal because entry of the judgment that binds that party is traceable to that party's own action.

While remaining in the settlement class, petitioners filed objections to the proposed settlement with the

district court. Their aim in staying in the settlement class evidently was to urge disapproval of the settlement by arguing against it in their objections. That purpose, however, does not create appellate standing because it does not override petitioners' agreement to be bound by the settlement if it were approved over their objections. Similar logic applied in *Baker*, where the plaintiffs voluntarily dismissed their case not intending to abandon their claims, but to appeal the district court's denial of their class certification motion. *Baker*, 137 S. Ct. 1711. This Court rejected their attempt to appeal. It is the parties' voluntarily undertaken actions, not the goals behind the acts, that matter. Standing "is not a question of motivation." *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 435 (1952).

C. This Court Has Not Addressed Whether *Devlin* Applies To Appeals From Non-Mandatory Class Settlements.

This Court has never addressed whether *Devlin* extends to objectors who had an opportunity to opt out of a proposed class settlement but elected to remain in the settlement class. Federal courts of appeal that have addressed the elements of Article III standing have allowed for the possibility that *Devlin* may not apply to Rule 23(b)(3) or other non-mandatory settlement classes where an opportunity to opt out exists. *See, e.g.*, *In re AAL High Yield Bond Fund, L.L.P.*, 361 F.3d at 1310, n.7 (noting that the inability to opt out from the Rule 23(b)(1) settlement class is a "feature of *Devlin* [that]

has led at least one court to believe that it applies only to mandatory class actions"); *In re General American Life Ins. Co. Sales Practices Litig.*, 302 F.3d at 800 ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin*'s holding applies to opt-out class actions certified under Rule 23(b)(3).").

Other courts have ruled *Devlin* supports appellate standing of objectors in non-mandatory class settlements. These courts have focused not on the elements of Article III standing, but on *Devlin* according party status to objecting class members. *See Churchill Village*, 361 F.3d at 572 (reasoning that *Devlin* extends appellate standing even to objectors to a Rule 23(b)(3) class because "the *Devlin* Court made clear that objectors should be considered parties"); *Fidel*, 534 F.3d at 513 (objector to a Rule 23(b)(3) settlement class had standing to appeal under *Devlin* because such an objector "is nonetheless a 'party' for the purpose of appealing the district court's approval of the . . . class action settlement"). As discussed in Section I.A *supra*, however, party status is a necessary but not necessarily sufficient condition for appellate standing. The pertinent inquiry is whether a finding that the injury, causation, and redressability elements of standing are undeniably present when a class member is forcedly bound to a settlement without an opportunity to opt out also applies when a class member voluntarily elects to remain in a settlement class and be bound by the approved settlement. Answering that question, instead of merely acknowledging that class members are

parties, leads to the conclusion that objectors in non-mandatory class settlements lack appellate standing.

D. Appellate Standing Is A Constitutional Requirement, Not A Policy Choice.

"In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Determining a litigant's Article III standing, therefore, is a constitutional question, not a policy consideration. For this reason, this Court has declined to accord standing to interested parties who fail to meet the injury, causation, and redressability elements. This is so even where failing to recognize a party's Article III standing results in no other party having standing to raise the question presented. *See Clapper*, 568 U.S. at 420. That objectors to a class action settlement may be the only parties with an interest in appealing the approval of the settlement, therefore, does not suffice to overlook their failure to meet the requirements of appellate standing.

Further, the question petitioners raise—the extent to which *cy pres* settlement may be approved under Rule 23—is one that can be raised by parties with standing to appeal. For example, in a future case in which a district court denies final approval of a *cy pres* class settlement, the named parties to the settlement agreement would have standing to seek interlocutory appellate review of that denial under 28 U.S.C.

§ 1292(b). Any outcome of that appeal then could be reviewed by this Court.

By petitioners' own account, the question presented is one that would satisfy § 1292(b)'s criteria for interlocutory review. Deciding whether a proposed *cy pres* class settlement terminating the litigation may be approved under Rule 23 obviously would materially advance the litigation before the district court and, as petitioners document, there is a difference of opinion among the federal appellate courts on resolving this question. *See* Pet., at 16 (noting circuit split on question presented).

Aside from embroiling federal courts of appeals in matters that are not justiciable, overlooking the lack of Article III appellate standing of objectors to non-mandatory class settlements has real pragmatic consequences. Giving these objectors free reign to appeal even from judgments to which they consented has created a pernicious cottage industry of "professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests." *Shaw v. Toshiba America Information Sys., Inc.*, 91 F. Supp. 2d 942, 973 (S.D. Tex. 2000) (quoted in *Devlin*, 536 U.S. at 21 (Scalia, J., dissenting). A leading treatise explains the *modus operandi* of these so-called "professional objectors":

> Most often, the objections are nonmeritorious. However, the objectors may appeal a court's denial of their objections, and that appeal might take several years in many circuits; during that time period, the class's recovery

> and, as importantly for these dynamics, class counsel's fee, will likely not be distributed. Faced with the possibility of having to wait several years for their fee, class counsel are willing to pay some amount to the objectors to drop their objections. The more often they do so, the more attractive they make the practice of filing such objections, leading some lawyers to organize their legal practice around objecting, that is, to become professional objectors.

William B. Rubenstein, Newberg On Class Actions § 13:21 (5th ed. 2012) (citations omitted).

E. Intervention Is Irrelevant To Determining Petitioners' Appellate Standing.

Devlin resolved the party status of absent class members who object to a class settlement. It held that objecting class members did not need to move to intervene to be considered parties. *Devlin*, 536 U.S. at 10, 14. With that question resolved, the appellate standing of class members who, like petitioners, object to non-mandatory class settlements is unaffected by whether these objectors attempted to intervene in the district court.

Petitioners lack Article III appellate standing for failure to meet the causation requirement. This failure would not have been cured by petitioners seeking to intervene before filing their objections. Even if their intervention motion had been denied, the injury they claim—the dismissal of their claims because of the settlement—would be caused by their own election to

remain in the settlement class. As *Devlin* clarifies, petitioners, as members of the settlement class, were parties to the action. Denial of any intervention motion, therefore, would not deprive them of anything. The net result is that all objecting class members are parties, but only those who object to settlements in mandatory classes have standing to appeal. Intervention is irrelevant to that result.

II. PETITIONERS' ARTICLE III STANDING MUST BE ADDRESSED BEFORE CONSIDERING THE MERITS OF THE PETITION.

The question *amicus* addresses—whether petitioners have Article III standing to appeal the approval of the Rule 23(b)(3) class settlement—differs from the question presented by petitioners. Nevertheless, the Court should address petitioners' standing first because that inquiry questions this Court's jurisdiction to hear the petition and, therefore, is antecedent to the merits. *See Ex parte McCardle*, 74 U.S. (7 Wall.) at 514. The limits on *cy pres* class settlements under Rule 23 may well present an important issue. *See Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of certiorari). Given *amicus'* credible assertion that petitioners lack appellate standing, however, the Court should "put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and

efficiency." *Raynes v. Byrd*, 521 U.S. 811, 820 (1997) (footnote omitted).

CONCLUSION

The writ of certiorari should be dismissed, and the judgment of the Ninth Circuit should be vacated, for lack of Article III jurisdiction.

Respectfully submitted,

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No. 17-961

In the
Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK
Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae law professors and legal scholars teach, write, and research in the areas of constitutional law, civil procedure and class actions, remedies, trusts, and internet privacy. They have analyzed the history and the use of *cy pres* awards. *Amici curiae* seek to advance the administration of law by offering their views on the circumstances under which a *cy pres*-only award is appropriate. *Amici* are:

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SUMMARY OF ARGUMENT

Class actions developed out of equity. Federal Rule of Civil Procedure 23 did not intend to displace consideration of equity. *Cy pres* is an equitable doctrine that is appropriate to class action settlements when (i) there are settlement funds unclaimed by the class or (ii) the class members suffer an injury or invasion of right, but with very little, if any, quantifiable monetary damages and their injuries can be redressed by non-monetary relief, including changes in conduct or policy by the defendant and measures undertaken via *cy pres* to provide ongoing benefit to the class, subject to Rule 23(e)'s requirements.

In either situation, *cy pres*, along with the requirements of Rule 23, can provide proper relief to class members, who either (i) had an opportunity to claim compensation or (ii) suffered an alleged injury but without appreciable actual damages.

Cy pres distribution in class actions is well established in American jurisprudence and is beneficial to class members and to defendants. Stringent standards are applied by courts to assure that the use of *cy pres* is "fair, reasonable, and adequate." When used in *cy pres*-only cases, these standards are adequate to protect the interests of the class members and to guard against collusion between class action counsel and the defendant.

ARGUMENT

I. CLASS ACTIONS AND *CY PRES* DISTRIBUTIONS ARE LONG-STANDING DOCTRINES FIRMLY ROOTED IN EQUITY AND WELL ESTABLISHED IN AMERICAN JURISPRUDENCE

The current use of the *cy pres* doctrine in class actions is firmly rooted in American jurisprudence, particularly in the equitable principles which became the foundations of the modern American judiciary.

A. The History of Equitable Relief

Class actions originated in England in the principles of equity and date as far back as the year 1199. Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. Rev. 1079, 1082 (2009). Class actions predate the formal institutionalization of the courts of equity which occurred in England by the fourteenth century. George Burton Adams, *The Origin of English Equity*, 16 Columbia L. Rev. 87, 88 (1916).

The development of the body of principles which became known as equity—including class actions—and the rise of chancery courts occurred due to the need to address controversies for which no remedy existed in the courts of law. James M. Fischer, Understanding Remedies 176-77 (Matthew Bender & Company, 2014). This lack of remedy at law arose due to the natural evolution of the early English legal system:

> Primitive legal 'systems' are usually not systems at all but simply a ***number of remedies*** available for certain types of wrongs. Thus, in early English law there was no thought of an all-embracing law which would, as we now assume, provide protection for the citizen's rights of all sorts, but rather a number of writs which were available to set in motion a selection of formalized actions to remedy certain specific ills. If the injustice suffered fell outside the scope of the writs, the would-be litigant had no remedy in the law.

Justinian, The Digest of Roman Law: Theft, Rapine, Damage and Insult 60 (Penguin Books 1979) (translated by C. F. Kolbert) (emphasis added). Thus, it was paradoxically due to the origin of the early English legal system as a system of limited remedies that the need for a supplementary remedy-based court system arose. *Id.* This development, however, is not unique to English law. Ancient Roman jurisprudence, for example, also developed a system of equity to address the problems created by the lack of an adequate legal remedy, granting upon those in power the ability to resolve controversies by providing remedies "where none had existed previously." *Id.* In fact, it is understood that English equity traces its origins to some extent to Roman law. *See* Fischer, Understanding Remedies at 177 note 8; Andrew Borkowski & Paul Du Plessis, Textbook on Roman Law 4 (Oxford University Press 2005); Timothy S.

Haskett, *The Medieval English Court of Chancery*, 14 Law & Hist. Rev. 245, 258 (1996).

In synergy with the courts of law, the courts of equity became instrumental in the delivery of justice:

> Into [chancery court] came individuals seeking justice. We may reflect for a moment on the type of justice available in chancery as opposed to the law courts. The law courts had by this time developed the principle of "deciding like cases alike;" chancery, however, knew no such principle. In chancery, each case was distinct and precedent was not consciously used as a method of resolving disputes.... The reason litigants chose chancery was because their claims fell outside those recognized by the law courts. This was not a case of concurrent jurisdiction with litigants selecting the most favorable forum for tactical reasons; litigants went to chancery because the law courts did not provide a remedy.

Fischer, Understanding Remedies at 176-77 (citations omitted). As such, the unique nature of matters heard in the courts of equity required granting the chancellors a high level of discretion in adjudicating controversies, resulting in the chancellors' ability to decide matters according to their own sense of right and wrong on a case-by-case basis. Haskett, *The Medieval Court of Chancery* at 255-56. This discretion, however, was neither unprincipled nor

unfettered. It was based on the principles and rules which became known as "equity"—including those governing class actions—that shaped the evolution of the "chancellor as judge" as well as the manner in which he adjudicated controversies. *Id.* at 251. Therefore, chancellors thought of their work as "reinforcing the [English common law] by making sure that justice was done in cases where shortcomings in the regular procedure, or human failings, were hindering its attainment by due process. [Chancellors] came not to destroy the law, but to fulfill it." *Id.* (quoting J. H. Baker, An Introduction to English Legal History, 117-18 (London 1990)). Later, and despite the deference traditionally accorded to the chancellors, courts of equity evolved to follow precedent and adopt set principles as did the courts of law. Haskett, *The Medieval Court of Chancery* at 256.

It was the manner in which English law and equity functioned as complementary to each other that ensured their survivability across the Atlantic after the American Revolution. Fischer, Understanding Remedies at 178. In fact, English law and equity became the pillars of the American judiciary as explicitly set forth in Article III, Section 2 of the United States Constitution: "The judicial Power shall extend to all Cases, *in Law and Equity*, arising under this Constitution, the Laws of the United States, and Treaties Made, or which shall be made, under their Authority." U.S. Const. Art. III, § 2 (emphasis added). *See also* Jennifer M. Bandy, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 Duke L.J. 651, 669 (2011). In 1938, courts of law and courts

of equity merged to become the modern American civil court system. *Id.* at 670 (citation omitted).

Thereafter, many principles which originated in equity became integral to American civil jurisprudence, including what is known today as the courts' "equitable power" which became the modern incarnation of the English chancellors' unique ability to deliver justice where the courts of law fell short. *See* Justinian, The Digest of Roman Law at 60; *see also* Borkowski & Du Plessis, The Textbook on Roman Law at 4. *See, e.g., Tincher v. Arnold*, 147 F. 665, 675 (7th Cir. 1906); *see also* Haskett, *The Medieval Court of Chancery* at 254-55. This power derived from equity allows federal courts to resolve controversies with the flexibility necessary to achieve justice and fairness. *See, e.g., Tincher*, 147 F. at 675; *see also* Haskett, *The Medieval Court of Chancery* at 254-55. This flexibility, however, is rooted in the interests of justice and "lies in [a court's] inherent capacity *to adjust remedies in a feasible and practical way* to eliminate the conditions or redress the injuries caused by unlawful action. *Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision.*" *Freeman v. Pitts*, 503 U.S. 467, 487 (1992) (emphasis added). As such, the federal judiciary's use of its equitable powers is rooted in the fabric of American jurisprudence itself, and the courts have employed it from the moment Article III conferred upon them the power to resolve controversies. *See, e.g., In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 191 (3d Cir. 2000) (upholding the District Court's decision to extend the deadline for filing claims pursuant to a securities class action settlement on the

ground that, "'[u]ntil the fund created by the settlement is actually distributed...the court retains its traditional equity powers.'") (quoting *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972)).

B. Class Actions Have a Storied History and Are Based in Equity

Class actions arose purely out of necessity from a fundamental principle of equity jurisdiction in the English judiciary: "The traditional ticket of admission to equitable remedies was the requirement that the remedy at law be inadequate." Fischer, Understanding Remedies at 187. The necessity of bringing a multiplicity of lawsuits to enforce a right was considered evidence of the inadequacy of a legal remedy. "Where legal remedies require multiple suits involving identical issues against the same defendant, federal equity practice has recognized the inadequacy of the legal remedy and has provided a forum." *Garrett v. Bamford*, 538 F.2d 63, 71 (3d Cir. 1976) (citations omitted); *see also Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948). The justification for class actions is twofold: "First, in the interests of equity, to promote the filing of litigation that would otherwise *never be prosecuted.*" Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 Mich. St. U. Det. C. L.J. Int'l L. 205, 214 (2001) (emphasis added). Second, to give "small claimants an opportunity to recover damages from defendants who, in the absence of a class remedy, would be unjustly enriched by retaining an aggregated ill-gotten gain." *Id.* at 213-14 (citations omitted).

This Court in 1842 promulgated Equity Rule 48, "officially recogniz[ing] representative suits where the parties were too numerous to be conveniently brought before the court." *In re Joint Eastern & Southern Dist. Asbestos Litigation*, 129 B.R. 710, 804 (S.D.N.Y. 1991), *judgment vacated*, 982 F.2d 721 (2d Cir. 1992) ("*Asbestos Litigation*").

In 1854, this Court applied the doctrine and described its equitable origins:

> The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. Mr. Justice Story, in his valuable treatise on Equity Pleadings, after discussing this subject with his usual research and fullness, arranges the exceptions to the general rule, as follows: 1. Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole; 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have

separate and distinct interests, yet it is impracticable to bring them all before the court.

. . . .

Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. *For convenience, therefore, and to prevent a failure of justice,* a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.

. . . .

The case in hand illustrates the propriety and fitness of the rule.... It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the changes constantly occurring by death or otherwise.

Smith v. Swormstedt, 57 U.S. 288, 302-3 (1853) (emphasis added) (citations omitted); *see also* Georgene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 Rev. Litig. 721, 729-30 (2013).

Equity Rule 48 and its successor, Equity Rule 38, were transformed into Federal Rule of Civil Procedure 23 in 1938 (*id.* at 737), which adopted its present form in 1966. Thereafter, Rule 23 made class actions—including their equitable origins—part of the American civil justice system generally: "Rule 23, governing federal-court class actions, stems from equity practice...." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Some of the most venerated U.S. decisions have been class actions. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

Today, class actions are used widely around the globe.[2] A class action does not always result in the distribution of monetary damages. *See, e.g., In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 353 (E.D.N.Y. 2000) ("The decision to forego individual recoveries was sensible, given the difficulty of identifying proper claimants and the difficulty, and especially the costs,

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[2] Countries in which class actions are used include Argentina, Brazil, Bulgaria, Chile, China, Denmark, Finland, Indonesia, Israel, Italy, Mexico, the Netherlands, Norway, Poland, Portugal, South Africa, Spain, Sweden, and Taiwan. Debra Lyn Bassett, *The Future of International Class Actions*, 18 Sw. J. Int'l L. 21, 22 (2011) (citations omitted).

that such recoveries and their administration would have entailed. The net monetary relief for any individual claimant would have been limited."); *Vista Healthplan, Inc. v. Warner Holdings Co. III*, 246 F.R.D. 349, 355 (D.D.C. 2007) (donating goods that benefit the class instead of compensating members). In fact, the U.S. has been criticized for allowing class members to get monetary relief instead of another measure to help assure social or legal change (such as an injunction or a declaratory judgment). Debra Lyn Bassett, *The Future of International Class Actions*, 18 Sw. J. Int'l L. 21, 23 (2011).

C. The *Cy Pres* Doctrine, Established in Equity, Is Well Recognized and Historically Rooted

The term *cy pres* comes from the French Norman phrase *cy pres comme possible*, which translates to "as near as possible." *See Caligiuri v. Symantec Corp.*, 855 F.3d 860, 866 (8th Cir. 2017); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (citations omitted). The concept of *cy pres* dates at least as far back as the third century A.D. in Roman law. *See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1, 52 (1890).

As usual in the context of equity, the use of *cy pres* in the United States was born of necessity, as equity understood the importance of saving a testamentary gift which could not be carried out as explicitly set forth in a will. *See, e.g., Tincher*, 147 F. at 665. In 1906 in *Tincher*, the Court of Appeals for the Seventh Circuit explained the rationale for the use of the *cy pres* doctrine in cases in which literal

interpretation of a testator's charitable gift would render the testator's intent impossible to execute. *Id.* at 674. In that case, the court found that allowing the gift to fail by narrowly reading it so that its execution would be impossible was an inferior choice to that of reading the gift broadly "thus giv[ing] effect to the testator's worthy purpose." *Id.* at 673. In *Tincher*, the court explained the *cy pres* doctrine as applied to wills:

> When a definite function or duty is to be performed, and it cannot be done in exact conformity to the scheme of the donor, it must be performed with as close an approximation to that scheme as reasonably practicable, and thus enforced. It is the doctrine of approximation. It is not confined to the administration of charities, *but it is equally applicable to all devises and contracts wherein the future is provided for*; and it is an essential element of equity jurisprudence. The doctrine of cy pres... is found to be a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor.

Id. at 675 (citations omitted) (emphasis added). In applying the *cy pres* doctrine in 1906 in the wills context, the court in *Tincher* recognized the concerns its use presented and which were already well known at the time, particularly, that the *cy pres* doctrine was "characterized... as a cloak for loose reasoning." *Id.* at

673. However, in rejecting this criticism, the court noted that application of the doctrine had "usually been most just, enlightened, and beneficial." *Id.* Not applying the *cy pres* doctrine and allowing the charitable gift to fail, the court reasoned, was manifestly unjust, as it would "defeat the very purpose of the trust, disappoint just expectations, and destroy gifts of great public importance and utility." *Id.*

Cy pres awards thus have a rich history in trust law and, over the past forty years, in the context of the distribution of class action damages. As far back as 1974, a court approved a *cy pres* approach to distribution of funds in the settlement of a derivative suit. *Miller v. Steinbach*, No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981 (S.D.N.Y. Jan. 3, 1974). The use of *cy pres* in class actions by federal and state courts is now well established. *See, e.g., id.*; *Heekin v. Anthem, Inc.*, 2012 U.S. Dist. LEXIS 160864 (S. D. Ind. Nov. 9, 2012); *Nachshin*, 663 F.3d at 1038; *Fauley v. Metro Life Ins. Co.*, 2016 IL App (2d) 150236, 52 N.E.3d 427 (2d Dist. 2016).

The equitable origins and the purpose of the *cy pres* doctrine mirror those of class actions. "[E]very class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system." Bob Glaves and Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice: Key Issues in 2013 and Beyond*, 27 Mgmt. Info. Exch. J. 24, 25 (2013). The *cy pres* doctrine has become an important mechanism through which courts oversee class action settlements to ensure they comport with

Rule 23's requirement that they be "fair, reasonable, and adequate." Fed. R. Civ. P. 23.

The *cy pres* doctrine works in class actions as follows:

> Used in lieu of direct distribution of damages to silent class members, this alternative allows for "aggregate calculation of damages, the use of summary claim procedures, and distribution of unclaimed funds to indirectly benefit the entire class." To ensure that the settlement retains some connection to the plaintiff class and the underlying claims, however, a *cy pres* award must qualify as "the next best distribution" to giving the funds directly to class members.

Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012) (quoting *Nachshin*, 663 F.3d at 1038, and *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)).

Courts value *cy pres* awards in class actions as a way to combat a variety of problems such as the unfair benefit to the defendant if the unclaimed portion of a class action award reverts to the defendant, the overcompensation of certain plaintiffs if an alternative distribution method such as a lottery were used, and the undercompensation of plaintiffs if the cost of distribution would swallow up the money set aside for them (such as if the mailing costs of distributing a check to each plaintiff is more than the

amount that each plaintiff would receive). *Cy pres* awards prevent defendants "from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement [or] judgment." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). In *The State of Cal. v. Levi Strauss & Co.*, 715 P.2d 564 (1986), a *cy pres* award was upheld to "ensure that the policies of disgorgement or deterrence are realized. Without fluid recovery, defendants may be permitted to retain ill gotten gains...." *Id.* at 570-71 (citations omitted). *See also Six (6) Mexican Workers*, 904 F.2d at 1301.

In sum, as the authoritative treatise on class actions, in describing *cy pres*-only awards, explains:

> Full *cy pres* distributions serve several purposes. First, they ensure that the defendant is disgorged of a sum certain, even if that money does not compensate class members directly. This disgorgement furthers the deterrence goals of the class suit. Second, *cy pres* distributions provide indirect compensation to the plaintiff class by funding activities that are in the class's interest. Indeed, large multimillion dollar contributions to charities related to the plaintiffs' causes of action arguably do more good for the plaintiffs than would a miniscule sum of money distributed directly to them. Third, the resolution of the class suit brings finality and repose to the defendant and relieves

> the judicial system of the possibility of myriad individual (or further class) suits.

William B. Rubenstein, 4 *Newberg on Class Actions* § 12:26 (5th ed. 2018) (citations omitted).

II. THE REQUIREMENTS FOR A *CY PRES* DISTRIBUTION PROVIDE AMPLE SAFEGUARDS TO ASSURE FAIRNESS AND JUSTICE ARE ACHIEVED

Cy pres is an equitable doctrine that is appropriate to class action settlements when (i) there are settlement funds unclaimed by the class or (ii) the class members suffer an injury or invasion of right, but with very little, if any, quantifiable monetary damages and their injuries can be redressed by non-monetary relief, including changes in conduct or policy by the defendant and measures undertaken via *cy pres* to provide ongoing benefit to the class, subject to Rule 23(e)'s requirements.[3]

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[3] The United States as *amicus curiae* proposes three factors to determine if a *cy pres* distribution is appropriate in class actions. Brief for the United States as Amicus Curiae Supporting Neither Party at 22-32, Frank v. Gaos, No. 17-961 (S. Ct. Jul. 16, 2018). The use of *cy pres* distribution in *de minimis* damage cases easily satisfy the first two factors. First, where actual damages are *de minimis* at best in a class involving millions of people, class members' injuries are redressed by changes in the defendant's conduct coupled with a *cy pres* award for charitable or public interest activities designed to redress the class members' injuries and provide ongoing protection of the interests of the class. This approach is consistent with the Stored Communications Act, which expressly authorizes the court to award "other equitable... relief as may be appropriate." 18

Cy pres awards are appropriate when several criteria are met: (i) the distribution to class members would be burdensome or not feasible; (ii) the *cy pres* award is "fair, reasonable, and adequate;" and (iii) the activities of *cy pres* recipients are designed to benefit the class members. They are especially appropriate in situations where class members can show only small monetary harm but an important right is at issue.

The district court's role in reviewing and approving a class action settlement is substantial, as the court "must ensure that there is a sufficient record as to the basis and justification for the settlement" to support a finding that it is "fair, reasonable, and adequate" as required by Rule 23(e). *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 604 (3d Cir. 2010). "This examination [of the proposed settlement] must be 'exacting and thorough' because the 'adversariness

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U.S.C. § 2707(b)(1). Second, there may be no economically feasible and non-arbitrary way to distribute the settlement funds to class members of a very large class such as a class of millions of internet users, particularly not where actual damages are *de minimis* and the identities and addresses of most of the millions of class members are unknown. The United States' suggestion that the settlement fund here might be distributed to 1% of the class at a payout of $4.00 each (U.S. Br. 28) is arbitrary in itself and is based on an assumption of an average claims rate that is speculative. The third factor the United States proposes—discounting of attorney's fees for *cy pres*-only settlements (*id.*)—conflates two different issues: the approval of a class action settlement involving *cy pres* distribution under Rule 23(e) with the approval of attorney's fees under Rule 23(h). The latter issue is not before this Court. And, ultimately, it does not bear on the separate question of whether *cy pres* distributions can be approved.

of the litigation is often lost' once the parties agree to settle." *Id.*

In addition to the factors the court must consider in class actions generally, in cases providing for a *cy pres* award, including a *cy pres*-only award, the court should not find the settlement fair, adequate, and reasonable unless the *cy pres* remedy "account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members...." *Nachshin,* 663 F.3d at 1036 (citation omitted).

A. The Feasibility Requirement

Courts apply the *cy pres* doctrine in the settlement of class actions when "proof of individual claims would be burdensome or distribution of damages costly." *Nachshin*, 663 F.3d at 1038 (quoting *Six (6) Mexican Workers*, 904 F.2d at 1305). A *cy pres* award is appropriate if it is impossible or infeasible to distribute the funds to class members. *Principles of the Law of Aggregate Litig.*, A.L.I. § 3.07 (2010). This occurs when "proceeds cannot be economically distributed to the class members." *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 523 (D. Md. 2002).

If an individual claimant's potential damages are small, this is "the type of case in which class action treatment is most needful" and a *cy pres* award "would amplify the effect of the modest damages in protecting consumers." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676-77 (7th Cir. 2013). "[S]mall-claim class actions are primarily about deterrence, not

compensation." Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. Kan. L. Rev. 913, 946 (2017).

The Court of Appeals for the Third Circuit explained the pros and cons of the different methods of handling undistributed funds or funds that are not feasible to distribute. In particular, the court noted the benefits of *cy pres* awards when compared to the other methods:

> Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement. Escheat to the state preserves the deterrent effect of class actions, but it benefits the community at large rather than those harmed by the defendant's conduct. *Cy pres* distributions also preserve the deterrent effect, but (at least theoretically) more closely tailor the distribution to the interests of class members, including those absent members who have not received individual distributions.

In re Baby Prods. Antitrust Litig., 708 F.3d 163, 172 (3d Cir. 2013).

B. The Requirement that the Award Is Fair, Reasonable, and Adequate

Rule 23(e)(2) of the Federal Rules of Civil Procedure provides, with respect to a proposed settlement of a class action: "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."

Courts use a wide range of factors in determining whether a proposed settlement meets the "fair, reasonable, and adequate" standard set forth in Rule 23. These factors include:

> (1) the complexity, expense and likely duration of the litigation...; (2) the reaction of the class to the settlement...; (3) the stage of the proceedings and the amount of discovery completed...; (4) the risks of establishing liability...; (5) the risks of establishing damages...; (6) the risks of maintaining the class action through trial...; (7) the ability of the defendants to withstand a greater judgment; [and] (8) the range of reasonableness of the settlement fund in light of the best possible recovery....

Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions), 148 F.3d 283, 317 (3d Cir. 1998) (citations omitted). In making a determination that the proposed settlement is "fair, reasonable, and adequate," the court must consider whether the settlement as a whole is fair rather than assessing its individual components. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). "[T]he court's intrusion upon what is

otherwise a private consensual agreement" is limited to a "reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole is fair, reasonable and adequate." *Id.* at 1027 (citation omitted). In other words, "a settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate and fair." *Joel A. v. Giuliani*, 218 F.3d 132, 144 (2d Cir. 2000).

Of great importance is that, "in approving a proposed class action settlement, the *district court has a fiduciary responsibility* to ensure that...the class members' interests [are] represented adequately." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987) (emphasis added) (citation omitted). The district court exercises greater oversight over a class action settlement than the court does over other settlements. Generally, a settlement between a single plaintiff and a defendant in a non-class action matter is a process which does not require the court's oversight or approval. *Kraus v. PA Fit II, LLC*, 155 F. Supp. 3d 516, 525 (E.D. Pa. 2016) (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 881 (1994); and *Williams v. First Nat. Bank*, 216 U.S. 582, 595 (1910)). On the other hand, the court plays a major role in reviewing and approving a class action settlement, as the court "must ensure that there is a sufficient record as to the basis and justification for the settlement," to support a finding that the settlement is "fair, reasonable, and adequate" as required by Rule 23(e). *Ehrheart*, 609 F.3d at 604 (citations omitted).

Due to the potential for a loss of adversariness, the court scrutinizes whether the settling parties are presenting the benefits of their proposed settlement to the court as well as any drawbacks. *Id.* (citation omitted). While objectors may be present and may point out deficiencies in a proposed settlement in some cases, in others, objectors "might simply seek to be treated differently than the class as a whole, rather than advocating for class-wide interests." *Id.* In addition, class counsel and defendant's counsel may be inclined to seek to further their own self-interest, specifically due to "the inherent tensions among class representation, defendant's interests in minimizing the cost of the total settlement package, and class counsel's interest in fees." *Partl v. Volkswagen, AG (In re Volkswagen Clean Diesel Mktg., Sales Practices, & Prods. Liab. Litig.)*, 2018 U.S. App. LEXIS 18562, *22 (9th Cir. 2018) (citation omitted). Intervenors may "counteract any inherent objectionable tendencies by reintroducing an adversarial relationship into the settlement process and thereby improving the chances that a claim will be settled for its fair value." *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). But intervenors may also seek to intervene for improper purposes, such as "caus[ing] expensive delay in the hope of getting paid to go away." *Id.*

The trial court's decision about the appropriateness of a *cy pres* award is entitled to a great deal of deference and is reviewed according to the "abuse of discretion" standard of review. *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997), *see also Boyle v. Giral*, 820 A.2d 561, 567 (D.C.

2003) (stating that the trial court's determination is entitled to "great weight").

The requirements of Rule 23 and the factors which courts use in evaluating the fairness of a settlement are not, however, the only safeguards that exist to ensure that a settlement is fair to the class. Class counsel owes a fiduciary duty to the class which "requires it to refrain from misconduct and prosecute the case with loyalty to the class." *In re Southwest Airlines Voucher Litig.*, 2016 U.S. Dist. LEXIS 80834, *5 (citing *Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014)). District courts review whether class counsel have breached their fiduciary duty. The existence of some clauses in settlement agreements of class actions, for example, may indicate that the settlement was not reached for the benefit of the class. The types of clauses which may indicate self-dealing by counsel or collusion with the defendant, are, for example, "clear sailing" clauses—which provide that the defendant will not object to class counsel's fee petition—and "reverter" clauses—which provide that unclaimed fees from the settlement are to be returned to the defendant. *Allen v. Bedolla*, 787 F.3d 1218, 1225 (9th Cir. 2015).

The existence of a *cy pres*-only award is not itself an indication of self-dealing or collusion. A class action attorney receives no more in fees when the settlement goes to a *cy pres*-only award than when the whole settlement goes to class members. Nor are defendants unduly benefited by a *cy pres*-only award. Giving four cents or four dollars or forty dollars to each class member in a class action suit likely has less

impact on a defendant's business than giving a substantial *cy pres* award to public interest institutions that are working to protect the interests of the class members in the future as well as to remedy the prior injury.

Nor is a *cy pres* award inherently unfair to the class members. Although the constitutional propriety of *cy pres* awards is not before this Court, Petitioners (and some of their *amici curiae*) suggest that the use of *cy pres* violates the First Amendment rights of class members by compelling them to support speech with which they do not agree. Brief of Petitioner-Appellant 17, 36, Frank v. Gaos, No. 17-961 (S. Ct. Jan. 3, 2018). *See also* Brief of the Cato Institute as Amicus Curiae in Support of Petitioners 20-24, Frank v. Gaos, No. 17-961 (S. Ct. Feb. 7, 2018) (arguing that a *cy pres* award compels class members to support speech with which they do not agree in violation of the First Amendment). It is worth noting, however, that the class members in this case brought suit out of concerns for the privacy of their information on the internet. It would be passing strange if a subset of the class could then challenge the propriety of actions undertaken by *cy pres* recipients to protect consumers' privacy on the internet. If the interests of the class were so noxious to Petitioners, they should have opted out of the class in the first place.

C. The Requirement that the Activities of *Cy Pres* Recipients are Designed to Benefit Class Members

Cy pres awards must "(1) address the objectives of the underlying statutes, (2) target the plaintiff

class, [and] (3) provide reasonable certainty that any member will be benefitted." *Nachshin*, 663 F.3d at 1040. Appellate courts have overturned *cy pres* awards when those safeguards have not been met.

Where a statute embodies policies of compensation, deterrence, and disgorgement, *cy pres* is an appropriate remedy. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 117–18 (2014). *See also Simer v. Rios*, 661 F.2d 655, 677 (7th Cir. 1981) ("those cases where a corporate defendant engages in unlawful conduct and illegally profits [are] most appropriate for a fluid recovery").

The interests of *cy pres* award recipients must reasonably approximate those being pursued by the class. *Principles of the Law of Aggregate Litig.*, A.L.I. § 3.07 (2010), cmt. a. *See also Six (6) Mexican Workers*, 904 F.2d at 1307. The submission of proposals about specific *cy pres* projects is an appropriate means to allow the district court and the public to analyze if the project could further the underlying purpose of the litigation. This creates transparency in the decision-making process and ensures that *cy pres* is really being used for the "next best use" that furthers the objectives of the class action litigation. Cecily C. Shiel, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 Wash. L. Rev. 943, 948, 986 (2015) (describing the proposal review process in *Judd v. Am. Tel. & Tel. Co.*, No. 00-2-17565-5 SEA (King Cnty. Super. Ct., Wash. Jan. 22, 2013) Settlement Agreement at app. 1); *see also Dennis*, 697 F.3d at 865–68; *Nachshin*, 663 F.3d at 1040.

The statute at issue in the case at bar is the Stored Communications Act. The Stored Communications Act ("SCA") was passed in 1986 as Title II of the Electronic Communications Privacy Act. 18 U.S.C.A. §2701-2713 (West). The SCA addresses stored wire and electronic communications and transactional records access. *Id.* It is intended to "protect privacy interests in personal and proprietary information, while protecting the Government's legitimate law enforcement needs." S. Rep. No. 99–541, 2d Sess. at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N, 3557; *see also* H.R. Rep. No. 99-647, 2d Sess. at 19 (1986). The SCA was enacted because changes and rapid advances in technology presented the need for "a set of Fourth Amendment-like privacy protections by statute." *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 972 (C.D. Cal. 2010) (citing Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1212 (2004)). Unlike the forms of communication that already had legal protections in place, there were "no comparable Federal statutory standards to protect the privacy and security of communications transmitted by new noncommon carrier communications services or new forms of telecommunications and computer technology." S. Rep. No. 99–541 at 5. Another key objective of the SCA was to encourage technological advancement. *Id.* Inadequate legal protections could "unnecessarily discourage potential customers from using innovative communications systems" and "may discourage American businesses from developing new innovative forms of telecommunications and computer technology." *Id.*

In a consumer class action case where the statutory objectives include consumer protection on the internet, a *cy pres* distribution to non-profit institutions whose activities are directed at protecting internet privacy is an appropriate means to achieve the public policy objectives of the statute. *See In re Google Buzz Privacy Litigation*, No. C10-00672JW, 2011 WL 7460099, *1 (N.D. Cal. June 2, 2011) (listing funding recipients).[4] In contrast, courts have reversed approval of *cy pres* award in internet privacy cases where the recipients were not involved with protecting internet privacy. *Nachshin*, 663 F.3d at 1036-37, 1040-1041 (reversing approval of settlement in an online privacy case where unclaimed funds were awarded via *cy pres* to a legal aid foundation, the Boys and Girls Club, and the Federal Judicial Center Foundation because the recipients did not "have anything to do with the objectives of the underlying statutes on which Plaintiffs base[d] their claims"); *see also Dennis*, 697 F.3d at 866 (reversing approval of the settlement of a false advertising case, where relief included *cy pres* donation of $5.5 million worth of food to the indigent, on the basis that the awards were "divorced from the concerns embodied in consumer protection laws").

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[4] In the case at bar, *cy pres* recipients evidently were chosen because of the close nexus between the projects that they were proposing and the underlying goals of the statute under which the class was suing. Joint Appendix in Case Number 17-961 (Supreme Court Joint Appendix) at 47-48. *Cy pres* awardees will train consumers, the elderly, reporters, lawyers, and others to protect their privacy online. See J.A. at 20.

There must also be "a match between the geographic breadth of the plaintiff case and the range of the *cy pres* recipients' work." 4 *Newberg* at § 12:33; *Nachshin*, 663 F.3d at 1040 (rejecting, in a nationwide privacy class action, a *cy pres* distribution with two-thirds of the money going to local Los Angeles charities, stating that the "*cy pres* distribution...fails to target the plaintiff class, because it does not account for the broad geographic distribution of the class").[5]

III. PERVASIVE DIGITAL TECHNOLOGIES AND THE POTENTIAL PROBLEMS THEY CREATE WARRANT A FLEXIBLE APPROACH AND THE CONTINUED EQUITABLE USE OF *CY PRES* IN CLASS ACTIONS

A signal virtue of equity is affording the court "a practical flexibility in shaping its remedies and...a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). That flexibility affords the court the ability to fashion relief—or, here, to approve a settlement—in a way "necessary to the right administration of justice between parties." *Seymour v. Freer*, 75 U.S. 202, 218 (1868). This flexibility is not

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[5] In the case at bar, the class was a national class and the *cy pres* recipients include non-profit organizations working on internet privacy issues from the West Coast, Midwest, and East Coast. J.A. at 24-25. (West Coast: World Privacy Forum, Stanford Center for Internet and Society; Midwest: Chicago-Kent College of Law Center for Information, Society, and Policy; East Coast: Carnegie Mellon University, Berkman Center for Internet and Society at Harvard University, AARP Foundation).

limitless, but is guided by history and the traditional practice of equity by courts over time. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("We are dealing here with the requirements of equity practice with a background of several hundred years of history.... The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.") (citation omitted).

This flexibility, guided by history and traditional practice, holds true with courts' approval of *cy pres* settlements in class actions that satisfy the requirements of Rule 23. As explained above, the class action and the *cy pres* doctrine each originated in equity and have a long history. The suggestion that the equitable doctrine of *cy pres* cannot be used in the context of class action settlements because it was first used in the context of trusts outside of class actions is illogical and misguided. Injunctive relief also developed in equity outside of class actions, but is routinely used in class actions today. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("In class actions, injunctions may be necessary to protect the interests of absent class members and to prevent repetitive litigation").

The need for maintaining *cy pres* within the court's equitable authority in class actions has a renewed importance in the 21st century, a time in which courts are facing the consequences of technologies with the capacity to affect staggering numbers of people. Digital technologies have

astounding reach. Because these technologies are often pervasive, they have the potential to affect millions of people instantaneously and continually. As this Court recognized, "seismic shifts in digital technologies" have "made possible the tracking of not only [an individual's] location but also everyone else's, not for a short period but for years and years." *Carpenter v. United States*, 138 S. Ct. 2206, 2219 (2018). Indeed, "[t]here are 396 million cell phone service accounts in the United States—for a Nation of 326 million people." *Id.* at 2211. And "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). In this case, the class settlement covers everyone who used Google in the United States between October 25, 2006 and April 25, 2014, which, according to the court below, involved 129 million people. *In re Google Referrer Header Privacy Litigation*, 869 F.3d 737, 740 (9th Cir. 2017). The pervasiveness of digital technologies often implicates the privacy interests of the many people who use them. *See Carpenter*, 138 S. Ct. at 2217; *Riley*, 134 S. Ct. at 2489-95.

The class action is an especially well-suited vehicle to resolve disputes over the legality of certain practices engaged in by a provider of services related to those digital technologies, given the pervasiveness of digital technologies in affecting millions of people—and their privacy interests. Indeed, a user policy or technological feature effectuated through pervasive digital technologies often results in a textbook case for

a class action—satisfying numerosity, commonality, typicality, and adequacy. The millions of users experience exactly the same user policy or technological feature.

Moreover, allowing a court, as a matter of its equitable discretion, to approve *cy pres*-only awards in this type of class action serves the interests of the parties and justice. This is particularly true in a case where unconsented-to disclosure of a person's information on the internet can potentially cause them harm, but that harm is difficult to quantify.[6] Those affected may not be able to prove they lost money or that they were physically harmed as a result of disclosure of their information. Accordingly, if they cannot prove actual damages, they may not be entitled to recovery of any damages under the Stored Communications Act. See *Van Alstyne v. Elec. Scriptorium*, 560 F.3d 199, 202 (4th Cir. 2009) (need to prove actual harm); *but see In re Hawaiian Airlines*, 355 B.R. 225, 230 (D. Haw. 2006) (need not prove actual harm).

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[6] A person may be refused a job or insurance based on private information from the internet which is disclosed without the person's consent, yet the person may never learn that the breach of privacy occurred or led to the refusal. Lori Andrews, I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy (2013). Private information from the internet can also be harvested by hackers for purposes of identity theft or sale.

In this type of situation, where actual damages are uncertain if not unavailable, a *cy pres*-only settlement can be fair, reasonable, and adequate. For example, instead of class members being entitled to a dollar or less, they can have their interests better served by non-monetary relief in the form of the defendant's alteration of conduct and the ongoing efforts of public interest groups dedicated to protecting their privacy online. In a case involving an emerging technology that implicates the important right of privacy in unseen ways, a *cy pres* award to such public interest institutions may be superior to an injunction that protects only against a single threat to privacy, for the time being, and not the entire range of privacy issues that the class members are concerned about. Given how quickly digital technologies change, such ongoing efforts of public interest groups may provide more effective and lasting protection.

"The main critiques of the cy pres doctrine stem from the improper use of the doctrine, not from inherent flaws in the doctrine itself." Shiel, *A New Generation of Class Action Cy Pres Remedies* at 980. The issues critics have identified with the use of *cy pres* awards in class actions can be addressed without eliminating the doctrine in cases in which it is impracticable and ineffectual to distribute funds to class members. *See id.* at 979-82. A direct *de minimis* distribution of settlement funds to class members at times provides no effective remedy, and "[a] legal remedy that exists only as an abstraction is not equal to an equitable remedy that will provide real redress. A remedy that is only illusory is not a remedy." Fischer, Understanding Remedies at 199. In

summary, the reasoning underlying the Court's decision to uphold a *cy pres* award in *Tincher v. Arnold* is as applicable in the context of wills when that case was decided in 1906 as it is in the context of class actions today. Not allowing the class action settlement funds to go to their "next best use" "defeat[s] the very purpose" of class actions stemming from their origins in equity, and will "disappoint just expectations, and destroy gifts of great public importance and utility." *Tincher*, 147 F. at 673.

CONCLUSION

There is ample precedent for allowing *cy pres*-only awards and there are stringent safeguards available to assure the appropriate use of such awards. *Cy pres* awards are part of the rich history of equitable remedies to assure that justice is done. *Cy pres* is appropriate in class action settlements when class members suffer an injury with very little, if any, quantifiable monetary damages and their injury can be redressed by non-monetary relief, including changes in conduct or policy by the defendant and measures undertaken via *cy pres* to provide ongoing benefit to the class, subject to Rule 23(e)'s requirements.

Respectfully submitted,

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No. 17-961

IN THE
Supreme Court of the United States

THEODORE H. FRANK and
MELISSA ANN HOLYOAK,
Petitioners,

v.

PALOMA GAOS, on behalf of herself and
all others similarly situated, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

Whether, or in what circumstances, a *cy pres* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate?

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STATEMENT OF INTEREST[1]

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ's primary purpose is to advocate for fairness and balance in the administration of civil justice, often by proposed changes to the Federal Rules of Civil Procedure ("FRCP") through the Rules Enabling Act process. Since its founding in 1987, LCJ has become a leading voice on FRCP reform. LCJ has submitted written comments related to the Advisory Committee's current work to develop potential amendments to Rule 23 and filed amicus briefs on issues related to the rules and their interpretation.

LCJ has specific expertise on the FRCP and the rulemaking process, drawing on both its own policymaking efforts and the collective experience of its members who are involved in litigation in the federal courts under the FRCP as written. LCJ has a deep knowledge of and interest in the process of civil litigation and how the rules, and a correct interpretation of the rules, can assure a just, inexpensive, and speedy outcome and avoid litigation abuses.

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1 Pursuant to Rule 37.6, *amicus curiae* LCJ certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have obtained consent to the filing of this amicus brief pursuant to Rule 37.

The issue of the use of *cy pres* in class actions is one of central concern to LCJ's membership. LCJ's concerns prompted proposed rule changes to abolish *cy pres* in class actions. And, LCJ members have testified at various hearings about the abuses that arise through the use of *cy pres* in the class action context. Accordingly, as amicus curiae, LCJ writes from its unique perspective to urge this Court to hold that a *cy pres* award of class action proceeds that provides no direct relief to class members fails to comport with Rule 23's requirement that a settlement binding class members must be "fair, reasonable, and adequate."

INTRODUCTION

The class action device, while intended to secure a just speedy outcome for certain kinds of claims, has resulted in two significant problems that together are at the heart of the issue before this Court: (1) certification of class actions in which most or all of the plaintiffs do not suffer actual injury; and (2) class actions which result in huge costs to the courts and to the defendants with little or no benefit to absent class members. As in this case, these problems often arise in tandem and each exacerbates the other. That is, when a class is certified even though the class members suffer little or no actual injury, the absent class members cannot be identified and do not make claims on any available settlement fund. Such circumstances all too often lead the parties and courts to resort to *cy pres* as a means of settling the litigation.

As one commentator has explained, "[l]oose certification standards risk high costs by inviting frivolous class action suits that defendants settle rather than face potentially crippling, even bankrupting, damage awards." Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 Duke L.J. 1251, 1254 (2002). Empirical studies confirm that "almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision. . . . [T]his settlement leverage creates serious problems when deployed in frivolous or weak class action suits." *Id.*, p 1292. See also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011)

(recognizing that "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.")

Once such claims settle, courts often "invoke[] the *cy pres* doctrine to distribute unclaimed or non-distributable funds," ostensibly to "serve the policy objectives underlying the class action and the interests of the absent class members 'as nearly as possible.'" Rhonda Wasserman, *Cy Pres* in Class Action Settlements, 88 S. Cal. L. Rev. 97, 116 (2014). In practice, however, the recipients are often "organizations only tangentially related to the subject of the lawsuit." Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. Rev. 903, 925 (2018), quoting Adam Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007, at A14.

Further, when settlements funds go to "an organization that initiates new litigation," through a *cy pres* distribution, "*cy pres* helps to promote the industry of non-economic litigation. In many instances, *cy pres* distributions go to consumer-interest, litigation-related charities that may then use the distribution to finance new litigation of the same type." Jennifer Johnston, *Cy Pres* Comme Possible to Anything Is Possible: How *Cy Pres* Creates Improper Incentives in Class Action Settlements, 9 J.L. Econ. & Pol'y 277, 296 (2013),

citing *In re Wells Fargo Sec. Litig.*, 991 F. Supp. 1193, 1198 (N.D. Cal. 1998).

The rules require judicial approval of settlements to ensure that the settlement is "fair, reasonable, and adequate." This Court should make clear that a *cy pres* settlement does not satisfy this standard.

SUMMARY OF THE ARGUMENT

In this case, no effort was made to distribute funds to the class members. Instead, as the Court is well aware, the parties agreed to a *cy pres*-only settlement of $8.5 million. In other words, aside from $15,000 in incentive awards to the three named plaintiffs, none of the settlement goes to class members. Class counsel, meanwhile, stand to be enriched by a fee of over $2 million. The remaining funds were allocated to six *cy pres* recipients. In light of such not-uncommon results, the Chief Justice has expressed the need for this Court to address, among other points, "when, if ever," *cy pres* relief in class actions should be considered. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013) (statement of Roberts, C.J., respecting denial of certiorari).

LCJ contends that a proper reading of Rule 23 in conjunction with the Rules Enabling Act, 28 U.S.C. § 2072, makes it clear that a settlement cannot be fair, reasonable, and adequate when class members do not receive any (or at best, a very small portion) of the settlement proceeds. The use of *cy pres* in class action litigation is wholly unrelated to

the doctrine's historical purpose under trust law. In a class action, a *cy pres* distribution of settlement proceeds offers no benefit to the absent class members, and in effect, *cy pres* becomes a punitive device by disbursing funds properly belonging to absent class members to non-litigants.

A categorical rule that *cy pres* settlements can never satisfy Rule 23's requirement that settlements be "fair, reasonable, and adequate" would end these abuses and avoid the need to decide the serious constitutional challenges and problems with legal authority to the use of *cy pres*.

First, allowing distribution of settlement funds to non-parties who have not suffered injury is akin to giving them standing in the action to which they otherwise are not entitled. Relatedly, by effecting such a result, a court steps out of its judicial role in violation of Article III. The court essentially imposes punitive relief on defendants that exceeds the compensation required, if any.

Second, to construe Rule 23 as allowing for so-called *cy pres* relief violates the Rules Enabling Act by imposing a fine on defendants not authorized by the underlying substantive law.

Third, and equally concerning, the failure to compensate actual class members implicates Due Process by eliminating their right to compensatory relief. This problem is exacerbated by conflicts of interests; class counsel are motivated to act in their

own best interest as opposed to the interests of the absent class members.

Fourth, *cy pres* awards infringe on First Amendment rights because such settlements compel class members to subsidize speech. A *cy pres* award essentially requires class members to exchange their cause of action for court-mandated contributions to charities not chosen by them and that may engage in speech or political activity with which the class members may disagree.

Finally, a *cy pres* award of class action proceeds that provides no direct relief to class members does not support class certification. In other words, such an award makes clear that the class was improperly certified in the first place.

By holding that *cy pres* can never be fair, adequate, and reasonable under Rule 23, the Court can avoid constitutional issues and simultaneously ensure that class actions are not used as mechanisms to transfer a defendant's wealth to nonparties and class counsel while depriving class members of compensation for actual injuries.

ARGUMENT

RULE 23'S REQUIREMENT THAT A SETTLEMENT BINDING CLASS MEMBERS MUST BE "FAIR, REASONABLE, AND ADEQUATE" CANNOT BE SATISFIED BY A CY PRES AWARD OF CLASS ACTION PROCEEDS, ESPECIALLY WHEN THERE IS NO DIRECT RELIEF TO CLASS MEMBERS.

A. Rule 23 Requires That Any Settlement Be "Fair, Reasonable, And Adequate."

1. Rule 23 Sets Forth A Standard.

This Court has made clear that "[t]he text of a rule . . . limits judicial inventiveness." *Amchem Prod., Inc. v. Windsor,* 521 U.S. 591, 620 (1997). Under Rule 23(b)(3), a class action may be maintained if the court finds, among other requirements, "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." When the parties to such a suit propose a settlement, "the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Rule 23(e)(2). As is evident from the plain language of Rule 23(e), it "contains no categorical rule entitling plaintiffs to *cy pres* distribution—and, in fact, does not mention *cy pres* distribution at all." *All Plaintiffs v. All Defendants*, 645 F.3d 329, 333 (5th Cir. 2011). Instead, the rule provides a standard for lower courts to apply to proposed settlements.

2. The Circuits' Efforts To Apply Rule 23's Standard Are Unsatisfactory.

In interpreting and applying Rule 23's standard, the Circuit Courts of Appeal have applied various multi-factored tests to assess whether a settlement is "fair, reasonable, and adequate." Most of the factors are "intuitively obvious and dependent largely on variables that are hard to quantify." *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009). See e.g., *In re: Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1116–17 (10th Cir. 2017), cert. denied sub nom.; *Speedway LLC v. Wilson*, 138 S. Ct. 1299 (2018) (setting forth four-factor test); *Pelzer v. Vassalle*, 655 F. App'x 352, 359 (6th Cir. 2016) (applying seven-factor test). And regardless, such multi-factor tests are often recognized as non-exhaustive. See, e.g., *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013) (citation omitted) ("additional inquiries . . . in many instances will be useful for a thoroughgoing analysis of a settlement's terms"); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) ("The factors in a court's fairness assessment will naturally vary from case to case . . . ."); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) ("Without quarreling with the district court's findings [under the applicable multi-factor test], we nevertheless conclude that this settlement is not fair, reasonable, and adequate under Rule 23(e) because there has been no demonstration on the record below that the settlement will benefit the class in any way . . . .")

Some of the circuits at least pay lip service to concerns that arise in the context of *cy pres* relief, which, as illustrated below, raises questions of basic fairness. For example, the Sixth Circuit has instructed that, "in evaluating the fairness of a settlement . . . we look in part to whether the settlement gives preferential treatment to the named plaintiffs while only perfunctory relief to unnamed class members. Such inequities in treatment make a settlement unfair. The same is true of a settlement that gives preferential treatment to class counsel ...." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (citations and punctuation omitted). Similarly, the Seventh Circuit has held that the "inspection of a settlement entails a careful inquiry into the fairness of the settlement to the class members before allowing it to go into effect." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997). And one of the factors the Tenth Circuit considers is "whether the proposed settlement was fairly and honestly negotiated." *In re: Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d at 1116–17 (citation omitted).

Nevertheless, despite the consideration of multiple factors and professed desire to comport with basic fairness, as this case illustrates, courts continue to approve settlements employing *cy pres*, which poses grave concerns regarding standing, judicial authority, and other constitutional issues.

3. Cy Pres Is An Equitable Doctrine Arising Under Trust Law Unrelated, If Not Antithetical, To The Adversary System.

This Court has recognized that the doctrine of *cy pres* – and a court's authority to fashion such a remedy – originates under the law of charities and trusts:

> where property has been devoted to a public or charitable use, which cannot be carried out on account of some illegality in or failure of the object, it does not, according to the general law of charities, revert to the donor or his heirs, or other representatives, but is applied under the direction of the courts, or of the supreme power in the state, to other charitable objects, lawful in their character, but corresponding, as near as may be, to the original intention of the donor. . . . [T]he authority thus exercised arises in part from the ordinary power of the court of chancery over trusts, and in part from the right of the government or sovereign, as parens patriae, to supervise the acts of public and charitable institutions . . . .

Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56 (1890). See also Restatement (Third) of Trusts § 67, Failure of Designated Charitable Purpose: The Doctrine of

Cy Pres (2003) ("[W]here property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose . . . the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.") In other words, when a donor voluntarily gives property for a charitable or trust purpose, and the purpose can no longer be carried out as precisely specified, the courts are empowered to cause the funds to be used as their donor would likely have intended had he or she known the present circumstances.

Judge Richard Posner has aptly observed that the use of *cy pres* in the context of class actions is unrelated to the doctrine's historical purpose under trust law. In a class action, *cy pres* offers no benefit to the absent class members, and in effect, becomes a punitive device:

> The doctrine [of *cy pres*], or rather something parading under its name, has been applied in class action cases, but for a reason unrelated to the reason for the trust doctrine. That doctrine is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor. In the class action context the reason for appealing to *cy pres* is to

> prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to trial) to the class members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "*cy pres*" remedy . . . is purely punitive.

Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 784 (7th Cir. 2004).

The justification for use of *cy pres* in class action settlements is to put "the defendant's funds to valuable and worthwhile use, rather than necessarily compensating the absent class members." Martin H. Redish et. al., *Cy Pres* Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617, 635–36 (2010). But "[i]t is inherently dubious to apply a doctrine associated with the voluntary distribution of a gift to the entirely unrelated context of a class action settlement . . . ." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring). In a class action, no funds have been donated. Instead, a court must exercise its judicial power to approve a settlement taking funds from the defendant and giving them to a non-party to the litigation. In so doing, the use of *cy pres* in class actions raises a host of constitutional and fairness concerns. These issues arise most often when

plaintiffs have little or no actual injury, leading parties and courts to the inappropriate use of *cy pres* to mask the underlying problems with the litigation as a whole.

B. A Rule That A *Cy Pres* Settlement Award Cannot Be Fair, Reasonable, And Adequate Under Rule 23 Would Permit The Court To Interpret Rule 23 Within The Limits Of The Rules Enabling Act Authority And Also Avoid The Serious Constitutional Issues Raised By The Parties And Amici.

Rule 23's requirement that a settlement be "fair, reasonable, and adequate" should not permit a *cy pres* distribution because *cy pres* gives standing to those not injured, imposes unauthorized punitive damages on defendants, and infringes the Due Process and First Amendment rights of actual class members. This Court should adhere to "the constitutional-avoidance canon," which instructs that "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

1. Cy Pres Is An Improper Use Of Judicial Power Under Article III.

Chief among the perils posed by a *cy pres* award of class action proceeds is the flouting of Article III's case or controversy requirement and the

separation of powers doctrine. "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). The case or controversy requirement is intertwined with standing because "at an irreducible minimum, Article III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Id.* at 472 (citations and quotation marks omitted).

Additionally, Article III is intended to "limit the federal judicial power to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* (citation and quotation marks omitted). Requiring a party to demonstrate an "actual injury redressable by the court . . . . tends to assure that the legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.*

A recent decision from this Court arising in the class action context emphasizes that to establish an actual injury "a plaintiff must show that he or she suffered an invasion of a legally protected interest

that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), as revised (May 24, 2016) (internal quotations and punctuation omitted). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way. . . . An injury in fact must also be 'concrete.' . . . A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Id.* (internal citations and punctuation omitted).

As one commentator has explained, implementing a *cy pres* remedy in a class action context indisputably results in an award of "'damages' to an uninjured third party." Redish et. al., 62 Fla. L. Rev. at 642. Accordingly, "[c]ourts should be troubled that a *cy pres* distribution to an outsider uninvolved in the original litigation may confer standing to intervene in the subsequent proceedings should the distribution somehow go awry." *Klier*, 658 F.3d at 481 (Jones, J., concurring).

Moreover, the award of damages to the uninjured third party through use of a *cy pres* distribution "is purely punitive." *Mirfasihi*, 356 F.3d at 784. Thus, the court's function is "effectively transform[ed] . . . into a fundamentally executive role, because no longer is the court functioning as a judicial vehicle by which legal injuries suffered by those bringing suit are remedied. Instead, the court presides over the administrative redistribution of wealth for social good." Redish et. al., 62 Fla. L. Rev. at 641-42. "As a result, the practice violates both the

constitutional separation of powers and the case-or-controversy requirement of Article III." *Id.* at 642.

Indeed, the class respondents effectively advocate for courts to transform themselves into extra-constitutional grant-writing entities. The response to the petition detailed how potential *cy pres* recipients were "required to and did submit a detailed grant-like proposal detailing exactly how the money would be put to use." Brief for the Class Respondents in Opposition, pp 5-6. Respondent Google for its part deems it a "positive development" that parties and courts are "using 'a grant-like approach' to thoroughly vet potential *cy pres* recipients." Brief in Opposition of Respondent Google, p 22, n. 5.

In the absence of statutory authorization, courts have no power to redistribute money between a defendant and an uninjured private entity – even if they make those private entities submit detailed "grant-like" proposals. Moreover, the judiciary's competency as a free-floating grant-providing agency is questionable. Unlike typical granting agencies, with staff to review detailed proposals, check the backgrounds of grant-seeking groups, and follow up with a review of how the funds were actually spent, the federal courts are created to decide cases and controversies, using the judicial power. Each time the courts approve a settlement with a *cy pres* award, the courts are obligated to either approve it without adequate information or to step outside of their judicial role and function to become a grant-

conferring entity, essentially operating as an executive entity.

2. Cy Pres Violates The Rules Enabling Act By Imposing A Fine On Defendants Not Authorized By The Underlying Substantive Law.

In addition to being an improper use of judicial power, construing Rule 23 to allow *cy pres* distributions also violates the Rules Enabling Act.

The Court has previously instructed that, "Rule 23's requirements must be interpreted in keeping . . . with the Rules Enabling Act . . . ." *Amchem*, 521 U.S. at 613. The Rules Enabling Act provides in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. . . .

28 U.S.C. § 2072.

A rule of procedure must "really regulate[] procedure," which is "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress

for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). If a rule "governs only the manner and the means by which the litigants' rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (citations and punctuation omitted).

When addressing Rule 23 generally, this Court has observed that, "rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are . . . valid," because "[s]uch rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. . . . [L]ike traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* at 408 (opinion of Scalia, J.).

Although Respondents speak in innocuous terms depicting a benevolent grant writing institution, *cy pres* distributions are troublesome because they "arguably violate the Rules Enabling Act by using a wholly procedural device—the class-action mechanism as prescribed in Rule 23—to transform substantive law from a compensatory remedial structure to the equivalent of a civil fine." *Klier*, 658 F.3d at 481 (Jones, J., concurring) (citation and punctuation omitted). For example the

substantive law at issue here, the Stored Communications Act, 18 U.S.C. § 2701 *et seq.* and the common law of contracts, does not require defendants to pay third parties that they have not injured. Accordingly, "[i]f existing substantive remedies are deemed inadequate . . . the task of altering the remedial framework is one for the authority that created the substantive law in the first place. Resort to *cy pres* when existing remedies cannot effectively be invoked by use of the class action device, then, improperly distorts the remedial structure through use of a nakedly procedural device." Redish et. al., 62 Fla. L. Rev. at 640.

3. Cy Pres Implicates Due Process.

While the use of *cy pres* in effect confers standing on those who could not otherwise show injury, a *cy pres* distribution of class action settlements also affects the Due Process rights of absent class members. Concern is warranted here because as Professor Redish explains, in this context, "use of *cy pres* . . . threatens the absent individual claimants' right to due process by judicially revoking their substantive right to compensatory relief." Redish et. al., 62 Fla. L. Rev. at 645.

Relatedly, a *cy pres* award of class action proceeds creates inherent conflicts of interest because class counsel is motivated to act in their own best interest as opposed to the interests of the absent class members. More specifically, where identification of absent class members and calculation of their damages is possible, but time-

consuming and costly, class counsel may be tempted to avoid the expense of proving causation and damages by asserting that such proof is too difficult or making it challenging for class members to claim their share of the settlement. See *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees."); *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) ("[I]nclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class."); *Mirfasihi*, 356 F.3d at 785 (holding a *cy pres* settlement to avoid litigation expense and gain a large class counsel fee "sold [the class] claimants down the river").

4. Cy Pres Infringes On Class Members' First Amendment Rights.

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Accordingly, "the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) (citation and punctuation omitted). As is relevant here, this Court has recognized that the "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Id.* (citation and punctuation

omitted). See also *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) ("First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . ."); *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, No. 16-1466, 2018 WL 3129785 (U.S. June 27, 2018) (state law which forces public employees "to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities," is a violation of "the free speech rights of nonmembers" because it compels them "to subsidize private speech on matters of substantial public concern.")

A *cy pres* settlement essentially requires class members to exchange their cause of action for court-mandated contributions to charities or advocacy organizations not chosen by them and that may engage in speech or political activity which class members do not support. It is impractical if not completely unworkable to find a single entity on which all class members could agree. The concern is especially pronounced in this case because, as explained in the petition, the funds were distributed to some entities to which defendant Google had previously given financial support.

C. A *Cy Pres* Award Of Class Action Proceeds That Provides No Direct Relief To Class Members Does Not Support Class Certification.

A necessary conclusion of the above discussion is that a *cy pres* award of class action proceeds that provides no direct relief to class members does not support class certification. This Court itself has recognized that an action under Rule 23(b)(3) is one in which "class action treatment is not as clearly called for." *Amchem*, 521 U.S. at 615. By resorting to *cy pres*, the courts and parties are admitting that they cannot compensate class members who were actually injured.

Respondents appear to go a step further in arguing that, in this case, class members ***should not*** be compensated because they suffered no injury. Specifically, Google contends that *cy pres* is proper because the class members suffered no harm and could not otherwise meet the requirements articulated in *Spokeo*: "This case is unusually well-suited to a *cy pres* remedy because no class member appears to have been actually harmed by the challenged practices . . . ." Brief in Opposition by Respondent Google, pp 2-3. Therefore, in Google's view, "any direct payment [to class members], however modest, [is] a windfall rather than compensation." *Id.*, p 15. Noting that "*Spokeo* clarifies that Article III requires lower federal courts to weed out putative class actions seeking statutory damages in the absence of actual harm," Google proves the point by further explaining, "[t]hese are

the cases that are most likely to result in proposed *cy pres* only settlements if they make it past the pleadings stage. . . ." *Id.*, p 22. In other words, "[c]lass members were unharmed and unlikely to receive anything from further litigation." *Id.*, p 23. In its effort to uphold the settlement terms by arguing that this case is sui generis, Google reveals the fundamental problem with the use of *cy pres* as part of a settlement.

A *cy pres* settlement occurs when class members who were actually injured cannot be compensated, or because class members are admittedly uninjured and thus undeserving of compensation. In either instance, the use of *cy pres* indicates that class certification is unsupported and that the proposed settlement is not "fair, reasonable, and adequate" since it is either circumventing the standing requirements of Article III or depriving actually injured but absent class members of their cause of action without providing them any relief.

CONCLUSION

In sum, courts "must not apply a federal rule of civil procedure if application of the rule violates either the Constitution or the Rules Enabling Act." *Douglas v. NCNB Texas Nat. Bank*, 979 F.2d 1128, 1130 (5th Cir. 1992), citing *Hanna v. Plumer*, 380 U.S. 460, 470-73 (1965); *Weems v. McCloud*, 619 F.2d 1081, 1097–98 n. 38 (5th Cir.1980). But reading Rule 23 to allow *cy pres* settlements does just that.

Allowing distribution of settlement funds to non-parties who have not suffered injury confers standing in an action, which would not have otherwise been granted. Moreover, when a court grants standing to an uninjured party, the court exceeds its authority under Article III and violates the Rules Enabling Act by imposing punitive relief not authorized by the underlying substantive law. The failure to compensate actual class members implicates Due Process by eliminating their right to compensatory relief, and at the same time, infringes their First Amendment rights by compelling the class members to support the speech of the *cy pres* recipients with whom they may disagree.

Finally, a *cy pres* settlement is used because class members who were actually injured cannot be compensated, or because class members are admittedly uninjured and thus undeserving of compensation. In either instance, the use of *cy pres* establishes that class certification is unsupported.

By holding that *cy pres* can never be fair, adequate, and reasonable under Rule 23, the Court can avoid the identified constitutional and other issues while ensuring that the substantive rights of both class members and defendants are protected.

Accordingly, *Amicus Curiae* LCJ respectfully requests this Court reverse the decision of the court of appeals.

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No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, Individually and
on Behalf of All Others Similarly Situated, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LEGAL AID ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This amicus brief is submitted by eight of the nation's leading legal aid organizations and foundations.[1] All amici provide legal aid to low-income people and underserved communities or are membership organizations and foundations which work with and rely on public interest legal aid organizations to carry out their legal services mission. All amici have a substantial interest in ensuring that *cy pres* awards are permitted in appropriate circumstances (including awards to legal aid organizations).

The National Legal Aid and Defender Association ("NLADA") is the largest national legal aid organization, with more than 700 program members nationwide dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender programs. NLADA's members are civil legal aid providers which are funded by a variety of sources, including *cy pres* awards, to address the overwhelming need for access to justice among the nation's poor.

Association of Pro Bono Counsel ("APBCo") is a membership organization of over 232 partners, counsel, and practice group managers who run pro bono practices in more than 122 of the country's largest law firms. APBCo is dedicated to improving access to justice by serving as a unified voice for the national law firm pro bono community. The members of APBCo rely

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[1] This brief is submitted *pro bono*, by counsel of record. No party or any counsel for a party authored this brief in whole or in part, nor did any party, party's counsel or any other person or entity contribute money to fund the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this amicus brief.

on the expertise of legal aid organizations to help provide successful pro bono programs at the nation's largest law firms.

Legal Aid Association of California ("LAAC") is a statewide membership association of nearly 90 public interest law nonprofits that provide free civil legal aid to low-income people and communities throughout California on a broad array of substantive issues and serve a wide range of low-income and vulnerable populations. Federal courts awarded more than $10 million in *cy pres* awards to California civil legal aid providers from 2000 to 2017.

The National Association of IOLTA Programs is a membership organization for state Interest On Lawyers' Trust Account programs. Every state, along with the District of Columbia, Puerto Rico, and the Virgin Islands, operates an IOLTA program. These programs pool interest earned on certain client funds held by lawyers for clients and use the interest income for grants to legal aid organizations.

Equal Justice Works creates opportunities for lawyers to transform their passion for equal justice into a lifelong commitment to public service. It runs the nation's largest postgraduate Fellowship program supporting hundreds of lawyers who work at nonprofits to provide legal services to underserved communities, such as homeless veterans, the elderly and victims of crime. Equal Justice Works launched the Fellowship program in 1992 with a *cy pres* award made after $200 million in distributions to class members in *In re Folding Carton Antitrust Litigation*. Many subsequent *cy pres* awards have supported Fellows working on specific issues related to the underlying litigation.

The Chicago Bar Foundation is an affiliate of the Chicago Bar Association that operates a grant program awarding over $2 million each year to legal aid organizations and access to justice programs. Chicago Bar Foundation receives *cy pres* awards and uses some of those awards to operate courthouse "help desks" to assist pro se litigants in the Northern District of Illinois.

The Legal Foundation of Washington ("LFW") is a non-profit organization created in 1984 at the direction of the Washington Supreme Court to distribute IOLTA funds to legal aid organizations across the State of Washington. The LFW receives *cy pres* awards ($300,000 in 2017) that are distributed to Washington's legal aid community through its grant program.

The Texas Access to Justice Foundation (TAJF) is the leading funder of legal aid in Texas. The Foundation, a 501(c)(3) nonprofit organization, was created by the Supreme Court of Texas in 1984 to administer the Interest on Lawyers' Trust Accounts Program. TAJF has diversified its funding sources to include state funding, cy pres funds, private donations, and funding from other foundations. TAJF made grants in 2017-18 to 37 organizations that provide free civil legal assistance in civil matters, such as protection from domestic violence and assistance with housing issues, to more than 150,000 disadvantaged Texas families.

SUMMARY OF THE ARGUMENT

This appeal challenges *cy pres* awards in class action settlements where there is no distribution to class members (the only question presented by the petition for certiorari). Petitioners' argument expands to supposed larger problems and reasons for broader limitations on *cy pres* awards. This *amicus* brief is submitted to provide the Court with a more balanced and realistic overview of the law and practice concerning *cy pres* awards in class actions. In particular:

1. Appropriate *cy pres* awards are part of the recognized discretion of the courts to accomplish fair and efficient resolution of Rule 23 class actions;

2. There are appropriate limits in place on district court discretion to approve *cy pres* awards;

3. Any changes in Rule 23 to limit *cy pres* awards should come from the Advisory Committee on Federal Rules or the Congress – which have declined to make such changes;

4. Petitioners' suggested grounds for relief are contrary to settled law; and

5. Legal aid organizations are appropriate *cy pres* recipients.

ARGUMENT

I. Federal Courts Have Long Recognized Appropriate Use of *Cy Pres* Awards to Advance the Fair and Efficient Resolution of Class Actions

It is well established that courts have considerable discretion to approve class action settlements and to fashion relief "on a case by case basis, in light of the relevant circumstances" to accomplish the fair and efficient resolution of class actions as provided by Rule 23 of the Federal Rules of Civil Procedure. *Evans v. Jeff D.*, 475 U.S. 717, 742 (1986). See generally *Conte and Newberg, Newberg on Class Actions* § 13.47 (5th Ed. 2014); *Girsh v. Jepson*, 521 F.3d 153 (3d Cir. 1975) (appellate courts review district court decisions to approve class action settlements for an abuse of discretion).

One aspect of this remedial discretion is determinations about the proposed disposition of settlement funds. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173-174 (3d Cir. 2013), describes the role of the district court in class action settlement hearings as follows:

> The role of a district court is not to determine whether the settlement is the fairest possible resolution... The Court must determine whether the compromises reflected in the settlement - including those terms relating to the allocation of settlement funds - are fair, reasonable, and adequate when considered from the perspective of the class as a whole.

One recurring problem in the allocation of settlement funds is what to do with residual funds that are unclaimed or cannot be distributed to the class members. While the present case concerns a class action settlement with no money distributed to class members, such settlements are rare. In the usual class action settlement, a settlement fund is distributed to class members on an equitable basis, but some amount often remains because not all class members can be located and not all file claims or cash settlement checks, or because the residual amount is so small that the cost of distributing it would exceed the amount to be distributed.[2] See *In re Baby Prods.*, 708 F.3d at 169.

In such circumstances, a court has four principal options: distribution of the excess funds to class members who have already made a claim, reversion of the remaining funds to the settling defendant, escheat to the state or a court award to put the undistributed residue to an appropriate use. *In re Lupron Mktg. and Sales Practices Litig.*, 677 F.3d 21, 33-33 (1st Cir. 2012). Courts have consistently exercised their discretion to distribute residual funds through court-approved awards rather than any of the other three options. *See, e.g., In re Lupron*, 677 F.3d at 34-35 (approving *cy pres* award over class members' request for treble damages); *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *In re Pharm. Indus. Avg. Wholesale Price Litig.*, 588 F.3d 24, 34-36 (1st Cir. 2009). They have done so when none of the other three options results in fair and efficient resolution of the

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[2] Francis McGovern, Distribution of Funds in Class Actions – Claims Administration, 35 *Journal of Corporation Law* 123-134 (2009).

class action. An additional distribution to class members who have already recovered their claimed damages affords them a windfall; reversion unjustly rewards the defendant; and escheat would serve neither the fairness nor the efficiency of the class action resolution.

For these reasons, it is well-established in the federal courts that a district court "does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury." *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *In re Lupron*, 677 F.3d at 38-39; *In re Baby Prods.*, 708 F.3d at 172. The American Law Institute's Principles of Law of Aggregate Litigation ("ALI Principles") specifically recognize this widely accepted appellate guidance: "many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members." ALI Principles § 3.07 cmt. a (2010).

The factual scenario that this case presents – in which the individual claims of class members for monetary relief are so small that they would be exceeded by the cost of distributing the funds – arises far more rarely. But when it does arise, it is governed by the same principles that the courts have developed in the more common cases involving residual funds. As

will be shown, those principles guide and limit the exercise of a district court's discretion in a manner that directly addresses the issues that petitioners have raised.

II. Federal Courts Have Developed Appropriate Limits to Narrow and Channel the Discretion to Approve *Cy Pres* Awards

The courts of appeals have been careful to develop and apply constraints on the use of *cy pres* awards - to ensure that they advance the fair and efficient resolution on class actions. As this Court recently said about patent damages, a district court's "discretion should be exercised in the light of the considerations underlying the grant of that discretion," and, through many years of discretionary awards and review by appellate tribunals "the channel of discretion has narrowed." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) (quoting Henry Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 772 (1982)). That is precisely what the federal courts have done with respect to *cy pres* awards. The limits that the courts have developed are fully adequate to the task of policing any potential risk of abuse in particular *cy pres* awards.

A. Compensation of Class Members Should Always Come First

Petitioners claim that *cy pres* awards are too often and increasingly used instead of distributions to class members. That argument ignores what actually happens with most settlement funds in almost all class action settlements, where there are already established requirements and procedures for getting settlement

funds into the hands of class members whenever feasible, with *cy pres* awards coming only from any undistributed residue. The ALI Principles provide a good description of this strict limitation:

> If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

ALI Principles § 3.07(b).

Consistent with this limiting principle, appellate courts have uniformly adopted a requirement that a *cy pres* distribution is permissible only when it is not feasible to make distributions to class members in the first instance or to make further distributions to class members. *See, e.g., In re Pharm. Indus.*, 588 F.3d at 35. To enforce this requirement, appellate courts appropriately reverse district court *cy pres* awards in cases that fail to make feasible payments first to class members. *See Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003) (rejecting proposed settlement with *cy pres* awards but no payments to known class members who had significant disability accommodations claims); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it failed to compensate one subset of class members); *Klier*, 658 F.3d at 479 (district court

abused its discretion by approving a *cy pres* distribution of unused funds from one subclass instead of distributing those funds to the members of a different subclass).[3] The application of this principle ensures that the sort of situations on which petitioners focus will not arise with frequency.

In some settlements, distributions are feasible for one or more rounds of payments to class members, but after that additional distributions to class members could become a windfall or are economically inefficient. The *ALI Principles* and the appellate courts recognize that the district court has discretion to order a *cy pres* distribution in these situations. *Id.* at § 3.07 (cmt. a). See generally *Newberg on Class Actions* § 10:17 ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach.").

B. Procedures and Limits Already in Place Address Conflicts of Interest and Any Appearance of Impropriety

The lower courts have developed and applied limits on the use of cy pres remedies in class actions that fully address the concerns petitioners have raised about conflicts of interest and judicial impropriety.

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[3] While cited *passim* by petitioners and by the United States as amicus, the *Klier* opinion actually did not reject *cy pres* awards in class actions. Rather, the Fifth Circuit acknowledged that "[i]n the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Id.* at 474.

For example, if a district judge is concerned that class counsel may lack incentives to vigorously pursue compensation for class members, the court can and should "subject the settlement [and the distribution process] to increased scrutiny." *In re Baby Prods.*, 708 F.3d at 173.

Other simple and effective procedures have long been employed to prevent class action parties and their counsel from steering unclaimed funds to recipients that advance their own personal agendas. *See In re Lupron*, 677 F.3d at 38; *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011). Courts can and do evaluate whether any of the parties or counsel involved in the litigation has any significant affiliation with or would personally benefit from the distribution to the proposed *cy pres* recipients. To accomplish this, courts may require that motions to approve class settlements disclose the named parties' and their counsels' relationships, if any, to any proposed *cy pres* recipient. Courts can then inquire into such relationships and selection process at fairness hearings on motions to approve class settlement, using the well-established tests developed to review class action settlements. See *Newberg on Class Actions* §13.48-61.

Courts have also developed standards to address any concern arising out of the possible "appearance of impropriety" arising out of "the specter of judges and outside entities dealing in the distribution and solicitation of settlement money." *Nachshin*, 663 F.3d at 1039. When parties or counsel (rather than the court) propose the organizations to receive any *cy pres* distributions, there will generally be no basis for concern about judicial impropriety (perceived or real)

in proposing awards. To protect the objective role of the district judge in considering *cy pres* awards proposed by the parties at a fairness hearing, a limiting rule is already spelled out in the ALI Principles: "[a] cy pres remedy should not be ordered if the court . . . has *significant* prior affiliation with the intended recipients that would raise substantial questions about whether the selection of the recipient was made on the merits." ALI Principles, § 3.07 cmt. b (emphasis added). And, if necessary, the statutes governing judicial recusal can be applied. For example, in *Nachshin*, one objector attacked the district judge who approved the parties' settlement agreement because her husband was one of fifty board members of the proposed *cy pres* recipient. The Ninth Circuit firmly rejected this attack, applying the test for recusal under 28 U.S.C. § 455(a) ("whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned") and finding that "there is no reason to believe [the judge's husband] (as one of 50 volunteer board members) would himself realize a significant benefit" from the proposed award."). *Nachshin*, 663 F.3d at 1041-42.

In short, while there are good reasons for careful court review of what organizations are proposed to receive *cy pres* awards, there are reliable procedures already in place for conducting that review without rewriting Rule 23.

C. *Cy Pres* Distributions Should Reasonably Approximate Class Action Relief, But Overly Constricted Application of the *Cy Pres* Doctrine in Class Actions Can Produce Perverse Results

When further distributions to class members are not feasible, either because remaining funds cannot be distributed cost-effectively or because of the minimal value of the claims of individual class members, the court must determine which entities are appropriate recipients of a *cy pres* distribution. The ALI Principles say recipients should be those "whose interests reasonably approximate those being pursued by the class" and, if no such recipients exist, "a court may approve a recipient that does not reasonably approximate the interests" of the class. ALI Principles § 3.07(c). This "reasonable approximation" test has been adopted by numerous appellate courts for determining the fairness of class action cy pres awards. *See, e.g., In re Lupron*, 677 F.3d at 33; *Klier*, 658 F.3d at 474; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990).[4]

Recent decisions from the Eighth and Ninth Circuit of Court of Appeals have used wording suggesting a narrower limitation: that *cy pres* recipients must be

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[4] Applying these principles, federal courts should and do reject settlements that propose *cy pres* awards to organizations which seem to be chosen at random – or seem to be merely favorite charities of the counsel or parties. *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (reversing and remanding *cy pres* award for a food distribution program because "[n]ot just any worthy recipient can qualify as an appropriate *cy pres* beneficiary.").

closely tied to the precise claims or relief sought in the class action. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819-20 (9th Cir. 2012) (*cy pres* awards should account for "the nature of plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members") and *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1067 (8th Cir. 2015) (awards "as near as possible to the objectives underlying the lawsuit" and a recipient "that relates directly to the injury alleged in this lawsuit.")

While the discretion of district judges should be channeled and limited, some limits would "unduly confine the discretion of district judges to exercise the discretion conferred on them" (*Halo Elecs.*, 136 S. Ct. at 1932) (vacating Federal Circuit opinion creating and applying new specific limits on awarding enhanced patent damages). As with patent damages, overly narrow or exact match tests for *cy pres* awards unduly limit the discretion of district judges; such tests are plainly more complicated for district judges than the functional language of the ALI Principles applied by most appellate decisions (awards to recipients "whose interests reasonably approximate those being pursued by the class") and could even embroil district judges in disputes about which particular organization does work that most exactly matches the statutory claims alleged in the case being settled.

A limit on judicial discretion that would narrowly match *cy pres* recipients to the exact claims in a class action fails to recognize how the *cy pres* doctrine is being used in the class action context. The use of the *cy pres* doctrine to dispose of settlement residue is really just a convenient analogy borrowed from trusts

and estates law.[5] But in a class action settlement, there is no underlying trust created by a deceased settlor whose objective should be respected after a specific bequest has become unfeasible; instead, courts have borrowed the *cy pres* device to help resolve practical questions about residual funds in class action settlements and to facilitate the efficient administration of complex class actions.[6] As the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortgage Corp.*, the *cy pres* device is used in class actions "for a reason unrelated to the trust doctrine" - to prevent the defendant from "walking away from the litigation scot-free because of the unfeasibility of distributing the proceeds of the settlement." 356 F.3d at 784.

Punishment aside, adapting the *cy pres* doctrine to class actions gives district judges and settling parties a useful procedural device to solve the recurring practical problem of what to do with undistributed funds. In actual practice, far from matching an impossible specific bequest in a will or trust, class

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[5] The term *cy pres* derives from the Norman French phrase, "*cy pres* comme possible," meaning "as near as possible," and the cy pres doctrine is a rule of construction used to save a testamentary gift that would otherwise fail. To honor the intent of the deceased testator, the court would seek a new beneficiary as close as possible to the beneficiary chosen by the testator. *See* Bogert's Trusts and Trustees § 438; *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 625 (8th Cir. 2001).

[6] In the first reported federal decision approving a settlement with a *cy pres* award, the district court acknowledged that it was "applying a variant of the *cy pres* doctrine at common law": *Miller v. Steinbach*, 1974 U.S. Dist. LEXIS 12981, at 3-4 (S.D.N.Y., Jan. 3, 1974).

action litigants are resolving a complex lawsuit by a settlement in which disposing of residual funds is typically only a small (albeit important) detail of settlement administration. Plaintiffs' counsel need a simple and accepted method to dispose of residual funds left after distributions by class action administrators hired to locate and pay class members. And while defendants are primarily interested in concluding the case being settled, they also have a legitimate interest in how residual funds they provide are used.

In contrast to the widely accepted limit of cy pres awards to reasonably approximate the settled class action, matching the lawsuit claims can actually lead to *cy pres* awards that appear unwise or unnecessary. The settlement in the Ninth Circuit *Facebook* case was widely criticized because the Court of Appeals approved a settlement with no distribution to class members but with a new "tailor made" computer user foundation created to receive a large *cy pres* distribution. *Lane*, 696 F.3d 811 at 825. The simple explanation for the new foundation device in the *Facebook* settlement is that the settling parties were dealing with the 9th Circuit's overly narrow approach to who can receive *cy pres* awards. Contrast that overly narrow matching approach with *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1254-55 (7th Cir. 1984), where the Court of Appeals held it was appropriate for the district court to consider a *cy pres* award in an antitrust case but firmly rejected a proposed new "Antitrust Development and Research Foundation" as "carrying coals to Newcastle" because numerous organizations were already engaged in antitrust research.

Cy pres awards to legal aid organizations provide a recognized and practical solution to avoid the problems of awards to unsuitable recipients and awards that would target settling defendants. While many legal aid services do work that parallels particular class action lawsuits, legal aid services will always reasonably approximate class actions relief by providing access to justice for those in need of legal help. This subject is discussed in Section V below.

III. Any Sweeping and Categorical Departures From Traditional Practices Developed in the Lower Courts For *Cy Pres* Awards Should Come From the Advisory Committee on Civil Rules or the Congress – But Both Have Declined to Impose Any Such Restrictions

The categorical limits on *cy pres* awards that petitioners propose are inconsistent with the traditional remedial discretion courts exercise and have no basis in statutory law or the text of Rule 23. Petitioners are essentially asking this Court to legislate. This Court should reject petitioners' invitation to rewrite Rule 23 where both the Advisory Committee and the Congress have made considered decisions not to do so.

A. The Advisory Committee on Civil Rules Has Rejected Proposals to Amend Rule 23 to Limit *Cy Pres* Awards and this Court Has Just Approved Their Rule 23 Recommendations

Petitioners are asking this Court to undo the work of the Advisory Committee on Civil Rules that this

Court recently approved. On April 26, 2018, this Court transmitted a proposed amendment of Rule 23 to Congress that will go into effect on December 1, 2018. *See Proposed Amendments to the Federal Rules of Civil Procedure, Rules 5, 23, 62, and 65.1*, Slip Order at *11 (U.S. Apr. 26, 2018), https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf. If allowed by Congress to go into effect, the new Rule would make numerous changes in Rule 23 and class action practice, but will not restrict or eliminate *cy pres* awards. Since the Advisory Committee has just considered and expressly declined to propose limits on *cy pres* awards that petitioners pursue here, any consideration of changes in Rule 23 concerning *cy pres* awards should come from further work of the Advisory Committee. As recently noted by the Sixth Circuit, "[o]nly by following the highly reticulated procedures laid out in the Rules Enabling Act can anyone modify the Civil Rules, whether in the direction of relaxing them or tightening them." *United States v. Walgreen, Co.*, 846 F.3d 879, 881 (6th Cir. 2017) (Sutton, J.) (declining to relax the pleading standard established by Civil Rule 9(b)).

On September 11, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a mini-conference on Rule 23 issues. One issue on the agenda was "[g]uidance on handling *cy pres* provisions in class-action settlements—Are changes to Rule 23 needed, and if so, what should they include?" Introductory Materials, Rule 23 Subcommittee, Advisory Committee on Civil Rules, Mini-Conference on Rule 23 Issues, at 2, Sept. 11, 2015. The Committee Report from the September 11, 2015 mini-conference reports the overall consensus that *cy pres* awards have been recognized by

courts as an appropriate use of residual class action funds. Report of the Advisory Committee on Civil Rules, Rule 23 Subcommittee, Mini-Conference on Class Actions, Sept. 11, 2015, at 8-12. The vast majority of submissions to the Subcommittee that did address the issue were in favor of *cy pres* awards, recommended best practices, and suggested either that the Subcommittee should amend Rule 23 to adopt the ALI's Principles approach or that an amendment to Rule 23 was unnecessary given the widespread adoption of the ALI principles in federal and state courts.[7]

At the Advisory Committee's November 2015 meeting, the Rule 23 Subcommittee presented three issues from the September 11 mini-conference that it did not favor retaining on its agenda. Report to the Standing Committee, Advisory Committee on Civil Rules, at 25, December 11, 2015. The issue of *cy pres* awards was one of the three issues taken off of the agenda.[8] In short, the Advisory Committee process ended by rejecting the idea of amending Rule 23 to restrict *cy pres* awards, and this Court has just adopted the Advisory Committee recommendations for a

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[7] Submissions to the Rule 23 Subcommittee for the September 11, 2015 Mini-Conference are available online at http://www.uscourts.gov/sites/default/files/rule_23_mini-conference_materials.pdf

[8] "[T]he Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed, (b) the challenges of developing specifics for a rule provision, and (c) concerns about the proper limits of the rulemaking authority cautioned against adopting a freestanding *cy pres* provision." *Id.* at 26.

number of Rule 23 amendments that do not restrict *cy pres* awards.

Objectors are asking the Court to ignore and depart from this recent work by the Advisory Committee on Federal Rules that was adopted by this Court. As this Court has reminded lower courts:

> [O]f overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. *See* 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered[.]

Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 620 (1997). Petitioners are in effect asking this Court to ignore that constraint.

B. The House Has Adopted Legislation to Make Many Changes in Rule 23 Class Actions, but That Legislation Does Not Make Changes in *Cy Pres* Awards.

Congress has been urged to legislate restrictions on *cy pres* awards,[9] but the most recent proposed

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[9] Petitioner Frank testified before the House Judiciary Committee Subcommittee on the Constitution and Civil Justice Examination of Litigation Abuse about the need to restrict *cy pres* settlements on March 13, 2013. Frank's testimony was much the same as the broader arguments in petitioners' opening brief. Theodore H.

legislation to revise Rule 23 that has passed the House does not restrict *cy pres* awards in class action settlements. On March 9, 2017, the House passed H.R. 985, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017. The bill would impose several new requirements on federal courts in certifying class actions: disclosures by class counsel about conflicts of interest; attorney's fees limits; an accounting for disbursement of funds paid by defendants; stay of discovery during of preliminary motion practice; class counsel disclosures if any person has a contingent right to receive compensation from a settlement, and early appeals from orders granting or denying class certification. H.R. 985, Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017.[10] Rather than introducing new restrictions on *cy pres* awards, the House report for the bill recognizes that "the use of *cy pres* in class action settlements has benefited numerous organizations." H.R. 115-25, Fairness in Class Action Litigation Act of 2017, Mar. 7, 2017. The House bill

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Frank, "*Cy Pres* Settlements," Statement before the House Judiciary Committee on the Constitution and Civil Justice Examination of Litigation Abuse, Mar. 13, 2013.

[10] The report explains that sections of the bill that would require disclosures of conflicts of interests and the names of third-party beneficiaries will help Congress expose any abuses in the allocation of class action settlement funds by requiring transparency. *Id.* The disclosure requirement would in no way limit a court's ability to approve *cy pres* awards.

was received in the Senate on March 13, 2017 and referred to the Committee on the Judiciary.[11] The legislation has not been adopted by the Senate, but adoption by the House demonstrates that Congress has shown no interest in the sorts of restrictions on *cy pres* awards suggested by the petitioners in this appeal.[12]

Where Congress has seen the need to enact legislation to restrict class actions, Congress has done so – including the Class Action Fairness Act. Pub. L. No. 109-2, 119 Stat. 4 (2005). But as this Court recently recognized, this Court has "no warrant to encumber [class action] litigation by adopting an atextual requirement...that Congress, despite its extensive involvement in the...field, has not sanctioned." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 477-478 (2013). Petitioners are asking this Court to impose precisely such requirements on Rule 23.

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[11] See House All Actions Report, available at https://www.congress.gov/bill/115th-congress/house-bill/985/all-actions

[12] Even the more conservative members of Congress have not been persuaded to restrict *cy pres* awards. During the roll call vote on March 9, 2017, 220 Republicans voted in favor of the bill, 14 Republicans voted against it, and 187 Democrats voted against it. *See* "Final Vote Results for Roll Call 148", available at http://clerk.house.gov/evs/2017/roll148.xml.

IV. Petitioners' Suggested Grounds for Reversal Are Contrary to Settled Law

A. *Cy Pres* Awards Are a Reasonable Exercise of Discretion Where Cash Distributions to Class Members Are Not Feasible

While petitioners' opening brief mounts a sweeping attack on class action settlements, the *only* question presented by this appeal is whether a class action settlement with a *cy pres* award but no direct monetary relief to class members satisfies the requirements of Rule 23. Respondents (the plaintiff class representatives and defendant Google) have addressed the objectors' arguments about the particular *cy pres* awards in this case and about the supposedly "perverse incentives" behind settlements with no distributions to class members. This amicus brief will address only the general law on this question presented.

It is a reality of class action litigation that cash distributions to class members may not be feasible in cases where there are small claimed individual damages or a relatively small settlement of huge claims. In *Nachshin v. AOL*, for example, a settlement was approved where the defendant's maximum liability was $2 million, which meant that each of some 66 million class members would have been entitled a recovery of only three cents, making any distribution to the class members cost prohibitive. 663 F.3d at 1037. In these uncommon cases, the ALI Principles and leading appellate decisions recognize that district courts should have discretion to approve *cy pres* awards in class action settlements where plaintiffs allege that defendants engaged in misconduct on a wide scale but there are only *de minimis* claimed damages to

individual class members or a small proposed settlement related to a huge class. The *cy pres* doctrine provides "the best solution" for a court presented with a proposed settlement in this situation. *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013). *See generally,* ALI Principles § 3.07 cmt. a (recognizing court authority to approve class action settlements that provide for cash payments to third parties with no direct cash recovery to class members).

Petitioners' arguments fail to recognize that class action settlements with no cash distribution to class members can provide injunctive relief that benefits the plaintiff class and the public. Injunctions aside, there are important public policies served by *cy pres* awards in these rare cases, including imposing a significant cost on settling defendants; *see Hughes*, 731 F.3d at 676-77 (endorsing a *cy pres* award with no payments to class members, because "class action litigation, like litigation in general, has a deterrent as well as a compensatory objective"). See also *Newberg*, supra § 1226, listing public benefits of class action settlements where individual distributions "are, as a practical matter, impossible," including "finality and repose to defendants."

B. Courts Have Not Adopted Petitioners' Broad Attacks on *Cy Pres* Awards

The only "question presented" in this appeal is about a *cy pres* award of class action proceeds that provides no direct relief to class members. Petitioners' broader constitutional and statutory arguments against *cy pres* awards are scattered throughout their opening brief, the supporting amicus briefs and the many articles and web postings cited on those briefs.

For good reasons, those arguments have not been adopted by the lower courts (nor should they be considered by this Court in this appeal). For an analysis of those arguments and their defects, see Wilber Boies and Latonia Keith, "Class Action Settlement Residue and *Cy Pres* Awards: Emerging Problems and Practical Solutions," 21 Va. J. Soc. Pol'y & L. 269 (2014), available at https://commons.cu-portland.edu/lawfaculty/9/ addressing the various arguments by *cy pres* award opponents claiming that *cy pres* awards in class actions are unconstitutional or violate the Rules Enabling Act – and explaining why those arguments have never been adopted by the lower courts. Also see *In re Baby Prods.*, 708 F.3d at 173 (rejecting Rules Enabling Act argument against *cy pres* awards).

The argument by petitioners and their *amici* about class members' First Amendment free speech rights is a new approach. That argument - not addressed by the district court or the 9th Circuit - ignores the constitutional protections set out by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) and provided by Rule 23. *Phillips* mandates class action settlement notice to "describe the action, and plaintiff's rights in it." As this Court explained, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' from the court." *Id.* As *Phillips* requires, Rule 23 provides class members a clear right to object to a proposed settlement, Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1787 (3d ed.), and class members who request exclusion or "opt out" of the class thereby keep their claims and are not bound by

the settlement. Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1787 (3d ed.). Given these protections recognized by *Phillips Petroleum* and provided by Rule 23, particularly the right to opt out, there is no need to rewrite Rule 23. See *Keller v. State Bar*, 496 U.S. 1, 16-17 (1990) (compelled speech avoided by giving lawyers the option to opt out of supporting bar political activities).

V. Legal Aid Organizations Are Appropriate *Cy Pres* Award Recipients

Within the appropriately constrained limits on discretion to approve *cy pres* awards, courts should retain their recognized discretion to approve *cy pres* awards to legal aid organizations. "[N]o matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661, (7th Cir. 2004). Legal aid organizations — like the class action device itself — exist to provide broad access to justice. As a result (and as many courts have recognized), this one category of *cy pres* recipients always has interests that reasonably approximate the interests of class members.

A. Federal Courts Regularly Approve *Cy Pres* Awards to Legal Aid Organizations For Access to Justice

Federal and state courts throughout the country have long recognized organizations that provide access to justice for underserved and disadvantaged people as appropriate beneficiaries of *cy pres* distributions from

class action settlements. *See, e.g., Lessard v. City of Allen Park*, 470 F. Supp. 2d 781, 783-84 (E.D. Mich. 2007), ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (internal citation omitted); *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at **7-8 (N.D. Ill. Mar. 5, 1991) (approving a *cy pres* distribution to establish a program to fund legal aid lawyers to help "those who might not otherwise have access to the legal system"); *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres* distribution for legal aid was found appropriate). *See also* Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice*, The Federal Lawyer, July 2010, at 26, 26-27 (examples of federal court class action *cy pres* awards that improved access to justice for indigent persons.) Many of these awards are to legal aid organizations providing services that parallel the subject matter of the settled class action; many others simply recognize the access to justice nexus between all class actions and legal aid services.

This access to justice nexus for *cy pres* awards falls squarely within one of the ALI Principles: "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests." ALI Principles § 3.07 cmt. b. Applying the ALI Principles:

> [L]egal aid or [access to justice] organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system.

Bob Glaves & Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice: Key Issues In 2013 and Beyond*, 27 Mgmt. Info. Exch. J., 24, 25 (2013); *see also* Robert Draba, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 Loy. Consumer L. Rev. 121, 122 (2004) (the rationale for approving *cy pres* distributions to legal aid organizations, like the purpose of the class action device, is "to protect the legal rights of those would otherwise be unrepresented").

B. State Statutes and State Court Rules Provide For *Cy Pres* Awards to Legal Aid Organizations

In addition to the many federal and state court decisions approving *cy pres* awards to legal aid organizations, a growing number of states - now 24 - have adopted statutes or court rules codifying the principle that *cy pres* distributions to organizations

promoting access to justice are *always* an appropriate use of residual funds in class actions.[13]

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[13] California Code of Civil Procedure § 384 (authorizing payment of residual class action funds to California nonprofits that provide civil legal services to low-income individuals); Co. R. Civ. P. 23(g) (requiring 50% of class action residue go to Colorado IOLTA Foundation); Conn. Superior Ct. R. 9-9 (establishing a process for distribution of residual funds and absent such designation residual funds to go to Connecticut IOLTA administration); Hawaii Civil Procedure Rule 23(f) (gives the courts discretion to approve distribution of residual funds to Hawaii nonprofits that provide legal assistance to indigent individuals); 735 ILCS 5/2-807 (2008) (requiring distribution of at least 50% of residual funds to organizations that improve access to justice for low-income Illinois residents); Ind. R. Trial P. 23(F)(2) (requiring distribution of at least 25% of residual funds to the Indiana Bar Foundation); Ken. Civ. R. 23.05(6) (directing 25% of residual funds to Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees); La. S. C. Rule XLIII Part Q. (promoting distribution of residual funds to be the Louisiana Bar Foundation); Me. R. Civ. P. 23(f) (2) (requiring that residual funds to the Maine Bar Foundation); Mass. R. Civ. P. 23(e) (permitting distribution of residual funds to Massachusetts nonprofits that provide legal services to low-income individuals); Minn. R. Civ. P. 23 (requires notice be given to legal service providers when district court it considering possible distribution of class action residue); Mon. R. Civ. P. 23 (requiring not less than 50% of residual funds be distributed to an Access to Justice Organization); Neb. Rev. Stat. 25-319 (requiring distribution of residual funds to the Nebraska Legal Aid and Services Fund); N.M. Dist. Ct. R. C.P. 1-023(G)(2) (permitting payment of residual funds to New Mexico nonprofits that provide civil legal services to low-income individuals); N.C. Gen. Stat. § 1-267.10 (requiring equal distribution of residual funds between the Indigent Person's Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents); ORCP 23(O) (directing 50% of residual funds to Oregon Legal Service Program); Pa. R. Civ. P. Ch. 1700 (directing distribution of at least 50% of residual funds to the Pennsylvania IOLTA Board to promote the delivery of civil legal assistance); P.R. R. Civ. P.

These state statutes and court rules begin with the general premise that *cy pres* distributions of residual funds are proper and useful, then specify appropriate *cy pres* recipients including or limited to legal aid organizations that promote access to justice for low-income individuals. The majority of these state statutes and rules actually *require* a minimum distribution to legal aid organizations. Because these state statutes and court rules establish a presumption or requirement that residual funds will be distributed to legal aid organizations, they make clear that legal aid organizations have a particular connection to the interests of class members. In other words, the statutes and court rules all recognize the connection between access to justice through legal aid and through class action procedures and also demonstrate a clear

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20.6 (providing that residual funds shall be deposited in the Puerto Rico Access to Justice Fund created to legal assistance to low income individuals; S.C. R. Civ. P. 23 (requires not less than 50% of residual funds be distributed to the South Carolina Bar Foundation to support access to justice for low income persons); S.D. Codified Laws § 16-2-57; (requires at least 50% of residual funds be distributed to the South Dakota Commission on Equal Access to Our Courts); Tenn. Code Ann. § 16-3-821 (authorizing the distribution of residual funds to the Tennessee Voluntary Fund for Indigent Civil Representation); Washington Supreme Court Civil Rule 23(f) (requires distribution of at least 25 percent of residual funds to the Legal Foundation of Washington to promote access to the civil justice system for low-income residents); W. Vir. R. Civ. P. 23 (directing that 50% of residual funds be distributed to the Legal Aid of West Virginia); Wisc. Statute 803.08 (requiring that 50% of residue go to the Wisconsin Trust Account Foundation to support direct delivery of legal services to low income individuals.

public policy favoring *cy pres* awards to legal aid organizations.[14]

C. This Court's Opinion Should Recognize the Access to Justice Connection Between Class Action Settlements and Legal Aid.

If this Court writes any guidelines concerning the use of *cy pres* awards, this Court should endorse the same approach as these 24 state statutes and rules (and the federal court access to justice decisions cited above) and recognize that legal aid providers are appropriate organizations to receive *cy pres* awards. Petitioners' arguments that *cy pres* awards are a sham are incorrect and certainly do not apply to *cy pres* awards to legal aid organizations. Rule 23 class actions exist to provide access to the courts for those who could not otherwise afford to litigate a legitimate claim; legal aid organizations serve the same purpose, because legal aid organizations exist to help those who would otherwise not be able to obtain the protections of the justice system. Legal aid organizations across the country use *cy pres* awards to protect and preserve the basic necessities of life – food, shelter, health care, safety and education – for millions of Americans. *See, e.g.*, Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 Geo. J. Legal Ethics 435, 438 (2012) (*cy pres* distributions to specific legal aid organizations have advanced legal services); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 La. B.J. 248, 251 (2011) (*cy pres*

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[14] The same public policy is evident in the many state statues and court rules providing that income earned in attorney trust accounts ("IOLTA" funds) will be pooled and use to support legal aid services.

awards made to Louisiana legal aid organizations will promote access to the courts); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 Tenn. B.J. 12, 13-14 (2009) (*cy pres* awards to legal aid organizations benefit class members in a similar way to Rule 23 – both provide access to the justice system). This Court should use the opinion in this appeal to recognize this important principle.

CONCLUSION

Rule 23 of the Federal Rules of Civil Procedure provides a carefully delineated process for the administration and settlement of class actions. In this appeal, petitioners ask this Court to rewrite part of that process - the well-established procedures and limitations for administration of class action settlement funds. While deciding the narrow question presented, any opinion by this Court should recognize the body of appellate decisions defining and setting limits on district court discretion concerning *cy pres* awards, recognize the positions of the Advisory Committee on Federal Rules and the Congress accepting the use of *cy pres* awards – and recognize that *cy pres* awards for legal aid are an appropriate use of residual settlement funds.

Respectfully submitted,

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In the Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, Individually and
on Behalf of All Others Similarly Situated, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* DAVID LOWREY, RAYMOND J. PEPPERELL, BLAKE MORGAN, AND GUY FORSYTH IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amici curiae David Lowery, Raymond J. Pepperell, Blake Morgan, and Guy Forsyth are professional recording and performing artists, label owners, and leaders of organizations who support strong and fair protection of intellectual property and privacy rights as well as fair compensation for violation of those rights.

In addition to their creative activities, amici are also regular commentators on public policy or professors. For example, Mr. Lowery, the founder of the musical groups Cracker and Camper Van Beethoven, is a lecturer at the University of Georgia Terry College of Business, has testified before the U.S. House of Representatives Subcommittee on the Courts, Intellectual Property and the Internet, and is a frequent commentator on copyright policy and artist rights in a variety of outlets, including his blog at TheTrichordist.com. *See The Scope of Fair Use: Hearing before the Subcomm. on the Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (Jan. 28, 2014). Mr. Pepperell (known as "East Bay Ray") is a well-known songwriter and guitarist for the American Punk band Dead Kennedys and a music producer. Mr. Morgan is an artist, songwriter, label owner, and the leader of the I

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[1] Pursuant to Rule 37.3(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici made a monetary contribution to fund the preparation and submission of this brief.

Respect Music campaign,[2] which focuses on supporting fair payment for use and play of artists' music across all mediums and platforms. Mr. Forsyth is an Austin, Texas-based American blues and rock singer and songwriter, as well as an entrepreneur with his own record label.

Amici respectfully submit this brief to alert the Court to the fact that *cy pres* awards can, at times, harm rather than benefit members of a class. For example, in this settlement and others involving Google and Facebook, defendants and class counsel have agreed to direct *cy pres* awards to organizations that lobby with defendants against the copyright interests of those class members who are in the artist community. Roger Parloff, *Google and Facebook's New Tactic in the Tech Wars*, Fortune (July 30, 2012) (noting criticism in *Google Buzz* case that *cy pres* awards were steered to organizations otherwise paid by Google to lobby or consult for the company); Kenneth P. Vogel, *Google Critic Ousted From Think Tank Funded by the Tech Giant*, N.Y. Times (Aug. 30, 2017).

SUMMARY OF ARGUMENT

For over thirty years, courts have been directed to conduct a "rigorous analysis" to ensure that the contours of Rule 23 are satisfied when managing class action lawsuits. *See, e.g.*, *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). But when it comes to approving or selecting *cy pres* recipients, this mandate has largely fallen on deaf ears. Far too often, courts rubberstamp class counsels' and the defendant's

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[2] *See* https://irespectmusic.org.

selection of *cy pres* recipients after conducting nothing more than a cursory review.

This lack of diligent court oversight deprives class members of the opportunity to obtain the benefit of a "next best" distribution. It also results in funds being distributed to organizations with interests adverse to portions of the harmed class as well as organizations that are friendly with and will advance the interests of the defendant.

When funds are distributed to interest groups antagonistic to a portion of the class, those class members have not been adequately represented as required by Rule 23. *See* Rule 23(a)(4) (providing that class members may sue as representatives on behalf of all class members if they will "fairly and adequately" protect the interests of the class). Nor are class members adequately represented—or compensated for their claims—when funds are distributed to organizations that lobby in support of the defendant's interests. Instead, class counsel and class representatives have advanced their own interests and the defendant's interests, at the expense of a broad swath of the class who are releasing their claims.

Amici are particularly focused on the harm resulting from *cy pres* awards to institutions that are directly or indirectly using *cy pres* funds to engage in activities that are contrary to artists' (and class members') rights.

In order to avoid such perverse results, amici respectfully request that courts be required to conduct a rigorous analysis of any *cy pres* recipient that is consistent with Rule 23, including an analysis of any

conflicts between the proposed recipients (including the recipients' broader activities) and the interests of class members.

ARGUMENT

Distributing funds to groups that have close relationships with the defendant and are hostile to the interests of portions of the class constitutes a violation of these class members' due process rights and is impermissible under Rule 23(a) and (e). *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620, 625-27 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent," and is of heightened importance in the settlement context.); Rule 23(e) (requiring court approval to settle a certified class action only after conducting a hearing and upon "finding that it is fair, reasonable, and adequate" if it would bind other class members).

Here, as frequently occurs, the court did not conduct a rigorous analysis of the proposed *cy pres* awardees.[3] Google and class counsel agreed on the recipients of the *cy pres* awards. Pet. App. 5, 84, 92. The court did not require that the parties disclose how the six *cy pres*

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[3] Courts often rubber stamp proposed *cy pres* recipients with little to no analysis. *See, e.g., In re Vitamin C Antitrust Litig.*, No. 1:06-cv-00988-BMC-JO, ECF No. 60 at 2 (E.D.N.Y. May 29, 2014); *In re Publ'n Paper Antitrust Litig.*, No. 3:04-MD-1631 (SRU), 2009 U.S. Dist. LEXIS 66654 (D. Conn. July 30, 2009). Indeed, some courts have explicitly held that they should defer to the selection of class counsel and representatives. *Sewell v. Bovis Lend Lease, Inc.*, No. 09-CV-6548 (SHS)(RLE), 2013 U.S. Dist. LEXIS 47526, at *8 (S.D.N.Y. Mar. 29, 2013).

recipients were chosen or which of the other 34 applicants either side rejected. Instead, with little to no meaningful analysis, the court (and the Ninth Circuit) allowed a *cy pres* award that reflects a clear and present conflict-of-interest based on prior relationships between class counsel and/or the defendant and *cy pres* recipients. Order, *In re Google Referrer Header Privacy Litigation*, No. 5:10-cv-4809-EJD (N.D. Cal. Mar. 31, 2015) (appended to Petition for Writ of Cert. at 31-61).

I. Google is the Party that Benefits by Directing Funds to *Cy Pres* Recipients that Support Its Aggressive Anti-Copyright Protection Turf War

In this settlement, like in many others, the defendant is the one that gets the largest benefit from the *cy pres* distribution. Indeed, publicly available information regarding Google's *cy pres* practices supports the conclusion that Google seeds and funds some of its most loyal academic and nonprofit allies by payments through *cy pres* awards in class action cases. Those recipients, in turn, have formally and informally supported or taken up Google's causes in cases and controversies unrelated to the class action case that awarded the *cy pres* funds.

One of those causes is Google's assault on copyright law. Google needs and uses a massive amount of digital content to drive users to its suite of products. Google then serves advertising to all these users and in turn famously scrapes their personal data into endless segments. Jeff Gould, *The Natural History of Gmail Data Mining*, Medium.com (June 24, 2014). One of the biggest impediments to Google's ability to sell

advertising around that scraped and curated content is copyright protection.

Google has engaged in a massive campaign to sway court opinions against support of artist rights and fair compensation for protected works. And it spends a lot of time and money in an effort to shape public opinion about its commercial goals and activities in addition to the vast sums it spends on lobbying for favorable laws. *See Google Academics, Inc.*, Google Transparency Project.org, http://www.googletransparencyproject.org/articles/google-academics-inc (last visited July 13, 2018); Emily Brill, *Emily Brill Investigates Jonathan Zittrain, star Harvard Law Prof*, The Daily Beast (July 5, 2010) (noting that Harvard's influential Berkman Center for Internet & Society and its associated professors, including Zittrain, often take positions supporting Google and against protection and better control of intellectual property rights); Felix Richter, *Google is the biggest lobbying spender in Tech*, Statistica (July 24, 2017). Google's shadow campaign efforts at influencing public opinion became such an issue in a recent litigation copyright and patent litigation against Oracle that Judge Alsup required Google to disclose its financial support for certain nonprofit organizations such as the Berkman Center for the Internet & Society, the EFF, Public Knowledge, and others. Google's Response to Order to Supplement, *Oracle Am. Inc. v. Google, Inc.*, No. 3:10-cv-03561 (N. D. Cal. Aug. 24, 2012).

The touchstone of a shadow campaign—like Google's campaign against protection and recognition of artists intellectual property and remuneration rights—is identifying a credible third-party source to

make its message resonate more deeply with the recipient. Central Intelligence Agency, *A Look Back ... Marlene Dietrick, Singing for a Cause*, CIA.gov (Oct. 23, 2008). As we have seen in recent times, the Internet (and social media) are an effective weapon for manipulating public messaging. Of course, a major challenge to sustaining these "cyberturf" operations is funding them in a way that does not reveal the true source of their funding, and gives the funder plausible deniability. *See generally* Sharyl Attkinson, *The Smear: How Shady Political Operatives and Fake News Control What You See, How You Think, and How You Vote* (2017).

Rubber-stamped *cy pres* awards are a gift to Google as it allows the company to secretly funnel money to a nonprofit (which is not reported as a corporate donation), obtain a charitable giving tax deduction for that portion of the class action settlement, and seed the public messaging landscape with reliable allies who support its anti-intellectual property protection campaigns.

As but one example, the EFF is a consistent recipient of corporate contributions and *cy pres* awards in class actions against Google and other big tech companies who share its hostile position towards intellectual property rights protection for artists. *See* Consumer Watchdog Report, *How Google's Backing of Backpage Protects Child Sex Trafficking*, at 18-20 Consumerwatchdog.org (May 17, 2017); Google's Response to Order to Supplement, *supra*, at 8-10 (stating Google has contributed to EFF and Public Knowledge for years, and has a Google Fellow at the Center for Democracy and Technology). The EFF is also a consistent and vocal

opponent of amici's interests on the legal battlefield, where those interests are contrary to Google's.

In fact, in a recent copyright infringement suit BMG filed against Cox Communications seeking to hold it contributorily liable for infringement of BMG's copyrights by Cox's Internet service subscribers, the district court refused EFF's motion to appear as an amicus on behalf of Cox and detailed its concerns regarding their cozy relationship:

> The problem isn't that you went to EFF and solicited their input... It's that you didn't disclose it. And you are close enough to this action as lead counsel where there is absolutely no question that you should have encouraged Public Knowledge or Electronic Frontier Foundation from identifying – Just a footnote...
>
> And that is, in my belief, disappointing and deceptive. Amicus are obviously friends of the court. And I think with that, there comes an obligation to tell the Court of relationships they have with a party to an action. You chose not to do it. And I think it's really unfortunate.
>
> ***
>
> We try things here honestly. And our duty of candor to the Court is a whole lot higher than your estimation of it.

Hearing on Motions Transcript, *BMG Rights Mgm't LLC et al. v. Cox Comms., Inc. et al.*, No. 1:14-cv-1611 (E.D.V.A. Oct. 23, 2015) (Judge O'Grady statement). In denying EFF's motion, the court focused on the fact that Cox's counsel in that case served on the EFF

advisory board and collaborated with EFF in drafting the brief, while neither Cox's counsel nor EFF disclosed either fact to the court before BMG's counsel raised these issues.

Nowhere is that proxy fight more obvious than in the struggle to protect copyright and receive adequate royalties for use of artists copyrighted works. *See, e.g.*, Rory Carroll, *Google battles legal fallout of copyright ruling on anti-Islamic film*, The Guardian (Mar. 8, 2014). Regular *cy pres* recipients the Berkman Center, the Center for Democracy and Technology, and Stanford's Center for Internet and Society are also consistent opponents of artist rights and supporters of Google's interests.[4] Consumer Watchdog Report, *supra*

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[4] If one includes the Facebook "Sponsored Stories" class action suit, some of these groups received similar *cy pres* awards from Facebook's settlement. *Fraley v. Facebook, Inc.*, 966 F. Supp.2d 939, 946 n.7 (N.D. Cal. 2013) (reflecting in percentage form the agreement to send what was ultimately calculated to be $300,000 to the Berkman Center, and $500,000 each to EFF, Stanford, and the Center for Democracy and Technology, among other *cy pres* recipients). Similarly, Amazon used a *cy pres* fund to make a grant to the Canadian Internet Policy and Public Interest Clinic ("CIPPIC"), which later received a grant from Pamela Samuelson and Robert Glushko, now called the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic. CIPPIC's external advisory board includes a representative of Creative Commons (which received a $1.5 million grant from Google), the executive director of *cy pres* recipient the EFF (which received $1 million in *cy pres* funds from the Google Buzz lawsuit alone), Professor Lawrence Lessig (formerly of *cy pres* recipient the Berkman Center), and Professor Samuelson. Professors Samuelson and Glushko also operate the Samuelson Law, Technology and Public Policy Clinic, which itself received a $200,000 *cy pres* grant from the Google Buzz class action settlement.

(noting Google gave at least $4.75 million to the Center for Democracy and Technology, the organization's associate director is an ex-Google employee, and its Advisory Counsel includes Google employees, law firms, and other academics that Google supports financially); Alana Goodman, *Consumer Watchdog Took Millions From Google, Quiet on Privacy Concerns*, The Washington Free Beacon (May 3, 2016) (reporting consumer watchdog group the Center for Democracy and Technology collected millions from Google while staying quiet on the company's controversial data mining practices).

From the vantage point of amici, *cy pres* awards are a well-known loophole used to fund Google's wide-ranging assault on the interests of copyright and professional recording artists' and musicians'. The *cy pres* process, which is simply rubber stamped by trial courts undertaking little to no analysis of the intended recipients, allows Google to pay academics and nonprofits who support its causes instead of class members, avoid liability and damage payments to the public, and get a tax break for payments made to non-class members through use of the *cy pres* distribution vehicle. Class members get nothing or virtually nothing to compensate them for the harm that is the subject of the class action.

Artists such as amici watch in powerless amazement as the lower courts allow millions in *cy pres* awards to be funneled to Google's academic and nonprofit influencers through dubious class action settlements such as the one which occurred in the Google Buzz case. *In re Google Buzz Privacy Litig.*, 2011 WL 7460099 (N.D. Cal. Jun. 2, 2011) (awarding

$500,000 to the Berkley Center for Law and Technology, the Berkman Center, and Stanford; $1 million to the EFF; and, at the judge's election, $500,000 to an ethics center at the University where the trial judge taught as a lecturer). They then see nonprofits like the EFF support a long string of copyright cases that attack copyright protections and copyright holders, from *Grokster* to *Limewire* to the *Lenz* case. *See* Cases, *MGM v. Grokster*, available at EFF.org (touting EFF's defense of the company behind the notorious Morpheus Grokster peer-to-peer file sharing software system that allows users to swap pirated copyright-protected works); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 549 U.S. 913 (2005); Greg Sandoval, *Did EFF lawyer cross line in* LimeWire *case?*, cnet (May 18, 2010); *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481 (S.D.N.Y. 2010); Greg Sandoval, *Strange turn in dancing baby vs. Prince case*, cnet (Feb. 14, 2011) (reporting on Ms. Lenz's public statements about EFF's pro bono support of her case against copyright holder UMG, including "EFF is pretty well salivating over getting their teeth into UMG yet again"); *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015). After receiving several rounds of Google money, a Harvard Law School Professor associated with the Berkman Center took on the defense of a notorious copyright infringer, pro bono. *See* Order, *Sony BMG Music Entertainment v. Joel Tenenbaum*, No. 07-cv-11446-NG (D. Mass. June 16, 2009).

At least one prominent copyright commentator and well-known professor—who supports organizations including Berkman, Stanford, and Creative Commons—publicly opposes amici's copyright interests

at every turn. His most recent efforts include arguing in favor of amending a bill in the Senate in a manner that would fail to respect the rights of artists who performed on recordings prior to 1972. Robert Levine, *As Music Modernization Act Enters Senate, Anti-Copyright Activists Come Out of the Woodwork*, Billboard (May 24, 2018). Amici believe that same professor is collaborating on that effort to block legislation that would protect artist rights with Public Knowledge, another nonprofit Google acknowledged funding in its disclosure in the *Oracle* copyright case.

Google's *cy pres* awards should not be treated as providing value for the class. To the contrary, Google is the real beneficiary of the money that flows to its partners through this flawed settlement distribution mechanism.

II. The Class Has Not Been Adequately Represented and At Least a Portion of the Class is Harmed by *Cy Pres* Awards to Google's Allies in the War on Copyright Protection

Amici and other artists are members of the class harmed by Google's activities that led to the current class action lawsuit for violation of their privacy rights. But Google has been allowed to earmark funds that should be distributed to members of this class, including amici and other artists, to Google's allies in its war on reasonable copyright protections and payment for use of copyrighted works.

By directing class funds to organizations that will directly or indirectly use the funds to advance interests antagonistic to portions of the class, class counsel and class representatives have not adequately represented

this portion of the class, as required by Rule 23(a)(4). This portion of the class is actually harmed by the distribution. Ultimately, the interests of amici and other class members with copyright interests that are adverse to Google's would be better served if the settlement funds were thrown away or burned rather than given to the *cy pres* recipients approved by the trial court.

Further, even class members without copyright interests are shortchanged when Google is allowed to direct class funds to its support organizations. When the district court evaluated the fairness of the settlement, it gave Google credit for the full amount of the settlement fund. Pet. App. 45. However, by approving *cy pres* recipients that will advance Google's interests, the district court functionally returned a portion of the funds back to Google. Indeed, since Google is the party that is likely to receive the largest benefit from the distribution, this Court should view the distribution as returning the majority of the settlement funds back to Google. Under such circumstances, the district court should not have given Google the full value of the settlement fund while conducting the Rule 23(e) fairness analysis. Instead, the district court should have heavily discounted the value of the settlement fund to the class.

To prevent such perverse results, courts should be required to conduct a rigorous analysis of the *cy pres* recipients. This includes an analysis of the full spectrum of the recipient's interests to identify any conflicts that recipient might have with the interests of class members as well as any possibility that the funds will be used to advance the defendant's interests. And

to the extent that the funds will directly or indirectly be used to advance the defendant's interests, courts should proportionately discount the value of the settlement fund prior to conducting any fairness analysis. Otherwise, class members will continue to be shortchanged and in some cases directly harmed by *cy pres* distributions.

Google's *cy pres* practice simply compounds the ennui of learned helplessness that artists feel in dealing with the company. As the critically acclaimed artist Zoë Keating wrote of her encounter with Google's YouTube subsidiary regarding the overreaching requirements of YouTube's take-it-or-leave it commercial license,

> I don't think they [Google] are evil. I think they, like other tech companies, are just idealistic in a way that works best for them....The people who work at Google, Facebook, etc., can't imagine how everything they make is not, like, totally awesome. If it's not awesome for you it's because you just don't understand it yet and you'll come around.

Zoë Keating, *What Should I Do About YouTube?*, Tumblr, zoekeating.tumblr.com/post/108898194009/what-should-i-do-about-youtube (last visited July 13, 2018).

Professor Jonathan Taplin also accurately captured Google's predatory approach to artists:

> Google has basic "digital fingerprinting" technology that could scrub both YouTube and its search results of illegal versions. But instead of safeguarding the work of artists, Google

> wields this tool as a bludgeon. Creators can either enter into a licensing agreement with YouTube at very low royalty rates, or get left at the mercy of pirates. What looks like protection for copyright holders is more of a protection racket benefiting Google.

Jonathan Taplin, *Do You Love Music? Silicon Valley Doesn't*, NY Times (May 20, 2016); *see also* Irving Azoff, *Dear YouTube, An Open Letter from Irving Azoff*, Recode (May 9, 2016) (artists' manager pleading with Google to allow Taylor Swift to opt out of YouTube content sharing policy).

Amici believe one of Google's strategies to overcome resistance to its commercial goals from the artist community is by persuading creators that resistance is futile—like O'Brien and Winston Smith, they must not only refuse to believe what they know to be true, they must truly believe that which they once knew not to be true. One of Google's "go to" methods for accomplishing their commercial goals is through messaging by its nonprofit allies through lawsuit warfare, lobbying, public messaging, or social media. Public Citizen's Congress Watch, *Mission Creep-y, Google Is Quietly Becoming One of the Nation's Most Powerful Political Forces While Expanding Its Information-Collection Empire*, at Citizen.org (2014) (Appendixes A-C list known Google trade associations, third party groups Google supports, and organizations that participate in the Google Policy Fellowship Program). As a search of the available public records and the information provided herein demonstrates, a number of those nonprofits are often supported directly by Google through dubious *cy pres* awards.

CONCLUSION

Allowing *cy pres* awards to continue along their current path means that the courts are complicit in allowing Google to fund its network of academics, think tank partners, and friendly nonprofits at the expense of class members.

The Court has questioned the propriety of such *cy pres* awards in the past. Amici respectfully request that the Court fashion guidance regarding the process by which trial courts managing class action litigations and the associated settlements to stop the practices that Google, and other class action defendants, have used so effectively for their own benefit to the detriment of class members like amici.

Respectfully submitted,

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No. 17-961

In The
Supreme Court of the United States

THEODORE H. FRANK and
MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and
all others similarly situated, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF MANHATTAN INSTITUTE FOR POLICY RESEARCH AS AMICUS CURIAE SUPPORTING PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus curiae Manhattan Institute for Policy Research was established in 1978 as a nonpartisan public-policy research foundation developing ideas that foster economic choice and individual responsibility. For more than 30 years, the Institute's legal-policy scholars have sought to develop and communicate novel, sound ideas on how to improve the civil- and criminal-justice systems.

Class action litigation has been a longstanding focus of the Institute's legal-policy research. Books by former Institute senior fellow Walter Olson and former Institute visiting scholar Lester Brickman, also of Cardozo Law School, extensively chronicled the problems with class-action practice. *See generally* Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (Truman Talley Books 1991); and Lester Brickman, *Lawyer Barons: What Their Contingency Fees Really Cost America* (University of Cambridge Press 2011). A series of Manhattan Institute reports by Brickman, Richard A. Epstein, and John H. Beisner offered theoretical and empirical analyses that laid the intellectual groundwork for the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4-14.

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[1] Petitioners and Respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or their counsel contributed monetarily to the preparation or submission of this brief.

In addition to the Manhattan Institute's policy interest in the subject matter underlying this case, the Institute's legal scholars believe that enforcing clear legislative mandates is central to the rule of law and that class action *cy pres* awards, among other aspects of modern class action practice, violate the Rules Enabling Act.

The Amicus is submitting this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

Federal courts have imported the *cy pres* remedy from the supervision of charitable trust into the administration of class actions. Congress has only authorized the federal courts to use this power in one, narrowly defined, type of class action settlement. Otherwise, the Rules Enabling Act, 28 U.S.C. § 2072, expressly prevents federal courts from using Federal Rules of Civil Procedure 23 to "abridge, enlarge or modify any substantive right" of the class members by substituting the *cy pres* remedy for the remedy created by the applicable substantive law. By approving a settlement that allows Respondent Google to discharge its liability to all class members by making *cy pres* payments to charities instead of compensatory payments to the class members, the courts below have effectively modified the substantive legal rights of the class members. Therefore, this Court should reverse the judgment below and hold that federal courts cannot use the

cy pres remedy in any case in which they are not expressly authorized by the existing substantive law to use this remedy.

INTRODUCTION

All federal courts have limited jurisdiction and powers. Therefore, litigants must demonstrate that a federal court has the jurisdiction to decide a case before the court will make a substantive decision. Sup. Ct. R. 14(1)(e); Fed. R. App. P. 28(a)(4); Fed. R. Civ. P. 8(a)(1). The Petitioners and the other amici raise many valid concerns about how the *cy pres* remedy is being used in this and other class action litigation. Before considering any of these objections, however, this Court should first decide if federal courts are ever authorized to use the *cy pres* remedy in class action litigation. *See Marek v. Lane*, 571 U.S. 1003 (2013) (Chief Justice concurring in denial of writ of petition for certiorari to review because the challenge to the Facebook settlement "might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of [*cy pres*] remedies in class action litigation, including when, **if ever**, such relief should be considered. . . .").

The Court should find that the answer to this threshold question is effectively "never" because federal courts are prohibited from substituting a *cy pres* remedy for the remedies established by the substantive law. Therefore, this Court should reverse the

judgment below and find that federal courts cannot use the *cy pres* remedy to distribute the proceeds from class action settlements or judgments unless the substantive law authorizes them to do so.

STATEMENT OF FACTS

Plaintiff-Respondent Pamela Gaos filed her original Complaint in the Northern District of California on October 25, 2010. (Joint Appendix, p. 1). Her original pleading attempted to state seven causes of action, which were based upon the alleged violation of federal statutes, California statutes and the California common law. (*Id.*, p. 18). Ms. Gaos was granted leave to amend her pleadings when Respondent Google, LLC successfully moved to dismiss her original complaint for failure to state a claim on which relief could be granted. (*Id.*, p. 22). In her Amended Complaint, Ms. Gaos modified her claims and alleged a different set of violations of statutory duties and common law torts. (*Id.*, p. 25). Google moved to dismiss once again for the failure to state a claim on which relief could be granted, and Ms. Gaos was permitted to file a Second Amended Complaint. (*Id.*, p. 31).

The lawsuit filed by Ms. Gaos was not the only putative class action lawsuit alleging that Google had violated the Stored Communications Act. On April 30, 2013, her lawsuit was consolidated with a second lawsuit that had been filed by Gabriel Priyev against Google. (Joint Appendix, p. 85). A Consolidated

Complaint was attached as Exhibit A to the Order of Consolidation and became the "operative complaint." (Order, p. 4 of 56, ¶ 10). This Consolidated Complaint contained the following causes of action:

> Count I – Violation of the Stored Communications Act, 18 U.S.C. § 2702
>
> Count II – Breach of Contract
>
> Count III – Breach of Contract of Good Faith and Fair Dealing
>
> Count IV – Breach of Contract Implied in Law
>
> Count V – Unjust Enrichment (In the Alternative)

In re Google Referrer Header Privacy Litigation, 869 F.3d 737, 739-740 (9th Cir. 2017). *See also* Order Granting Motion for Preliminary Approval of Class Certification. (Joint Appendix, p. 84).

After a mediation, the named parties reached a settlement, which requires Google to pay a total of $8.5 million. 869 F.3d at 740. Although Google agreed to provide additional information on its website, the settlement did not require Google to change any of its practices. *Id.* Of this sum, $3.2 million was for attorney fees, administration costs and incentive payments to the named plaintiffs. *Id.* The remaining $5,300,000 was to be paid to six *cy pres* recipients. *Id.* None of the allegedly injured persons would receive a penny, with the exception of the three named plaintiffs, who receive $5,000 each as class representatives. *Id.* at 741. In

return, Google would receive a full release of the claims by all members of the class. *Id.* at 740.

The class in this case is estimated at 129 Million. 869 F.3d at 740. Therefore, the notice requirements were unusual. Instead of providing notice directly to each class member, "[n]otice was given to the class by a website, a toll-free telephone number, paid banner ads, and press articles." *Id.* The settlement was approved by the federal district court, and the Ninth Circuit affirmed its decision. *Id.* at 739, 741.

ARGUMENT

The *cy pres* remedy has a long history of being used to handle charitable gifts and trusts that have become impossible to administer in accordance with their express terms. Some federal courts have concluded that it is also an effective remedy for problems that arise during class actions. But the Rules Enabling Act prohibits the use of the federal rules to substitute the *cy pres* remedy for the remedies authorized by statute or the common law. Therefore, unless this remedy is expressly authorized by the controlling substantive law, this Court should hold that federal courts cannot use the *cy pres* remedy in class action settlements or to dispose of any unclaimed portion of class action judgments.

A. American state courts having jurisdiction over charitable trusts are expressly authorized by state statutes to use the *cy pres* remedy in a limited set of circumstances.

When it affirmed the district court decision approving the use of *cy pres* payments in settlement of this case, the Ninth Circuit explained the origins of this remedy and its use in class actions as follows:

> *Cy pres*, which takes its name from the Norman French expression *cy pres comme possible* (or "as near as possible"), is an equitable doctrine that originated in trusts and estates law as a way to effectuate the testator's intent in making charitable gifts. *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). In the class action settlement context, the *cy pres* doctrine permits a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the "next best" class of beneficiaries for the indirect benefit of the class. *Id.*

869 F.3d at 741. The Seventh Circuit has explained that "Th[e *cy pres*] doctrine is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

In England, the Chancellor had a supervisory role over charitable trusts and could use his broad equitable powers to prevent charitable trusts from

completely failing. Hamish Gray, *The History and Development in England of the Cy-Pres Principle in* Charities, 33 B.U. L. Rev. 30, 32 (1953); Edith Frisch, *The Cy Pres Doctrine in the United States*, § 2.01 (Mathew Bender 1950). Parliament also enacted the Statute of Charitable Uses, which partially codified and reformed the use of *cy pres* in the English Courts of Chancery. Gray, 33 B.U. L. Rev. at 35. Many American states were initially hesitant to adopt *cy pres*. Frisch, § 2.01. Over time, however, most state courts having jurisdiction over charitable trusts were authorized to use the *cy pres* remedy when the purpose of the trust has been frustrated. *Id.*, §§ 2.00 et seq.

One example is the Michigan Estates and Protected Individuals Code ("EPIC"),[2] which governs charitable trusts. Mich. Comp. Laws § 700.7405. EPIC expressly authorizes the Probate Court to use *cy pres* "if a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve, no alternative taker is named or provided for, and the court finds the settlor had a general, rather than a specific, charitable intent. . . ." Mich. Comp. Laws § 700.7413(1). Under these circumstances, a Michigan Probate Court may "modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's general

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[2] These sections of EPIC related to the *cy pres* remedy are based upon the Uniform Trust Code, which has been adopted by 32 states and the District of Columbia. http://uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code (last visited July 8, 2018).

charitable intent." Mich. Comp. Laws § 700.7413(1)(c). In addition, EPIC also allows the settlor to create a trust that the Probate Court is not permitted to modify using *cy pres*. Mich. Comp. Laws § 700.7413(2). Other states have similar statutory authorization and limitations.[3]

In summary, the *cy pres* remedy is an equitable remedy that was designed to handle the unique problems that arise when administering charitable gifts or trusts that long outlive their settlors. This remedy may only be used when specific conditions are met, and the settlor has chosen not to prevent its use to modify the express intent of the trust.

B. Federal courts are not authorized to use the *cy pres* remedy in class action litigation unless that use is specifically authorized by the controlling substantive law.

Unlike state courts having jurisdiction over charitable trusts, federal courts lack the statutory authorization to use the *cy pres* remedy, with one very narrow exception discussed below. Instead, they are expressly prohibited from using the federal rules to substitute the *cy pres* remedy for the remedies created by the substantive law. But, in this and many other cases, that is exactly what the federal courts are doing. Therefore, this Court should find that federal courts are not

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[3] *See, e.g.*, Cal. Prob. Code § 15409 (2016); Mass. Gen. Laws ch. 214, § 10B; N.Y. Est. Powers & Trusts § 8-1.1(c)(1); and 20 Pa. Cons. Stat. § 7740.3 (2016).

permitted to use the *cy pres* as a remedy in class action litigation unless that remedy is expressly authorized by controlling legal authority.

1. Federal courts have used their equitable powers to import the *cy pres* remedy into the administration of class action litigation.

Cy pres payments are now frequently used in the administration of federal class actions. Before adopting the *cy pres* remedy for class actions, however, the federal courts barely mentioned *cy pres* at all. A July 6, 2018 search of the Westlaw All Federal database identified 1458 cases in which the phrase "*cy pres*" appears. Only 125 of these cases were decided before 1978. In many of the 19th century cases, the phrase was mentioned, but was not the basis or the decision. *See, e.g.*, *Loring v. Marsh*, 15 F. Cas. 905, 907, 908, 914 (D. Mass. 1865) (counsel's argument referenced *cy pres*, but Court did not apply doctrine). In others, federal courts discussed *cy pres* because an issue of state law had arisen. *See, e.g.*, *John v. Smith*, 102 F. 218, 221-224 (9th Cir. 1900). In a substantially similar manner, federal courts have occasionally used *cy pres* to determine how to handle the assets of charitable trusts whose express purposes were barred by the Fourteenth Amendment. *See, e.g.*, *Wachovia Bank & Trust Co. v. Buchanan*, 346 F. Supp. 665, 667-668, 671 (1972) (applying *cy pres* after determining that it was unlawful for North

Carolina public officials[4] to administer testamentary trust to provide scholarships to the University of North Carolina for "white boys and girls").

The post-1978 explosion in the number of federal cases using the phrase "*cy pres*" results from the remedy being used in class action lawsuits. The decision to import the *cy pres* remedy into class actions is generally attributed to a 1972 law review comment, which suggested that courts use this remedy to distribute class action proceeds that were not collected by class members. This comment recommended that the "court may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal remedies on which the main cause of action was based." Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 452 (1972). The 1972 comment does not identify any legal authority that would allow federal courts to use this remedy.

Soon afterwards, federal courts began to evaluate whether to use the *cy pres* remedy in class actions. One of the first federal court decisions approving a settlement that applied the *cy pres* remedy was *Miller v. Steinbach*, No. 66 CIV. 356, 1974 WL 350 (S.D.N.Y. Jan. 3, 1974). *Miller* was a shareholder's derivative suit that was certified as a class action. *Id.* at *1. The parties reached a settlement in which all of the net

[4] There was a Fourteenth Amendment issue because almost all the members of the administrative group that selected the scholarship recipients were persons holding state elective or appointed public office. 346 F. Supp. at 667.

settlement proceeds, after paying approved costs and fees, would be paid to the Trustee of the retirement plan of the entity on whose behalf the stockholder's derivative suit was being pursued. *Id.* at *2. In deciding whether it could approve the settlement, *Miller* found that:

> As to any legal prohibition, while neither counsel nor the Court has discovered precedent for the proposal – at least in a case such as this where distribution to the class of plaintiffs was theoretically possible if not in a practical sense feasible – nor have we been made aware of any precedent that would prohibit it.

Id. at *2. Having concluded that it was not prohibited from doing so, *Miller* approved the settlement because it was "fair and reasonable." *Id.*

There are many subsequent federal court decisions considering whether the *cy pres* remedy should be used. Like *Miller*, these cases provide no more than minimal discussion of the authority that allows them to award this relief. For example, in *Van Gemert v. Boeing Co.*, 739 F.2d 730, 756-758 (2d Cir. 1984), the court reviewed the potential use of *cy pres* in the distribution of the unclaimed portion of a class action judgment. *Van Gemert* held that two statutory provisions[5] did not control the distribution of the unclaimed funds. *Id.* at 735-736. Instead, the district court was found to have "broad discretionary powers in shaping equitable decrees." *Id.* at 737. Ultimately, *Van Gemert* affirmed the

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[5] 28 U.S.C. §§ 2041-2042.

district court decision not to use *cy pres*, but instead to return the unclaimed portion of the judgment to the defendant, Boeing. *Id.* at 736-738.

In *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706-707 (8th Cir. 1997), the circuit court affirmed the district court decision to use *cy pres* to distribute unclaimed funds from a class action settlement. In reaching this decision, *Powell* held – without citing any authority – that "the [district] court correctly turned to traditional principles of equity to resolve the case." *Id.* at 706. It then relied upon a treatise[6] to find that *cy pres* remedy was one of the four ways that the district court could have exercised its discretion to disburse the uncollected funds. *Id.* Subsequent circuit court decisions have relied upon the prior decisions from other circuits as the authority for finding that the *cy pres* remedy may be used. *See, e.g., In re Pharmaceutical Industry Average Whole Price Litigation*, 588 F.3d 24, 33-35 (1st Cir. 2009) (approving use of *cy pres* in class action settlement); and *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (explaining when *cy pres* distributions may be used).

Therefore, the only federal courts that have considered the original authority for federal courts to use the *cy pres* remedy have relied upon the general equitable authority of district courts to administer remedies.

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[6] 2 Newberg and Conte, *Newberg on Class Actions* § 10.15 at 10-38, 10-39 (3d ed.).

2. The Rules Enabling Act prevents Rule 23 from being used to modify the remedies authorized by substantive law.

The English Chancellor possessed broad equitable powers. American state courts are expressly authorized to use the *cy pres* remedy as part of their supervisory authority over charitable trusts. Federal courts not only lack the same express authorization to use broad equitable remedies, but they are also prohibited by the Rules Enabling Act from using procedural devices to modify the controlling substantive law.

Indeed, this Court has recognized that "Rule 23's requirements must be interpreted in keeping with Article III's constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' 28 U.S.C. § 2072(b)." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). "As nothing more than a Federal Rule of Civil Procedure, however, the class action device [Rule 23] may do no more than enforce existing substantive law as promulgated either by Congress or, in diversity suits, by applicable state statutory or common law." Martin Redish, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 623 (2010) (quoted with approval in the concurring opinion of the Honorable Edith H. Jones in *Klier v. Elf Atochem North-America, Inc.*, 658 F.3d 468, 481 (5th Cir. 2011)).

In *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. ___, 136 S. Ct. 1036, 1046 (2016), the petitioners requested

that this Court "announce a broad rule against the use in class actions of what the parties call representative evidence." This Court applied the Rules Enabling Act to reject this argument, finding that:

> In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge . . . any substantive right." 28 U.S.C. § 2072(b).

136 S. Ct. at 1046. *See also Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 332, 345 (4th Cir. 1998) (concluding that "[i]t is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members"). It follows that the Rules Enabling Act also prevents federal courts from: (1) applying a remedy in a claim pursued as part of a class action unless that remedy could be used by an individual bringing the same claim and (2) using Rule 23 to reduce the substantive rights of class members. Using a *cy pres* remedy to extinguish the claims of absent class members – in this case, more than 100 million plaintiffs, with essentially no notice – necessarily reduces class members' substantive rights, as discussed in more detail below.

3. The use of *cy pres* in class action litigation substitutes charitable payments for the remedies available under the substantive law.

This Court has held that the Rules Enabling Act limits the ability of the federal courts to use the Rule 23 procedures to approve the settlement of a class action lawsuit. *See Amchem*, 521 U.S. at 628-629 (finding that district court could not use Rule 23(e) settlement approval to create "nationwide administrative claims processing regime . . . [for] compensating victims of asbestos exposure" because of limitations of Rules Enabling Act).[7] *See also In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1135-1136 (7th Cir. 1979) (finding that district court's approving settlement that dismissed claims of non-consenting class members "contravene[d] the Rules Enabling Act . . . by abridging the substantive rights of those who did not accept the settlement offer"). This Court should now hold that the Rules Enabling Act prevents the district court's approval of a settlement that substitutes the *cy pres* remedy for the remedy existing under the substantive law for two reasons.

First, the substantive law includes the remedy for its violation. All substantive law consists of two

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[7] Despite this decision, some circuit courts have concluded that the Rules Enabling Act simply does not apply to the district court's approval of a settlement. *See In re: Motor Fuel Temperature Sales Practices Litigation*, 872 F.3d 1094, 1116 (10th Cir. 2017); and *Marshall v. National Football League*, 787 F.3d 502, 511 n.4 (8th Cir. 2015).

elements: prohibition and enforcement. *Redish*, *supra*, 62 Fla. L. Rev. at 644. By enacting a law, a legislature chooses among different enforcement methods, such as compensation, punitive damages, civil fines and criminal punishment. *Id.* at 645. When a district court approves a *cy pres* settlement, the court is substituting a fine made payable to a charity for the substantive law's remedy, which is usually compensation paid to the injured persons. *Id.* at 645-646. In other words, the use of *cy pres* modifies the substantive law because it punishes the defendant with a fine rather than compensates the allegedly injured persons.[8]

The proponents of *cy pres* do not dispute this. In fact, they argue that using *cy pres* to punish a defendant is a feature, not a bug. After the 1966 revisions to Rule 23, a class action judgment "binds all class members who have not acted to exclude themselves from the suit." Comment, 39 U. Chi. L. Rev. at 448.[9] Despite being bound by the judgment, many class members do not take any action at all with respect to the class action lawsuits "even after a judgment or settlement in their favor has been reached and do not attempt to collect their shares of the recovery." *Id.* Because many class members do not make a claim, a portion of the

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[8] This same principle applies if the use of *cy pres* replaces a criminal penalty or changes the recipient of the fine from a governmental entity to a private charity.

[9] *See also Amchem*, 521 U.S. at 614-15 ("Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.").

sums set aside to pay the judgment or the settlement is not claimed and collected.

If an individual plaintiff does not take steps to enforce that judgment, the plaintiff does not recover anything. Therefore, the defendant retains money that the plaintiff has chosen not to collect, which was the ultimate result in *Van Gemert*. 739 F.2d at 736-738. The 1972 Comment characterized the defendant's retaining the unclaimed funds as "unjust enrichment" and argued that "distribution to the next-best class would be preferable." 39 U. Chi. L. Rev. at 459. Circuit courts approving of *cy pres* distributions of unclaimed funds use similar justifications. *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 172 (3d Cir. 2013) ("Reversion to the defendant risks undermining the deterrent effect of class actions by rewarding defendants for the failure of class members to collect their share of the settlement.").

The same risk applies in any lawsuit where the plaintiff does not enforce the judgment or cash the settlement check. But, it is only in lawsuits certified as class actions under Rule 23 that federal courts use the *cy pres* remedy to punish defendants. Therefore, a procedural device is being used to change the substantive remedy enacted to deter persons from performing the acts prohibited by that substantive law.

Second, class action settlements differ from individual settlements in two important ways. One, the settlement negotiations are not conducted by all the parties that will be bound by the outcome of the case.

Instead, they are only conducted by the named parties, some of whom are charged with acting on behalf of all class members. Therefore, all the parties are not expressly consenting to replace compensatory payments with payments to charities. Two, district courts must approve class action settlements before they become binding upon the entire class and discharge the defendant's liability to that class. Fed. R. Civ. P. 23(e). As the Fifth Circuit has explained:

> A class settlement is not a private agreement between the parties. It is a creature of Rule 23, which authorizes its use to resolve the legal claims of a class "only with the court's approval." . . . In granting approval, the court must, as always, adhere to the precepts of Article III and the Rules Enabling Act. While a "welcome byproduct" of deciding cases or controversies on a class-wide basis, the goal of global peace does not trump Article III or federal law. . . . Courts do not have the authority to create a cause of action (and their corresponding subject-matter jurisdiction over it) and then give peace with regard to that cause of action.

In re Deepwater Horizon, 732 F.3d 326, 343 (5th Cir. 2013).

The district court is permitted to approve a class action settlement only after giving "notice in a reasonable manner to all class members" and holding a hearing. Fed. R. Civ. P. 23(e)(1), (2) and (5). Therefore, the federal district court is performing an adjudicative act when it determines that a particular settlement is

"fair, reasonable and adequate" under Rule 23(e)(2). Accordingly, if the district court substitutes a new remedy – *cy pres* – in whole or in part for the authorized remedy, then the district court's application of Rule 23(e) violates the Rules Enabling Act just as creating a new remedial process violates this Act. *Amchem*, *supra*, 521 U.S. at 628-629.

This case presents a good example of both problems. First, the primary cause of action that Plaintiffs alleged was that Google had violated the federal Stored Communications Act, 28 U.S.C. § 2702. In this statute, Congress outlawed specified conduct. *Id.* Congress also authorized – as part of the substantive law that it was enacting – the following remedies for violations of this Act: (a) preliminary and injunctive relief, (b) actual damages up to $1,000 per violation and (c) reasonable attorney fees. 18 U.S.C. § 2707(b), (c). But the settlement neither enjoins Google from any violation of this Act nor requires Google to pay any actual damages to the persons harmed.[10]

Instead, as suggested by the Comment, the settlement substitutes the *cy pres* remedy for all of the remedies that Congress authorized. 39 U. Chi. L. Rev. at 452. In its decision affirming the district court approval of the *cy pres* distributions, the Ninth Circuit found that *cy pres*-only settlements are "appropriate where the settlement fund is 'non-distributable'

[10] The attorney fees were included in the settlement pursuant to the class action procedures under Rule 23(h), not 18 U.S.C. § 2707(b)(3). *See* District Court Order Approving Settlement, App. 52-58.

because 'the proof of individual claims would be burdensome or distribution of damages costly.'" *In re Google Referrer Header Privacy Litigation*, 869 F.3d at 741-742 (citing *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012)). It then found that the use of the *cy pres* remedy is consistent with the requirements of class certification because certification is proper when "the recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis. . . ." *Id.* at 743.

In other words, the Ninth Circuit implicitly held that federal courts may use one federal rule (authorizing approval of class action settlements) to modify the remedy created by Congress because a second federal rule (authorizing class certification) makes it infeasible to apply the remedy created by Congress. This Court should find that doing so violates the clear language of the Rules Enabling Act, as previously applied by *Amchem* and *Tyson*.

C. This Court should find that federal courts may only use the *cy pres* remedy when the substantive law allows the use of this remedy.

The states have authorized the use of the *cy pres* remedy for charitable trusts under limited circumstance because they concluded that its use was equitable under those circumstances. The proponents of using the *cy pres* remedy in class actions raise legitimate concerns. So do the opponents of the use of *cy pres* in class actions. The Rules Enabling Act prohibits the

federal courts from using the procedures under Rule 23 to resolve the competing concerns raised by these parties to determine when the *cy pres* remedy can be used in class action litigation.

There are, however, two situations where federal courts are permitted to use *cy pres* in class actions. First, a few states have also authorized the use of the *cy pres* remedy in class actions pending in those courts. *See* 4 Rubenstein, *Newberg on Class Actions* § 12:35 (5th ed.) (stating that "at least a dozen states" have a statute authorizing the use of *cy pres* payments in class actions). Depending upon the precise circumstances, federal courts might be authorized to use *cy pres* in class actions that apply one of these state's substantive laws.

Second, Congress has authorized the use of the *cy pres* remedy in one limited circumstance in class action litigation. The Class Action Fairness Act of 2005 governs settlements that involve the distribution of coupons to class members. 28 U.S.C. § 1712. It expressly authorizes the federal courts to "require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." 28 U.S.C. § 1712(e).

All legislation involves compromises, and the Class Action Fairness Act of 2005 is no exception. One of the concerns raised by Petitioners in this case, and by other opponents of *cy pres* payments in class actions in general, is that they can be used to inflate the

attorney fees that are recovered by class counsel. Petitioners' Merits Brief, pp. 16, 22-23, 28-29. When Congress passed the Class Action Fairness Act, it decided that "[t]he distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section." 28 U.S.C. § 1712(e).[11] Under the federal Constitution and the Rules Enabling Act, this is precisely how this type of conflict between competing principles should be resolved. In the absence of such legislative action, however, the Rules Enabling Act prohibits the interpretation of Rule 23 to allow federal courts to substitute *cy pres* charitable distributions in place of the remedies that are authorized by the applicable substantive law.

CONCLUSION

Google is certainly free to donate its own money to any of the charities designated as *cy pres* recipients. But, federal courts are not generally authorized to extinguish the rights of private party litigants by substituting the *cy pres* remedy for the remedies that exist under applicable statute or the common law. Therefore, this Court should reverse the judgment below and hold that federal courts cannot approve use of the *cy pres*

[11] This Act also provides detailed instruction on how attorney fees are to be calculated and awarded. 28 U.S.C. § 1712(b), (c).

remedy in class actions except when the federal courts are expressly authorized to do so.

Respectfully submitted,

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No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK, ET AL.,

Petitioners,

v.

PALOMA GAOS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF FOR THE NATIONAL CONSUMER LAW CENTER AND U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The **National Consumer Law Center** is a non-profit research and advocacy organization that focuses on the legal needs of low-income, financially distressed, and elderly consumers. Founded at Boston College Law School in 1969, NCLC is a 501(c)(3) and legal aid organization that employs many attorneys and advocates with twenty or more years of specialized consumer law expertise.

NCLC has been a leading source of legal and public policy expertise on consumer issues for Congress, state legislatures, agencies, courts, consumer advocates, journalists, and social service providers for nearly fifty years. NCLC is the author of a twenty-volume Consumer Credit and Sales Legal Practice Series. NCLC has been a recipient of court-awarded *cy pres* funds as part of residual class action funds and uses these awards to protect the rights of economically vulnerable consumers through education, publications, policy analysis, and advocacy.

United States Public Interest Research Group Education Fund, Inc. ("U.S. PIRG Education Fund") is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, outreach, and litigation, it serves as a counterweight to the influence of powerful special interests that

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

threaten the public's health, safety, or well-being. U.S. PIRG Education Fund regularly participates as *amicus curiae* in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund has been a recipient of court-awarded *cy pres* funds as part of residual class action funds, and it uses these awards to protect the interests of the public and consumers through research, policy analysis, education, and advocacy.

SUMMARY OF ARGUMENT

Amici submit this brief to provide their perspective on the importance of class actions and the *cy pres* doctrine for the effective enforcement of consumer protection statutes, and their importance to low-income consumers, in particular.

In our society, consumers engage in far more economic transactions than previously and do so with nationwide or regional companies using standardized forms, sales methods, and contracts of adhesion. To combat abuses in these practices and others, class actions continue to be essential.

The *cy pres* remedy serves an important role in consumer protection class actions. When direct distribution of all or part of a monetary recovery to class members is infeasible, the *cy pres* doctrine provides courts with an indispensable framework for distributing these funds in a way that benefits absent class members and consumers as a whole while also effectively serving the disgorgement and deterrence goals of consumer protection statutes. To prevent possible abuse, comprehensive and effective guidelines have been emplaced—chief among them

the American Law Institute's *Principles of the Law of Aggregate Litigation*—to govern the use of *cy pres* awards, thereby allowing them to prove a workable and advantageous distribution option for over a half-century.

In deciding this case, the Court should be mindful of the implications for low-income consumers of unduly hampering class actions, which constitute the most effective—and very often the sole—means of vindicating their rights as enshrined in consumer protection statutes. And the Court should be wary of unduly circumscribing the use of *cy pres* distribution because it is the next-best use of the funds recovered from such lawsuits, when direct distribution to class members is infeasible.

ARGUMENT

Class actions remain an indispensable mechanism for the effective enforcement of consumer protection statutes, and are of particular import for safeguarding the rights of low-income consumers. When the funds recovered from such lawsuits cannot be directly distributed to class members, the *cy pres* doctrine, in turn, provides courts with a framework for distributing them in a way that benefits absent class members and consumers as a whole while also serving the goals of the consumer protection statutes underlying the litigation.

In assessing the value of a given class action lawsuit, Petitioners focus almost exclusively on one criterion: monetary relief awarded directly to class members. They open their brief by asserting that they are challenging a settlement that "pays the class no money but instead directs millions to class

counsel and funnels the remainder to third parties." Pet'rs' Br. 1. They argue that a class action cannot be a worthwhile—let alone the *superior*—method of litigation unless monetary benefits will inure directly to class members. *Id.* 15; *see also id.* 52-54. Accordingly, rather than permit a next-best use of funds, they argue that if a court were to find that direct distribution to class members is infeasible, class certification is improper. *Id.* 10-11.

If restitution were class actions' sole purpose, Petitioners' arguments might be availing. But it is not. On the contrary, Petitioners ignore the "policy at the very core of the class action mechanism," which is to "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotations and citations omitted). "A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.*

In other words, Petitioners' approach would prohibit class action lawsuits in precisely those cases where they have been deemed essential: cases involving very small claims for individuals that, in the aggregate, involve substantial sums that will otherwise remain in the hands of the wrongdoers. Class actions—including those that involve *cy pres* awards—are thus the superior method of litigation for the enforcement of consumer protection statutes involving small individual damages. *See* Part A, *infra*.

Petitioners' myopic focus on individual recovery also overlooks—or perhaps willfully ignores—the other well-established policy purposes of consumer protection statutes that often form the basis of these suits: enhancing the fundamental fairness of the marketplace, deterring illegal conduct, and disgorging ill-gotten gains. When direct distribution to class members is infeasible, distributing *cy pres* awards to organizations working in the field of consumer protection indirectly benefits class members and better effectuates these purposes than do other options for the distribution of residual funds. *See* Part B, *infra*.

In short, prohibiting class actions simply because direct distribution is infeasible would disserve the very purposes of consumer protection statutes upon which these suits often are premised.

A. Class Actions—Including Those Involving *Cy Pres* Awards—Often Are Superior to Alternative Methods of Litigation for Protecting the Rights of Low-Income Consumers.

Class actions are critical in labor, civil rights, and many other contexts, but consumer claims provide perhaps the quintessential example of large-scale illegal profit-seeking behavior by companies that nevertheless does not financially harm any individual enough to induce litigation in the absence of the class action device. As one federal court put it, "[c]lass actions are often the most suitable method for resolving suits to enforce compliance with consumer protection laws because the awards in an individual case are usually too small to encourage the lone consumer to file suit." *Carr v. Trans Union*

Corp., 1995 U.S. Dist. LEXIS 567 (E.D. Pa. 1995) (class certified based on allegation of misleading debt collection notices). *See also Amchem Prods.*, 521 U.S. at 617 (discussing "negative value" suits).

Compounding the necessity of class actions to enforce many violations of these acts is the fact that low-income consumers, who are disproportionately their victims, are less able to bring suits on their own behalves. Class action lawsuits are thus vital tools for protecting the interests of these consumers. And indeed, they are the superior method of litigation in many cases.

When individual awards for consumer protection violations are not only so small that they do not provide an incentive for individual action, but are so small that they would be swallowed by the costs of distributing them—in other words, in those circumstances in which *cy pres* recovery may be triggered—the need for class actions to protect consumers' rights only is heightened.

1. Often, the "Alternative" to Class Treatment for Small Consumer Claims Is No Enforcement at All.

In theory, one benefit of the class procedure is its efficiency: adjudication of a properly constituted class action saves the resources of courts and parties by permitting an issue affecting numerous individuals to be litigated at once. In reality, a consumer class action rarely is filed to supplant numerous individual lawsuits. Rather, class actions are often the *only* economically viable way to provide legal representation for clients—particularly economically disadvantaged clients—with relatively

small claims. As Judge Posner succinctly, and colorfully, put it:

> The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.

Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

Indeed, for many consumers, entry into court itself proves an insurmountable barrier to vindication of their rights. For members of the armed service, for example, the realities of deployments, transfers out of the state where the courts have jurisdiction, and restrictions on their time often render the doors of small-claims courts (where these suits would likely be filed) effectively closed to them. And many low-income individuals cannot afford to forgo a day's wages to recover a lesser sum taken from them.

A class action—including one involving the prospect of a *cy pres* award because settlement funds cannot otherwise be economically distributed—is therefore the only realistic alternative, and it will nearly always be superior to no litigation at all. Consumer class actions for violations of the Servicemember's Civil Relief Act (SCRA), for example, have proved an important tool for enforcing

the economic rights of military servicemembers. *See, e.g., Olson, et al. v. Citibank, N.A.*, 10-cv-2992, 2012 WL 1231787 (D. Minn. Apr. 12, 2012) (preliminarily approving settlement agreement for monetary and injunctive relief in a class action alleging illegal mandatory forbearance on servicemember student loans under the SCRA). More broadly, without the legal restraint imposed by a lawsuit, a defendant that has acquired a sizeable windfall wrongly by illegally obtaining small sums of money from a large group of people will continue doing business in the future as in the past.

2. Class Treatment Is Also Superior to Individual Consumers Pursuing Claims in Small-Claims Court.

Even if some individual claims are filed in small-claims court—which will often be without the assistance of counsel—companies are apt to simply treat these small individual judgments as a cost of doing business. Companies may well continue to engage in the same illegal conduct with their other customers because there is no economic incentive to do otherwise.

On the other hand, class-wide judgment disgorges these unlawful gains, eliminating the profit-motive for the misconduct. Moreover, even the mere possibility of class-wide judgment can deter defendants from transgressing legal boundaries, before their doing so can harm consumers.

3. Class Actions Are Superior to Punitive Damage Awards in Small-Claims Consumer Protection Cases.

If small compensation class actions are discouraged, the only realistic alternative for achieving the deterrence goals of consumer protection statutes will be to seek large punitive damages awards on behalf of a few consumers who, while litigating relatively small individual claims, can prove willful, widespread misconduct by defendants. Nat'l Ass'n of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 299 F.R.D. 160, 167 (3d ed. 2014).

This alternative is second-rate. First, the heightened "willful" standard is a more difficult and costly one to prove. More important, it frequently fails to capture injuries businesses cause through recklessness or negligence. Finally, even in those cases where punitive damages successfully extract large payments from defendants, using class actions to distribute *cy pres* awards is a better societal outcome. By distributing funds to appropriate charitable or public service organizations serving consumers in ways that are closely related to the underlying claims of the case, *cy pres* awards go one step further than punitive damages awards. They help to fund efforts to prevent the same harms from being perpetrated on future, similarly situated consumers, instead of providing relief merely to the few consumers who prevailed in their individual punitive damages claims.

B. *Cy Pres* Distribution of Residual Class Action Funds Best Effectuates the Purposes of Consumer Protection Statutes.

Consumer protection laws are meant to ensure that the choices given to consumers in the marketplace are unimpaired by fraud or withholding of material information, and that the power differential between consumers and commercial enterprises is equalized. *See* N. Averitt & R. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 Antitrust L.J. 713 (1997). They seek to improve the functioning of the marketplace by making it unprofitable to operate dishonestly. *Id.* And, of course, they seek to compensate consumers for the wrongs inflicted upon them.

Making all class members whole is the optimal outcome of any class action. Period. This case, however, concerns circumstances in which distribution to class members would not be possible. The three third-party options usually considered are: (1) escheat to the state, (2) reversion to the defendant, and (3) *cy pres* distribution. *See* H. Newberg, 2 Newberg on Class Actions §§ 10.13-10.25 (3d ed. 1992).

In consumer protection class actions, the underlying statutes' aims of promoting fundamental fairness in the marketplace, deterrence of fraud, and disgorgement of illegally obtained profits must be weighted heavily in making this determination. *Cy pres* awards, when the doctrine is applied as directed, are that next-best option. They benefit absent class members and consumers as a whole

while also fully effectuating consumer protection statutes' deterrence and disgorgement goals.

1. Escheat Falls Short by Failing to Serve the Consumers Harmed by the Consumer Statute Violation.

The escheat option (i.e., transfer of abandoned property to the state) generally fails to serve consumer protection statutes' goals to the fullest extent possible. Escheat can be broken into two categories: general and earmarked.

General escheat has been appropriately deemed "the least focused compensation to the class." *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 475 (Cal. 1986). This option holds little promise of benefiting absent class members or those similarly situated, as the funds may be used for virtually any governmental purpose, with no attempt to realize the objectives of the underlying substantive law. *Id.* Moreover, it is lacking in deterrent power because it does nothing to support the efforts of those working to prevent similar conduct.

Earmarked escheat refers to an award of the funds toward a specific government agency in a position to assist citizens similar to the injured class. If used properly, this option can benefit consumers greatly and satisfy the deterrence and disgorgement goals with low administrative costs. It has been looked on favorably, but has rarely been applied. *See, e.g., Market St. Ry. Co. v. Railroad Commission*, 28 Cal.2d 363 (Cal. 1946). The reluctance of courts to rely upon earmarked escheats stems from concerns that the funds will be used for agency purposes

unrelated to the subject of the lawsuit and, therefore, not benefit class members or members of the public similar to them at all. *See* McCall, Sturdevant, Kaplan and Hillebrand, *Greater Representation for California Consumers: Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 Hastings L.J. 797, 809 (1995).

2. Reverting Funds to the Defendant Frustrates Rather Than Serves Consumer Protection Goals.

Reversion of residual funds to the defendant is, of course, rarely an appropriate option, and Petitioners do not propose it—at least not directly. Reversion is inappropriate because it neither compensates class members nor satisfies consumer protection goals. Rather it allows the defendant, the alleged wrongdoer, to keep the fruits of its wrongdoing. *See In re Motorsports Merch. Antitrust Litig.*, 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001). *See also In re Wells Fargo Secs. Litig.*, 991 F. Supp. 1193, 1196 (N.D. Cal. 1998); Am. Law. Inst., *Principles of the Law of Aggregate Litigation* § 3.07 cmt. B (2010) (rejecting reversion because it would "undermine the deterrence function of class actions"). Reversion is only appropriate in limited cases where the defendant acted in good faith, and/or when punitive damages are disallowed pursuant to statute. *See, e.g., Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807 (5th Cir. 1989) (an example of appropriate reversion in a Title VII action).

Curtailment of class action certification along the lines Petitioners propose would not be reverting funds to defendants but rather never requiring

defendants to hand over their ill-gotten gains in the first place. This is because the likely consequence of discouraging these actions, as discussed in I.A.1, *supra*, is to discourage the only realistic form of litigation for challenging this misconduct when it inflicts injuries to individuals too small to rationalize non-collective action.

3. *Cy Pres* Distribution Often Best Effectuates Purposes of Consumer Protection Statutes.

The final option is *cy pres* distribution, the primary purpose of which is to serve as a deterrent to would-be wrongdoers and to enable the effective enforcement of the policies underlying the cause of action. It does so by helping to fund organizations that work to prevent the same wrongs from being perpetrated on future consumers, and redressing those wrongs when they do, inevitably, recur.

Petitioners discount—nay vilify—this option. Rather than permit funds to be distributed to entities serving the relevant interests of class members, they argue that if a court were to find that distribution to class members is infeasible, then no class should be certified in the first instance. Pet'rs' Br. 10-11. But, as discussed throughout this brief, restitution is not the sole aim of class actions or consumer protection statutes, and *cy pres* awards can help realize and amplify the various other benefits that consumer protection class actions achieve.

By providing a mechanism through which to furnish an indirect benefit to non-claiming class members, as well as deter misconduct and disgorge

wrongful gains, *cy pres* distribution often provides the ideal solution for distribution of residual funds. *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (noting that the *cy pres* doctrine is utilized to prevent defendants "from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement . . . to the class members").

Moreover, to prevent possible abuse, appropriate guidelines have been put in place to govern the use of *cy pres* awards, allowing these awards to prove a workable and advantageous distribution option for over a half-century. Appellate courts overwhelmingly have adopted the American Law Institute's *Principles of the Law of Aggregate Litigation*, *supra* § 3.07,[2] which provides guidelines on the limited circumstances where *cy pres* distribution is appropriate, including standards regarding appropriate recipients, and neither Congress nor the Rules Advisory Committee have found reason to diverge from these well-functioning principles. *See* Class Resp'ts' Br. 9-11, 31-35. In consumer protection class actions, in particular, finding a worthy *cy pres* recipient—namely, one who will promote the interests of the class of consumers and the purposes of the statutory prohibitions underlying the litigation—is made easier by the array of reputable organizations working in the consumer protection sphere.

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[2] NCLC participated in the drafting of—and adheres to—the National Association of Consumer Advocates (NACA) *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, *supra*. Guideline 7 of these guidelines closely follows § 3.07 of the American Law Institute's *Principles of the Law of Aggregate Litigation*.

For all of these reasons, allowing residual funds to be distributed via *cy pres* awards fulfills these funds' next-best use, when direct distribution is not possible.

CONCLUSION

The National Consumer Law Center, on behalf of the low-income consumers who are its clients, and U.S. PIRG Education Fund urge the Court to be mindful of the effects its decision in this case will have on enforcement of consumer protection statutes, and the consequent impact on the low-income consumers who are too often the victims of transgressions of these laws.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NEW JERSEY CIVIL JUSTICE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The New Jersey Civil Justice Institute ("NJCJI") is a non-profit, non-partisan group whose members include individuals, small businesses, business associations, and professional organizations that are dedicated to improving the civil justice system in New Jersey. Part of the NJCJI's mission is to advocate for the sound development of the law, including federal law, which is critical to ensuring the fair resolution of conflicts and the fostering of economic growth.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party funded this brief in whole or in part. Sup. Ct. R. 37.6. Counsel for all of the parties were consulted and have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure is a procedural device that must always remain subordinate to the resolution of whatever the underlying claims might be. The judicial approval of a *cy pres*-only class action settlement in which class counsel and the defendant agreed upfront that the unnamed plaintiffs would get nothing, class counsel would be entitled to a fee award in the millions of dollars, and non-party organizations would receive the bulk of the multi-million-dollar settlement fund has the effect of elevating Rule 23 into a substantive remedial scheme. This result cannot be countenanced.

The Court should hold that a proposed class action settlement fails to satisfy Rule 23(b)(3)'s superiority requirement if the proposed settlement will provide no direct benefit to the unnamed plaintiffs. Abusive *cy pres*-only settlements like the one in this case will remain commonplace if the Court does not alter the incentive structures that make such settlements possible.

ARGUMENT

I. Rule 23 Cannot Function as a Substantive Remedial Scheme.

Rule 23 of the Federal Rules of Civil Procedure is a purely procedural device that is "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). The rule is intended to provide an efficient way to litigate alleged harms involving numerous plaintiffs who cannot or would not file individual lawsuits. *See Carnegie v.*

Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."). For that reason, the right of a plaintiff "to employ Rule 23 is a procedural right only." *Roper*, 445 U.S. at 332. Rule 23 is not a stand-in for, and should not be used as, a substantive remedial scheme. This principle should be top of mind for a district court when the unnamed plaintiffs—who are, after all, the owners of the substantive claims underlying any Rule 23 class action—get no benefit at all under the terms of a class action settlement.

The Court should hold in this case that a proposed class action settlement necessarily flunks Rule 23(b)(3)'s requirement that a "class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy" where class counsel and the defendant have agreed that the proposed settlement will provide no benefit at all to the unnamed plaintiffs. Class-action treatment cannot be a superior method under such circumstances because the unnamed plaintiffs would necessarily be better off retaining their individual claims, no matter how large or small those claims might be. *See Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 602-05 (S.D. Tex. 2007) (suggesting that the use of "*cy pres* as a substitute for distributing damages to individual class members" fails to satisfy Rule 23(b)(3)'s superiority requirement).

Procedure has always existed in service of substance. *See* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 Va. L. Rev. 517, 542 (1925)

(observing that procedure "is a means to an end, not an end in itself—the handmaid rather than the mistress of justice") (cleaned up). No procedural device, no matter how lucrative it might be to lawyers or how doctrinally complex the device might become over time, can be or should be an end in itself. *See Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself."); *see also* topdoggjb, *Herm Edwards You Play to Win*, YouTube (Jan. 22, 2013), https://bit.ly/UMCet2 ("You play to win the game. Hello? You play to win the game. You don't play to just play it."). Indeed, although the case law construing Rule 23 spans thousands of pages in the United States Reporter, the Federal Reporter, and the Federal Supplement, Rule 23 cannot abridge, enlarge, or modify any substantive right, nor can it override the requirements of Article III. *Amchem Prods., Inc. v. Windsor*, 523 U.S. 591, 613 (1997); 28 U.S.C. § 2072(b).

Here, when the Ninth Circuit affirmed the approval of a class action settlement in which no compensation whatsoever was paid to a class consisting of approximately 129 million people, most of the $8.5 million settlement fund was funneled to organizations handpicked by class counsel and the defendant, and class counsel were rewarded with millions of dollars' worth of attorneys' fees, the Ninth Circuit encouraged the filing of class action lawsuits that, from all outward appearances, exist for the purpose of generating an award of attorneys' fees for class counsel.

Blessing a settlement in which only non-party organizations share in the damages award, the tens of millions of unnamed plaintiffs receive no benefit at

all, and class counsel (who bargained away the class members' supposedly valuable substantive rights) reap millions of dollars in fees has the effect of elevating Rule 23 into a substantive remedial scheme intended to compensate class counsel and (maybe) punish wrongdoers, all at the victims' expense. A mere procedural device cannot and should not be elevated in this way.

It cannot be overemphasized that class actions present a heightened risk of collusion, self-dealing, and similarly nefarious conduct. *Mirfasihi v. Fleet Mortg. Co.*, 356 F.3d 781, 785 (7th Cir. 2004) (Posner, J.). Defendants, as economically rational actors, have two goals; they want to obtain a broad release at a bargain price. *See* Richard A. Posner, Divergent Paths: The Academy and the Judiciary 149 (2016) (explaining that from a class action defendant's standpoint an "optimal settlement is one that is modest in overall amount") ("Posner Book"). Class counsel, who often represent thousands or millions of people they will never meet, have a natural incentive to maximize their own fees at the expense of obtaining a better recovery for their faceless clients. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) (Kethledge, J.). Defendants are also typically indifferent as to the issue of how a settlement fund is divvied up between class members and class counsel. *Id.* at 717.

All of the above is why district courts are tasked with probing the terms of proposed class action settlements. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014) (Posner, J.) (characterizing district judges as a "fiduciary of the class, who is subject therefore to

the high duty of care that the law requires of fiduciaries") (cleaned up). Yet the rule requiring district judges to go over proposed class action settlements with a fine-tooth comb is more often honored in the breach than in the observance. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014) (Posner, J.) ("A trial judge's instinct, in our adversarial system of legal justice, is to approve a settlement, trusting the parties to have negotiated to a just result as an alternative to bearing the risks and costs of litigation. But the law quite rightly requires more than a judicial rubber stamp when the lawsuit that the parties have agreed to settle is a class action."). District judges are sometimes too passive when proposed class action settlements land on their desks. *See* Posner Book at 137 ("[S]ome judges appear to shirk their duty to scrutinize settlements in class action cases carefully."); *see also id.* at 149 (emphasizing that "[i]t's up to the judge to make sure that the settlement doesn't give class counsel an exorbitant share of the settlement proceeds, thus selling out the class—an endeavor in which the defendant is happy to join.").

Cy pres-only class action settlements like the one approved by the district court and affirmed by the Ninth Circuit in this case offer a particularly troubling example of procedure rising above, and even displacing, substance. Where a "settlement benefits class counsel vastly more than it does the consumers who comprise the class," then the proposed settlement should almost always be rejected. *In re Dry Max Pampers Litig.*, 724 F.3d at 721. This rule plainly applies where the proposed settlement contemplates no direct payments to any of the absent class members. *Id.*

(concluding that the district court abused its discretion in approving a settlement where the "relief that [the] settlement provides to unnamed class members is illusory"); *see also In re Hotel Tel. Charges*, 500 F.2d 86, 92 (9th Cir. 1974) ("When, as here, there is no realistic possibility that the class members will in fact receive compensation, then monolithic class actions raising mind-boggling manageability problems should be rejected. If, as appellees maintain, the suit would not be litigated except as a class action which would provide plaintiffs' attorneys with lucrative incentives, then that decision of the legal marketplace may be the best reflection of a public consciousness that the time of the lawyers and of the court should best be spent elsewhere.") (cleaned up). It is a tautology that the unnamed class members derive zero benefit "from the defendant's giving the [settlement fund] money to someone else." *Mirfasihi*, 356 F.3d at 784.

There are several supposed justifications for *cy pres*-only class action settlements, but none of them are persuasive. One commonly invoked justification is that a defendant should not be able to get off "scot-free because of the infeasibility of distributing the proceeds of the settlement" to the unnamed class members. *Id.*; *accord Pearson*, 772 F.3d at 784 (observing that a "*cy pres* award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries"). Sometimes that infeasibility arises from the fact that administrative costs exceed the value of individual claims; in other instances the class's enormous size precludes distributions to each and every class member.

Yet this case shows why that justification must fail. The class in this case was extremely large; it consisted of approximately 129 million people. Assuming only for the sake of argument that the class actually suffered some harm as a result of Google's use of referral headers, then class counsel bargained away the rights of 129 million people in exchange for $0 to the class, $5.3 million to a handful of organizations that the vast majority of the class had almost certainly never heard of (much less supported), and $2.125 million to class counsel.

Moreover, class counsel in this case were able to point to the $8.5 million settlement fund as evidence that they were entitled to a substantial award of attorneys' fees. This is not an unusual outcome, either. *See SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009) ("To the extent attorney's fee awards are determined using percentage of recovery method, the recovery and, therefore, the attorney's fee award is exaggerated by cy pres distributions that do not truly benefit the plaintiff class."); *accord Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (observing in a class action settlement involving a *cy pres* award that "serious issues [exist] about the alleged dollar value of the product *cy pres* award, an important number used to measure the appropriateness of attorneys' fees" and opining that the "settlement is a paper tiger"). That result, however, makes the case for abolishing *cy pres*-only class action settlements. *See In re Dry Max Pampers Litig.*, 724 F.3d at 720 ("To be clear: The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people. . . .") (cleaned up).

II. The Class Device Is Not Superior if the Unnamed Plaintiffs Will Receive No Direct Benefit Under a Proposed Settlement.

A class should not be certified and a class action settlement should not be approved if class counsel and the defendant have agreed on the front end that the unnamed class members cannot (or will not) be directly compensated at all. Jay Tidmarsh, *Cy Pres and the Optimal Class Action*, 82 Geo. Wash. L. Rev. 767, 797 (2013) ("Deterrence of wrongful behavior is an important goal, but not so important as to justify extinguishing a victim's claim in favor of compensating a third party.").

Put another way, a class action settlement should not be approved if the direct benefit to the absent class members is nil. *See Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013) (M. Smith, J., dissental) (explaining that the approval of a *cy pres* settlement that was not reasonably certain to benefit the class "creates a significant loophole in our case law that will confuse litigants and judges, while endorsing cy pres settlements that in no way benefit class members"); *accord* Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 141-42 (2014) (advocating a "no fee approach, which would deny class counsel any fee on the portion of the fund distributed cy pres") (cleaned up).

Tying the recovery of attorneys' fees to the actual and direct benefit (if any) received by the class would help to ensure that class actions will not be brought by class counsel simply to obtain massive fee awards.

To reiterate, Rule 23 "is not a free-standing device to do justice." *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d 1097, 1112 (D.N.M. 2012) (cleaned up). And the "Federal Rules of Civil Procedure cannot work as substantive law." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011).

The Ninth Circuit's approval of the *cy pres*-only settlement in this case incentivizes more class action lawsuits that would effectively transform a procedural device (i.e., Rule 23) into substantive law. Without a bright-line rule requiring some actual and direct benefit to the unnamed class members, the Rule 23 procedural tail wags the substantive law dog. Martin H. Redish *et al.*, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 648 (2010) ("Redish I"); Tidmarsh at 773-74 (contending that "cy pres often fails to ensure the creation of optimally structured class actions and may indeed exacerbate the problem by creating incentives to create suboptimal class actions").

Starting with what was ostensibly at stake here, the named plaintiffs alleged that Google had violated the Stored Communications Act by communicating Google users' search terms to the websites visited by those users. *See In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 740 (9th Cir. 2017) (recounting the procedural history of the case). The Stored Communications Act establishes a damages floor of $1,000. *See* 18 U.S.C. § 2707(c) ("[B]ut in no case shall a person entitled to recover receive less than the sum

of $1,000."). And in cases involving willful or intentional violations, the Stored Communications Act makes punitive damages available. *Id.* Thus, each class member's claim was in theory worth at least $1,000 and possibly more. That is a relatively high-value individual claim in the context of a consumer class action.

Nowhere in the Stored Communications Act's provisions governing civil actions does there exist any language that permits damages to be awarded to some non-party to a successful class action lawsuit brought under the statute, not even to the public fisc. *See generally* 18 U.S.C. § 2707. In this respect, the Stored Communications Act is like most other substantive laws. *See* Marvin H. Redish, *Class Action and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 75 (explaining that substantive laws typically "enforce their behavioral proscriptions by establishing claims for damages for private victims of the proscribed behavior") ("Redish II"); *see also Klier*, 658 F.3d at 481 (Jones, J., concurring) ("Yet in no instance of which we are aware does the underlying substantive law sought to be enforced in a federal class action direct a violator to pay damages to an uninjured charity." (citing Redish I at 623)).

A federal court should be deeply skeptical of a proposed class action settlement that purports to release the claims of roughly 129 million people in exchange for $0 to the class, $5.3 million to various organizations, and $2.125 million to class counsel, particularly

when the unnamed plaintiffs' claims have a theoretical floor value of $1000 apiece.

If the underlying problem is that the Stored Communication Act's damages provisions somehow offer inadequate compensation to aggrieved plaintiffs, then that problem is one for Congress to address. *See* Redish I at 640 ("If existing substantive remedies are deemed inadequate as a means of enforcing the law's behavioral prohibitions, the task of altering the remedial framework is one for the authority that created the substantive law in the first place."). The analysis and the solution are the same if the underlying problem involves the statute's less-than-optimal level of deterrence of wrongdoers or the less-than-vigorous enforcement of the statute by private plaintiffs.

Class counsel in this case received a $2.125 million fee award while every plaintiff except the named plaintiffs got zilch. The vast majority of the remainder of $8.5 million settlement fund was routed to non-party organizations. Rule 23 "is meant to provide a vehicle to compensate class members and to resolve disputes." *In re Thornburg Mortg., Inc. Secs. Litig.*, 885 F. Supp. 2d at 1105. From the perspective of the unnamed plaintiffs, the procedural device meant to enhance efficiency and to promote recovery failed to do its job. The natural inference is that the class action device should not have been used at all because it was not a superior method for fairly adjudicating the unnamed plaintiffs' claims. *See id.* at 1107 ("Parties do not initiate class actions so that class action damages can be distributed to third parties not involved in the litigation and without standing to sue

for the damages they receive through the mechanics of court intervention.").

And it is not enough to say that the *cy pres* awards in this case were a necessary evil. Notably, the use of the *cy pres* doctrine cannot (and should not) alter parties' substantive rights. *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (so stating), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). The bulk of the $8.5 million settlement fund in this case went to organizations that were non-parties. Neither the Stored Communications Act nor most other substantive laws contemplate such a result when private plaintiffs bring lawsuits under those laws. *See Klier*, 658 F.3d at 481 (Jones, J., concurring) (suggesting that *cy pres* distributions in the class action context "present an Article III problem" and "likely violate Article III's standing requirements"); *accord Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540, 1547 (2016) (explaining that the standing doctrine "developed in our case law to ensure that federal courts do not exceed their authority as it has traditionally been understood"). Rule 23, as a purely procedural device, should not permit (much less compel, as it apparently did in this case) a different result.

It is likewise insufficient to argue that the *cy pres*-only settlement in this case was permissible under the class-action-suit-as-private-attorney-general theory. Although this suit—like virtually every other class action lawsuit—was doubtless the brainchild of entrepreneurial plaintiffs' lawyers, this action and class action lawsuits in general are supposed to be

"private compensatory damage suits." Redish II at 81. When Congress intends to create a bounty-hunter-like enforcement scheme, it knows how to do so. *See id.* at 81-83 (discussing the history of *qui tam* actions); *see also* Redish I at 649 (explaining that in an ordinary *qui tam* action an "uninjured party is incentivized to bring suit by receiving a portion of the damages for its successful prosecution"). The *qui tam* model cannot be shoehorned into Rule 23 or the substantive law that Rule 23 is supposed to serve, nor should it be. *See* Redish II at 93 ("The problem is that the substantive law that the class action purports to enforce invariably fails to authorize private attorney general actions of the bounty hunter variety.").

Further, the presence of injunctive relief in this case does not make the class device a superior method of adjudication. Injunctive relief, by definition, does not provide any direct compensation to the unnamed plaintiffs. And it is entirely speculative whether class members will derive any benefit from the injunction because they may not continue to use the product or service. Worse, class members do not receive any benefit beyond what is available to society at large. By giving up their claims to be no better off than any member of society at large, the class device has failed the class members. Injunctive relief is often just another mechanism by which plaintiffs' lawyers and go-along corporate defendants create the illusion of relief in the context of proposed settlements. Judicial passivity toward injunctive relief incentivizes the filing of more low-to-no-merit class actions that exist only for plaintiffs' lawyers to obtain a fee award.

What the Ninth Circuit failed to appreciate is that its approval of the *cy pres*-only settlement in this case creates perverse incentives for more cases and proposed settlements substantially like this one. Plaintiffs' lawyers, like all rational human beings, respond to incentives. *See Mirfasihi*, 356 F.3d at 785 ("Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself?"); *cf. Johnson v. Daley*, 339 F.3d 582, 595 (7th Cir. 2003) (en banc) (Easterbrook, J.) (observing that the enactment of the Prison Litigation Reform Act "shows that [prisoners] *do* respond to incentives" as they relate to behavior in litigation). Specifically, the Ninth Circuit has signaled that within its district courts class counsel may satisfy their "self-interest in securing a healthy fee . . . by a cy pres distribution that denie[s] the class sufficient direct benefit." Wasserman at 134.

An empirical analysis of *cy pres* awards in federal class action suits between 1974 and 2008 shows that federal courts' approval of *cy pres* awards increased significantly beginning in 2001, which is around the time that coupon settlements began to attract negative attention. *See* Redish I at 652-61 (discussing the data). Between 1991 and 2000, federal courts approved *cy pres* awards in twenty-one class action settlements. *Id.* at 653. That number more than tripled (for a total of sixty-five) between 2001 and 2008. *Id.* Most of the *cy pres* awards over that same time period occurred in the context of settlement (as opposed to litigation) class actions. *Id.* at 661.

If the Ninth Circuit's decision survives review, then plaintiffs' lawyers will be incentivized to search for patsies to serve as named plaintiffs and to file putative class actions involving tens (or hundreds) of millions of unnamed plaintiffs who have suffered one or more alleged injuries (whether statutory or common law) relating to their online activities. A diffuse community of unnamed plaintiffs helps plaintiffs' lawyers in this regard because if the class is so massive that it appears from the get-go to be infeasible to compensate each and every class member, then class counsel will have a superficially appealing argument that a *cy pres*-only settlement is appropriate under the circumstances.

And a defendant faced with a class containing tens or hundreds of millions of plaintiffs will likely think that creating a settlement fund of (for example) $10 million is a reasonable-enough price to pay for global peace. Then class counsel—just as they did in this case—can point to the settlement fund and ask the district court to award millions of dollars' worth of attorneys' fees notwithstanding the fact that the tens or hundreds of millions of unnamed plaintiffs did not receive a penny. The result is that the merits (whatever they might be) of the class members' claims have been entirely subordinated to the Rule 23 procedural device, which is in fact operating impermissibly as a substantive remedial scheme. Finally, and most troublingly, Rule 23(b)(3)'s superiority requirement is effectively written out of Rule 23 under such circumstances.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit and hold that proposed class action settlements in which the unnamed plaintiffs will receive no direct benefit fail Rule 23(b)(3)'s superiority requirement.

Respectfully submitted,

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No. 17-961

IN THE

SUPREME COURT OF THE UNITED STATES

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NEW YORK BAR FOUNDATION and THE NEW YORK STATE BAR ASSOCIATION AS *AMICI CURIÆ*

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September 5, 2018

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The New York Bar Foundation (the "Foundation") and the New York State Bar Association (the "Association") submit this brief *amici curiæ* with respect to the decision of the United States Court of Appeals for the Ninth Circuit approving the use of a *cy pres* remedy in a Federal Rule of Civil Procedure 23(b)(3) class action.[1] This Court should affirm that decision's underlying holding that district courts have broad discretion to approve or apply such a remedy when appropriate. The experiences of the Foundation and the Association, including those described in this brief, are good examples of why such discretion furthers not only the purposes of Federal Rule of Civil Procedure 23, but the ends of justice.

STATEMENT OF INTEREST OF *AMICI CURIÆ*

Founded in 1950, the Foundation is the charitable arm of the Association. The Foundation sponsors charitable and educational projects to meet the law-related needs of the public and the legal profession. Its activities include financial support to

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[1] No counsel for a party authored this brief in whole or in part. No party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae*, their members, or their counsel, made any such monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it should be considered to reflect the views of any judicial member of the Association or the Foundation. All parties have consented to the filing of this brief.

programs that facilitate the delivery of legal services, improve the justice system and the law, increase public understanding of the law, and enhance professional competence and ethics. The Foundation has received, and distributed to such programs, *cy pres* amounts from approximately 30 different class-action settlements since 2008. In this process, it has been entrusted with several significant appointments to oversee the use by specific recipients of approximately $4.4 million in such amounts. The Foundation therefore has significant insight and firsthand experience that may benefit the Court as it considers how *cy pres* actually works in class-action settlements.

The Association is the largest voluntary state bar association in the country. It is also one of the most prominent. (Among other things, a former Chief Justice of this Court was once its president.) Its stated objectives are to cultivate the science of jurisprudence, promote reform in the law, facilitate the administration of justice, and elevate the standards of integrity, honor, professional skill and courtesy in the legal profession. As part of this mission, the Association is the drafter of the New York Rules of Professional Conduct. The Appellate Division of the Supreme Court of the State of New York adopts those rules (subject to any final changes by the court before adoption) as the ethical standards applicable to all attorneys licensed to practice in New York. Attorneys who violate those rules are subject to discipline up to and including disbarment. Because those rules govern the behavior of lawyers in connection with their

representation of parties in class actions, including class-action settlements involving a *cy pres* remedy, the Association's experience may benefit this Court as it considers such remedies.

SUMMARY OF ARGUMENT

Neither the Foundation nor the Association is an organization dependent on *cy pres* funding. The Foundation has, however, substantial experience assisting courts in supervising the use of *cy pres* funds from class-action settlements to make sure that such use matches the court's intentions. *See, e.g., City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. 2010); *Charrons v. Pinnacle Group*, 874 F. Supp. 2d 179 (S.D.N.Y.), *aff'd sub nom. Charrons v. Weiner*, 731 F.3d 241 (2d Cir. 2012); *White v. First Advantage Saferent, Inc.*, No. 1:04–cv–1611 (LAK), 2007 U.S. Dist. LEXIS 18401 (S.D.N.Y. Mar. 7, 2007).

The Foundation's experience has demonstrated that, contrary to Petitioners' arguments, *cy pres* provides an essential flexibility to district courts seeking to assure the fairness, reasonableness, and adequacy of Rule 23(b)(3) class action settlements. *See generally* FED. R. CIV. P. 23(e). There are strong existing protections against abuse of that flexibility, including not only the procedures of Rule 23 itself, but regulations and laws such as the ethics rules promulgated by the Association. Given these protections, there is no basis for the Court to consider a general bar to the use of *cy pres* remedies on the current record. Any

consideration of such a radical step would be a matter better left to policy-making institutions such as the Congress or the Federal Rules Advisory Committee.

ARGUMENT

This Court should affirm that *cy pres* remedies may be used in connection with appropriate settlements involving classes certified under Federal Rule of Civil Procedure 23(b)(3). The experience of the Foundation, and the protections against abuse such as those promulgated by the Association, strongly support the continued availability of *cy pres* to enable district courts to assure that such settlements achieve their just purposes.

I. The experience of the Foundation demonstrates the importance of *cy pres* remedies for certain class-action settlements.

The Federal Rules of Civil Procedure require that any class-action settlement that would bind absent class members be evaluated *individually* to determine whether it is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). As a result, "although certain factors must be considered and certain procedures complied with, much of the judicial oversight of class actions," including in settlement, "is in the sound discretion of the district judge." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1344 (9th Cir. 1980), *abrogated on other*

grounds by Evans v. Jeff D., 417 U.S. 717, 725 n.10 (1986).

District courts also "have historically had broad authority to fashion equitable remedies . . . ." *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting); *accord, e.g., Conn. Office of Protection & Advocacy for Persons with Disabilities v. Hartford Bd. of Ed.*, 464 F.3d 229, 245 (2d Cir. 2006); *Hardison v. Cohen*, 375 F.3d 1262, 1266 (11th Cir. 2004). Because "[j]udicial *cy pres* is part of the 'regular and inherent jurisdiction [of] a court of equity'," *Pennsylvania v. Brown*, 260 F. Supp. 323, 337 (E.D. Pa. 1966) (quoting *Fontain v. Ravenel*, 58 U.S. 369, 397 (1854) (Daniel, J., concurring)), it is not surprising that federal courts have been using it carefully since at least the early 1970s in the context of class-action settlements, *see, e.g., Miller v. Steinbach*, No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981, at *3 (S.D.N.Y. Jan. 3, 1974).

This ongoing use of *cy pres* is consistent with a recognition that adopting "[p]er se rules rigidly confining the trial court's exercise of its discretion in the supervision of class actions" would "represent the abdication of judicial discretion rather than its informed exercise." *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133 (7th Cir. 1979). The Foundation's own experience shows how the informed use of *cy pres* in appropriate class-action settlements furthers the aims of Rule 23(e)(2) and is, with appropriate checks and balances, an essential tool for district courts.

A. The Example of *City of Detroit v. Grinnell Corp.*

The problem that arose in *City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. 2010), is a good example of the importance of being able to use *cy pres* in connection with certain class-action settlements. The *Grinnell* cases date back to 1961. They are familiar to this Court because of its landmark decision in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Following the conclusion in 1967 of that government action concerning price-fixing in the market for provision of residential "central station alarm systems"—an early form of electronic data-collection and response services—private plaintiffs filed a number of similar cases in the federal courts under the Sherman Act, 15 U.S.C. §§ 1–2. *See City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1095-98 (2d Cir. 1977) (describing history).

Those private actions were settled in 1972 for $10,000,000 (an enormous amount at the time). *See City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972). Multiple appeals produced, among other things, a leading decision on the factors for approval of class-action settlements. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).

What did not happen, however, was a prompt exhaustion of the entire $10,000,000 settlement fund. An inability to find good addresses for distribution of settlement amounts to certain

claimants meant that a modest residue of approximately $100,000 remained in an interest-bearing account. Decades passed with no additional plaintiffs being located. Over thirty years later, the executor of the estate of one of the original lead counsel in the cases discovered the account. By that time, the modest residue had grown to over $850,000. *See* Order Approving Distribution of Residual Settlement Funds at 3, *City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. Dec. 14, 2010) (the "*Grinnell* Cy Pres *Order*").

The district court resolved this problem with a *cy pres* remedy. *See id.* The technology and business originally at issue in the early 1960s had long been superseded by developments such as the internet. The class members were also long gone or unfindable. But the issue of competition in the market for provision of data services remained. So did the need for entrepreneurial small businesses to foster that competition.

The district court recognized this by rejecting a suggestion by class counsel to distribute the remaining settlement funds to medical research. *Cf.* Memorandum of Law in Support of Motion To Authorize Distribution of Residual Settlement Funds, *City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. June 11, 2010).[2]

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[2] As this indicates, the Association and the Foundation agree that it is entirely proper for a district court to conduct a "rigorous analysis" of proposed recipients of *cy pres* funds as

Instead, it approved a proposal to have the Foundation oversee grants to two entities. One was a major research university's center for technology, innovation, and competition. This was an entity that could help improve competition in services that might be considered descendants of the technology in the early 1960s. The other was a specialized entrepreneurship training program for disabled veterans delivered by a network of leading business schools. This was an entity that could not only help foster small businesses of the kind that had been harmed in the original *Grinnell* cases, but that would include ethics training to encourage fair competition. *See, e.g.*, *Grinnell* Cy Pres *Order*; Letter from Lesley F. Rosenthal, Howard L. Schechter, & Daniel Berger to Hon. Loretta A. Preska, Chief Judge, *City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. Nov. 20, 2010). As a result, the $850,000 in residual funds from a case over a generation old was put to work for the public benefit in ways well tailored to serve the ends of the original class-action settlement.

B. The Example of *Charrons v. Pinnacle Group*

A second example of why the flexibility offered by *cy pres* can be essential in some settlements is *Charrons v. Pinnacle Group*, 874 F. Supp. 2d 179 (S.D.N.Y.), *aff'd*, 731 F.3d 241 (2d Cir. 2012). The

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part of its duties under Rule 23. *See, e.g., Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

Charrons case was a class action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2017), and the New York Consumer Protection Act, N.Y. Gen. Bus. Law § 349(a) (McKinney 2018). It challenged the setting and charging of fraudulently high rents to "approximately 20,000" tenants of rent-regulated apartments in "over 400 buildings." *Charrons v. Weiner*, 731 F.3d 241, 244–45 (2d Cir. 2012) (upholding settlement over challenge by objectors).

Eventually the parties were able to resolve those disputes. Their settlement included an informal claims-administration process outside the court system under which tenants could pursue their highly diverse alleged losses. *Id.* at 246. The total amount that would be paid (or not) in that process was not a fixed settlement fund. *See id.* However, the parties also agreed (in a settlement provision visible to class members in advance for purposes of objections and opt outs) to pay "[u]p to $2,350,000 . . . to the Legal Aid Society and Legal Services NYC (to be administered by the New York Bar Foundation) for legal and related assistance in implementing the terms of the Settlement Agreement." *Charrons*, 874 F. Supp. 2d at 187.

Under this settlement structure, the Foundation was appointed to oversee the amount granted to the designated legal-service providers. *Id.* While the $2,350,000 at issue was not called a *cy pres* payment, it was in fact a distribution of funds that did not go directly to class members—precisely the kind of payment that Petitioners believe is

improper. *See, e.g.*, Brief for Petitioners, *Frank v. Gaos*, No. 17–961 ("Pet. Br."), at 49 (U.S. July 9, 2018) ("*Cy pres* awards are inappropriate . . . if it is feasible to distribute cash to *any* absent class members."). Yet the importance of providing knowledge and assistance to the class generally in the *Charrons* settlement could not be denied. It was, in fact, necessary to enable class members' use of the claims-administration process at the heart of the settlement, enhancing their access to justice.

C. The Example of *White v. First Advantage Saferent, Inc.*

The Foundation's supervision of the use of $1,210,116 in *cy pres* amounts from the settlement of *White v. First Advantage Saferent, Inc.*, No. 1:04–cv–1611 (LAK), 2007 U.S. Dist. LEXIS 18401, at *8–9 (S.D.N.Y. Mar. 7, 2007), provides a third example of why it is important for district courts to have discretion to approve such remedies in appropriate settlements. The *White* case was a class action challenging the defendants' sales to landlords of "a list of individuals who have been involved in landlord–tenant litigation." *Id.* at *3. The way Defendants aggregated and sold this publicly available information allowed landlords to "blacklist" and reject prospective tenants based solely on whether they had ever been parties to a landlord–tenant action, no matter what the outcome of that action. While legal in theory, the list ended up stigmatizing certain tenants unfairly. *See id.* at *4.

To resolve these claims, the parties in *White* agreed to a settlement including some changes in the list and the creation of a settlement fund of $1,900,000. *Id.* at *4–5. The settlement provided in advance that "[a]ny part of the $ 1.9 million left [over] . . . would be donated to appropriate governmental and/or charitable entities 'to further the goal of increasing awareness of tenant screening and the duties and obligations under' pertinent laws." *Id.* at *5.

Given that the class members were a highly transient population of low-income tenants, often difficult to locate or loath (for a variety of reasons) to participate in a court-related proceeding, there was in fact a residue left over from the settlement fund. The Foundation was selected to ensure that this residue was distributed to, and properly used by, appropriate entities for the designated purposes stated in the settlement. The funds were provided to multiple legal-services providers, a housing-court task force, and an advocacy project for neighborhood economic development. These entities in turn used the funds to provide housing court "hotlines" that handled thousands of calls; to staff help stations (in multiple languages) at housing courts; to prepare and disseminate training materials on tenant screening (including online materials with forms for removal of names improperly included on screening reports); and to provide training both to landlords and tenants on tenant screening. The result was to help prevent, and to help remedy, the improper screening that had been the injury at the heart of the underlying case. Had *cy pres* not been available,

the only choice would likely have been to allow the residual funds to escheat to the state. The *cy pres* remedy defined in the settlement itself and approved by the district court certainly fit the specific goal of the plaintiffs in *White* better than a payment into the general fund of the State of New York would have. *See generally In re Xpedior Inc.*, 354 B.R. 210, 233–41 (Bankr. N.D. Ill. 2006) (explication of some of the issues in the debate about escheat versus *cy pres*).

II. There are strong existing protections against abuse of *cy pres* remedies.

As the examples above show, *cy pres* remedies can be not only beneficial, but essential in ensuring that justice is done in connection with certain Rule 23(b)(3) class-action settlements. *See also, e.g.*, Brief of the American Bar Association as *Amicus Curiae* in Support of Neither Party, *Frank v. Gaos*, No. 17–961, at 5, 9–14 (U.S. July 16, 2018) (benefits of *cy pres* remedies in access to justice). Petitioners do not now argue that the Constitution or any federal statute directly precludes the use of *cy pres* to achieve these results.[3] Nor have they provided

[3] The closest Petitioners come is an assertion that *cy pres* remedies could "infringe upon the First Amendment rights of class members by requiring them to subsidize political organizations they disapprove of without their explicit consent." Pet. Br. at 17. But this risk, if it exists at all, is not a widespread one like the compulsory "agency fees" paid by public employees to labor organizations. *See Janus v. Am. Fed'n. State, County, and Mun. Employee, Council 31*, 138 S.

record evidence of the frequency of any supposed abuse of the remedy, or demonstrated that district courts simply "rubber stamp" requests for it. In fact, as the *Grinnell* case shows, district courts do reject particular *cy pres* requests and appellate courts do reverse *cy pres* remedies when that use is deemed improper in a particular case. *See, e.g., Klier v. Elf Atochem N. Am.*, 658 F.3d 468, 479 (5th Cir. 2011); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).[4]

Given this lack of record evidence of a widespread problem with the discretionary use of *cy pres* remedies, this Court should not discount the already strong existing protections against efforts to cause abuse of that discretion. For example, the rules of ethics promulgated by the Association, and adopted by the Appellate Division of the Supreme Court of the State of New York to govern all lawyers licensed in New York, *require* lawyers in class actions to maintain loyalty to their respective clients, candor with the courts in which they appear, reasonableness in fees, and avoidance of prejudice to

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Ct. 2448, 2463–64, 2484–85 (2018). In any event, such issues are simply not ripe for consideration on this record.

[4] The statistical analysis in Martin H. Redish, Peter Julian, and Samantha Zyontz, *Cy Pres Relief and the Pathologies of Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 717 (2010), is not to the contrary. The authors admit that they removed from their incomplete data set all instances where courts "rejected a *cy pres* award." *Id.* at 652 & n.163. This means their analysis is not meaningful in determining whether district courts do a good job exercising discretion or not.

the administration of justice. *See, e.g.*, N.Y. COMP. CODE R. & REGS. tit. 22, § 1200, Rules 1.1(c), 1.2(a), 1.5(a), 1.8(g), 3.1, 3.3(a), 3.4(a), 4.1, 8.3(a), 8.4(a), (c), (d) (2018). Attorneys can be, and are, disciplined for violations of these rules. Each restriction the rules impose is therefore a barrier to the specter of pervasive *cy pres* misuse, "gamesmanship," and conflicts raised by Petitioners. *See, e.g.*, Pet. Br. at 22–49, 54–56.

Nor are such ethical protections unique to New York. Every state has similar rules. Every United States district court (including the one that approved the *cy pres* remedy in this case) imposes those rules, or similar rules, on the lawyers appearing before it. *See Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993) (citing *In re Snyder*, 472 U.S. 634, 645 n.6 (1985)); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000). In addition, the behavior of lawyers advocating for *cy pres* remedies is subject to malpractice claims with respect to that issue. *See, e.g., Vermont Pure Holdings, Ltd. v. Berry*, No. 06–01814 (BLS1), 2010 Mass. Super. LEXIS 71 (Mass. Super. Ct. Feb. 8, 2010). *See also, e.g., Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 69 P.3d 965 (Cal. 2003). *See generally Wyly v. Weiss*, 697 F.3d 131 (2d Cir. 2012); *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328 (2d Cir. 2006); *Thomas v. Albright*, 77 F. Supp. 2d 114 (D.D.C. 1999), *aff'd sub nom. Thomas v. Powell*, 247 F.3d 260 (D.C. Cir. 2001).

And even beyond rules of ethics and threats of malpractice liability, the Federal Rules of Civil Procedure give a protection directly to each class member with respect to any undesired *cy pres* remedy. Under Rule 23(c)(2)(B)(v), absent members of a class certified under Rule 23(b)(3) must receive notice and the opportunity to opt out. This requirement means that if any class member disagrees with a particular *cy pres* remedy, that class member can choose not to participate in the settlement.

As the experience of the Foundation demonstrates, settlement documentation can often enhance this protection by addressing in advance the use of *cy pres* with respect to residual funds. *See, e.g.*, Amended Stipulation of Settlement, *Zwickel v. Taro Pharm. Indus. Ltd.*, No. 04–cv–5969–RMB, at ¶ 8 (S.D.N.Y. Mar. 25, 2013) (typical residual clause providing that "[a]ny amount remaining . . . after all payments are made . . . shall be re-distributed" down to a minimum per-class member amount after expenses and that "[i]f any funds remain," the residue will be "contributed to [a] . . . charity to be agreed upon by the parties and approved by the Court."), *as included at page 7 of "so ordered" application approving distribution to the Foundation. See also West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 734 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) (notice that if a class member did not opt out of the class, and also did "not file a claim, this latter choice constitute[d] an authorization for use for the benefit of all citizens of the government entity involved (in such manner as

the Court might direct)." And if settlement documentation does not address a *cy pres* remedy for residual funds in advance, district courts have the power, under Rule 23(e)(4), to order further notice if necessary. (Of course, if a court properly applies practices such as those in the American Law Institute's PRINCIPLES OF THE LAW, AGGREGATE LITIGATION (2010) (the "ALI PRINCIPLES"), *see infra* at 18–19, a class will have no meaningful claim to any residual amount, and thus no need of further notice. *See generally* Wilber H. Boies and Latonia Haney Keith, *Class Action Settlement Residue and* Cy Pres *Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POLICY & THE LAW 267 (2014).)

III. Existing policy-making institutions are well suited to address the issue of *cy pres* remedies in class-action settlements generally.

As the experiences of the Foundation show, *cy pres* can provide necessary solutions to unique problems in certain Rule 23(b)(3) class-action settlements, all consistent with the command and intent of Rule 23(e)(2). To the extent that Petitioners or certain *amicus curiæ* have asserted any valid policy concerns about *cy pres* remedies in the abstract, however, there are better ways to address them than a general rule devised from this one particular case.

The American Law Institute, for example, has studied *cy pres* in class-action settlements at some

length. *See* ALI PRINCIPLES § 3.07. That study has produced not only a general statement of the law consistent with the views of *amici* in this brief, but also a set of "best practice" principles to advance the law. *See id.* § 3.07 cmt. a.

Those principles are simple. First, distribute settlement proceeds directly to class members if that can be done with reasonable effort in an economically viable way. *Id.* § 3.07(a). Second, redistribute any leftovers unless the amounts are too small, or doing so would be impossible or unfair. *Id.* § 3.07(b). Third, if distribution or redistribution is not viable, have the parties identify one or more *cy pres* recipients "whose interests reasonably approximate those being pursued by the class." *Id.* § 3.07(c). Fourth, if that is not possible, then the "court may approve a recipient that does not reasonably approximate the interests being pursued by the class." *Id.* A number of courts have begun using these principles as guidance in the exercise of their discretion in particular cases with respect to distribution of proceeds from class-action settlements, to apparent good effect. *See, e.g., id.* § 3.07 and *cases cited in cumulative annual pocket part.* The principles appear to be working.

The Federal Rules Advisory Committee (the "Committee"), another entity well suited to deal with policy issues of the kind raised abstractly by Petitioners, recently considered *cy pres* in connection with proposed revisions to Rule 23. While not a principal focus of the Committee at the time, the identification of the issue nonetheless produced

substantial public commentary. *See, e.g.*, Advisory Comm. on Civ. R., AGENDA BOOK FOR MEETING IN AUSTIN, TEX., at 137, 147–48, 152–54, 162, 164, 167, 183, 186–87, 189, (Apr. 25–26, 2017), *available at*: http://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf. Given commentary received, the Committee decided to defer action on the issue. It chose not, for example, to rush to propose rules along the lines of what Petitioners wish this Court to impose by fiat.

Finally, together with the current status of the Committee's proceedings, the absence of federal legislation forbidding or limiting *cy pres* remedies matters. Legislatures are well able to consider the policy issues involved in the use of *cy pres* remedies generally. The legislatures and rules advisory committees of numerous states, of widely varying political sensibilities, have considered such matters, particularly as to residual funds in class-action settlements. *Compare, e.g.*, CAL. CIV. PROC. CODE § 384 (Deering 2018) *with* N.C. GEN. STAT. § 1–267.10 (2018). These state policymakers also typically recognize that courts must still have discretion with respect to any *cy pres* remedy, either as to an entire amount or as to a defined portion of it. *Compare, e.g.*, COL. R. CIV. P. 23(g)(2) (at least 50% of residual funds must go to the Colorado Lawyer Trust Account Foundation, but the balance may go "to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified

class") *with* HAW. R. CIV. P. 23(f) (complete discretion given to court "to approve the timing and method of distribution . . . and . . . the recipient(s) of residual funds, as agreed to by the parties"). *See also, e.g.*, CAL. CIV. PROC. CODE § 384(c); CONN. PRAC. BOOK § 9–9(g)(2); 735 ILL. COMP. STAT. 5/2–807 (2018); IND. R. TRIAL P. 23(f); KY. CIV. R. 23.05(6); LA. SUP. CT. R. XLIII § 2; MASS. R. CIV. P. 23(e)(2); ME. R. CIV. P. 23(f)(2); N.C. GEN. STAT. § 1–267.10(b); NEB. REV. STAT. 25–319.01(2) (West 2018); N.M. R. ANN. 1–023(G)(2) (Michie 2018); OR. R. CIV. P. 32(O)(2); PA. R. CIV. P. 1716(b); P.R. LAWS ANN. tit. 32A, app. V, R. 20.6(b) (2017) (no official translation); S.C. R. CIV. P. 23(e)(2); S.D. CODIFIED LAWS § 16–2–57 (2018); TENN. R. CIV. P. 23.08; WASH CIV. R. 23(f)(2); W. VA. R. CIV. P. 23(f)(2); WIS. STAT. § 803.08(10)(b)(1) (West 2018).

The United States Congress and the Federal Rules Advisory Committee can obviously consider the same array of policy issues considered by independent organizations such as the American Law Institute, or by state rules advisory committees, or by state legislatures. Those federal institutions are no less well suited to resolving such issues than their nongovernmental counterparts or state equivalents. If they choose not to do so, that does not mean that this Court must then assume a general policy-making role through the imperfect vehicle of a specific litigated case.

CONCLUSION

This Court should affirm that, while the inclusion of a *cy pres* component is not required under Federal Rule of Civil Procedure 23(e) to settle a case, district courts have broad discretion to approve or apply such a remedy when appropriate.

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No. 17-961

IN THE
SUPREME COURT OF THE UNITED STATES

THEODORE H. FRANK and MELISSA ANN HOLYOAK,
Petitioners,
v.

PALOMA GAOS, *on behalf of herself and all others similarly situated, et al.,*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF OREGON, CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW YORK, NORTH CAROLINA, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In a class action where distributing funds to the class is not feasible, can a settlement that distributes those funds on a *cy pres* theory to third-party organizations working on issues that benefit the class be "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2)?

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INTEREST OF THE AMICI STATES

This case concerns whether a settlement agreement in a class action is "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2) where the settlement provides *cy pres* funds to third-party organizations that indirectly benefit the class when direct distribution to class members is not feasible. The states have a strong interest in protecting their residents from tortious or illegal conduct, including through *cy pres* relief when warranted. In appropriate circumstances, *cy pres*-only relief protects the interests of class members because it allows a remedy for the injuries class members have suffered when the available funds are too small for individual distribution. *Cy pres* distribution of residual funds vindicates the interest of the class by directing those amounts to entities that will indirectly benefit the class instead of returning the funds to the defendant. By providing a remedy to injured class members, *cy pres* relief also holds defendants accountable for their wrongdoing. Moreover, the Class Action Fairness Act provides an express role for the states in evaluating class action settlements in federal court. Under CAFA, the states have frequently alerted courts to class action settlements that are inadequate, including those that misuse *cy pres* relief. The courts, with help from the states, can ensure that class action settlements that provide for *cy pres* relief are fair, reasonable, and adequate under Rule 23.

The states also have a strong interest in protecting state laws governing *cy pres* relief from unfounded constitutional challenges. Although the question

presented here concerns only the proper interpretation of a federal rule, some of the arguments made by petitioners and their *amici* go beyond the question presented and address the constitutionality of *cy pres* relief in class actions generally. Those arguments, if accepted, could affect the law in the majority of states that have made a policy decision to recognize *cy pres* relief in class actions in certain circumstances. Twenty-three states expressly authorize the distribution of residual class action funds to *cy pres* recipients. In a substantial number of other states, state courts have approved class action settlements containing *cy pres* relief under the applicable statutes and rules even where those states do not have an express *cy pres* statute. Those state laws and court rulings are constitutional, and the states have an interest in explaining why.

The states provide this brief to explain the importance of *cy pres* relief as a tool for disbursing residual class-action funds and as an appropriate substitute remedy when it is not feasible to distribute funds to class members. Beyond the merits of the particular *cy pres* provision at issue in this case, the states have a compelling interest in supporting the availability of *cy pres* relief under their own laws and as approved by their own courts.

SUMMARY OF ARGUMENT

Cy pres relief is a vital tool for providing a remedy that benefits class members when a direct disbursement is not feasible and for distributing re-

sidual class action proceeds. State legislatures, state courts, Congress, and the federal courts have all recognized that *cy pres* relief has a role to play in class actions. Many states expressly authorize *cy pres* disbursements of residual class action funds, and Oregon and New Mexico expressly authorize *cy pres*-only disbursements. In other states, the courts have permitted—under more general state laws—*cy pres*-only settlements and *cy pres* disbursement of remainder funds when appropriate. In CAFA, Congress expressly authorized *cy pres* disbursements in coupon settlements. And the federal courts have long recognized that *cy pres* relief is consistent with Rule 23 when it provides a fair, reasonable, and adequate remedy for class members. In those federal class actions, the states have served as a check against improper *cy pres* awards by alerting the courts to inappropriate or inadequate settlements.

The lesson from the experience of the states is that *cy pres* relief is an important remedy in class actions when employed in the appropriate circumstances and under close supervision by the courts. *Cy pres* relief prevents defendants from retaining damages or restitution amounts that were properly awarded but not claimed or not amenable to distribution, affords an adequate remedy to injured class members when direct compensation is impractical or impossible, and helps the parties craft efficient settlement agreements. This Court should affirm because *cy pres* relief can be a legitimate and appropriate remedy in class actions under state and federal law, and be-

cause the lower courts correctly held that the settlement here was fair, reasonable, and adequate.

In addition to petitioners' challenge under Rule 23, petitioners and several *amici* argue that *cy pres* distributions violate the Due Process Clause and the First Amendment. But those arguments were not raised in the courts below, and this Court should decline to address them in the first instance. In any event, the constitutional objections are misplaced.

First, *cy pres* distributions do not pose any inherent due process problems. Rather, such distributions merely require courts to evaluate the same considerations that apply to class actions generally to protect the rights of absent class members.

Second, *cy pres* distributions do not violate the First Amendment by compelling speech. The concerns that animate the Court's compelled speech jurisprudence are wholly absent from the *cy pres* context, both generally and on the facts of this case. A *cy pres* distribution in a federal class action cannot be a compelled subsidy for speech because class members have the opportunity to opt out of the class. Moreover, for *cy pres* distribution of remainder funds, those funds could have been claimed by class members but were not. Class members are not compelled to subsidize anyone's speech when those residual funds are directed to *cy pres* recipients. But even if the compelled speech doctrine were applicable, *cy pres* relief is permissible under that doctrine because it is a narrowly tailored remedy that vindicates the states' and

class members' interests in obtaining redress, albeit indirectly, for injuries caused by a defendant and in holding such a defendant accountable.

ARGUMENT

A. *Cy pres* disbursements are authorized under state and federal law as a way to afford relief to class members when direct compensation is infeasible.

Cy pres relief originated as a common law doctrine for distributing funds from a charitable trust to a substitute beneficiary when the original intent of the testator could not be fulfilled. In the 1970s, courts began to apply the doctrine in class actions as a way of distributing funds that are left over after class claims have been fulfilled or when distribution to the class would not be feasible. *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 171-73 (3d Cir. 2013) (discussing development of *cy pres* distributions in class actions). As detailed below, the majority of states have expressly authorized *cy pres* disbursements in class actions either through legislative act or court decision. Under CAFA, federal law expressly authorizes *cy pres* distributions for funds remaining in coupon settlements. The states also receive notice when their residents will be subject to a class action settlement in federal court and have the opportunity to inform the court when the settlement is inadequate, an opportunity that states have frequently used.

Cy pres relief plays an important role in vindicating the rights of injured class members. One purpose of class action litigation is to provide a remedy to the class when it would be impossible or impracticable for an individual litigant to pursue a claim. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Class actions augment and amplify the ability of the states to enforce substantive law by providing an avenue for private enforcement. *Cy pres* relief is an important component of that private enforcement because it provides a remedy when individual recovery would be impossible. Without the option of *cy pres* relief, particularly *cy pres*-only distributions, meritorious cases would not be brought and class members would have no recourse, simply because the size of their injury was small relative to the costs of disbursing an award. By providing a remedy for class members with a small individual injury, *cy pres* relief furthers the core function of class actions. This Court should affirm that *cy pres* remedies, including *cy pres*-only settlements, are permissible under Rule 23.

1. State legislatures and state courts recognize the validity of *cy pres* remedies in appropriate circumstances.

Twenty-three states have statutes or court rules that authorize, and in some cases require, *cy pres* distributions of residual funds that result from a class action settlement or judgment:

- **California:** California Code of Civil Procedure § 384

- **Colorado:** Colorado Rule of Civil Procedure 23(g)
- **Connecticut**: Connecticut Superior Court Rules § 9-9(g)
- **Hawaii**: Hawaii Rule of Civil Procedure 23(f)
- **Illinois**: Illinois Code of Civil Procedure § 2-807
- **Indiana**: Indiana Rules of Trial Procedure 23(f)
- **Kentucky**: Kentucky Rules of Civil Procedure 23.05(6)
- **Louisiana**: Louisiana Supreme Court Rule XLIII
- **Maine**: Maine Rule of Civil Procedure 23(f)
- **Massachusetts**: Massachusetts Rule of Civil Procedure 23(e)
- **Minnesota**: Minnesota Rule of Civil Procedure 23.05(e)
- **Montana:** Montana Rule of Civil Procedure 23(i)(3)
- **Nebraska**: Nebraska Revised Statutes 30-3839
- **New Mexico**: New Mexico Rule of Civil Procedure 1-023(G)
- **North Carolina:** North Carolina General Statute § 1-267.10 (a)
- **Oregon**: Oregon Rule of Civil Procedure 32 O

- **Pennsylvania**: Pennsylvania Rule of Civil Procedure 1716
- **South Carolina**: South Carolina Rule of Civil Procedure 23(e)
- **South Dakota**: South Dakota Codified Law 16-2-57
- **Tennessee**: Tennessee Rule of Civil Procedure 23.08
- **Washington**: Washington Rule of Civil Procedure 23(f)
- **West Virginia**: West Virginia Rules of Civil Procedure 23(f)
- **Wisconsin**: Wisconsin Statute 803.08(10)

Some states also have statutes that authorize *cy pres*-only remedies in particular circumstances. For example, Oregon and New Mexico expressly authorize *cy pres*-only relief when it would be impracticable to distribute damages to the class directly. Or. R. Civ. P. 32 O ("If any amount awarded as damages is not claimed within the time specified by the court, or if the court finds that payment of all or part of the damages to class members is not practicable" the court shall order *cy pres* disbursements); N.M. R. Civ. P 1-023(G) (authorizing *cy pres* disbursement "if it is impossible or economically impractical to distribute the common fund to the class as all").

In other states and the District of Columbia, courts have approved the use of *cy pres* distribution of residual funds or *cy pres*-only settlements:

- **Arizona**: *Charles I. Friedman, P.C. v. Microsoft Corporation*, 141 P.3d 824, 828 (Ariz. Ct. App. 2006) (describing settlement containing *cy pres* distribution of residual funds).

- **District of Columbia**: *Boyle v. Giral*, 820 A.2d 561, 570 (D.C. 2003) (approving *cy pres*-only settlement)

- **Iowa**: *Zaber v. City of Dubuque*, 902 N.W.2d 282, 292 (Iowa Ct. App. 2017) (approving *cy pres* distribution of residual funds)

- **Kansas**: *Premier Pork, Inc. v. Rhone-Poulenc, S.A.*, No. CV2000-3, 2006 WL 1388464, at *4 (Kan. Dist. Ct. Jan. 31, 2006) (approving *cy pres* distribution of residual funds)

- **Michigan**: *Cicelski v. Sears, Roebuck & Co.*, 348 N.W.2d 685, 690-91 (Mich. Ct. App. 1984), *rev den*, 369 N.W.2d 194 (Mich. 1985) (concluding that *cy pres* relief is permissible in appropriate circumstances)

- **Missouri**: *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258, 262 (Mo. 2013) (approving *cy pres* distribution of residual funds)

- **New Jersey**: *Muise v. GPU, Inc.*, 851 A.2d 799, 823–24 (N.J. Super. Ct. App. Div. 2004) (noting availability of *cy pres* relief, but reject-

ing argument that possibility of such relief warranted certification of the class)

- **New York**: *Klein v. Robert's Am. Food*, 28 A.D.3d 63, 74 (N.Y. App. Div. 2006) (rejecting coupon settlement when court did not consider availability of *cy pres* distribution)

- **Texas**: *Northrup v. Sw. Bell Tel. Co.*, 72 S.W.3d 16, 22 (Tex. Ct. App. 2002) (approving *cy pres*-only settlement)

We are unaware of any state court or state legislature that has categorically rejected *cy pres* disbursements as an available tool in class actions.

Some states have adopted detailed criteria for selecting *cy pres* recipients. *See, e.g.*, 735 Ill. Comp. Stat. 5/2-807(a) (defining organizations eligible to receive distributions of residual funds). Some states require a minimum percentage of the *cy pres* funds to be distributed to legal aid organizations. *See, e.g.*, Or. R. Civ. P. 32 O; Mont. R. Civ. P. 23(i)(3). Other states give the trial court discretion in selecting *cy pres* recipients, but acknowledge that legal aid organizations are an appropriate recipient. *See* Tenn. R. Civ. P. 23.08. Uniformly, the state laws, court rules, and court decisions limit *cy pres* disbursements to organizations that would further the interests of the class or further the state's interest in justice. *See, e.g.*, Cal. Civ. P. Code § 384(a); *Zaber*, 902 N.W.2d at 291-92.

Additionally, state courts have effectively supervised *cy pres* relief in class actions. State laws governing class actions impose similar requirements to federal law concerning court approval of settlements and class awards, and the due process requirements that animate the federal rules extend to state law as well. Like the federal courts, the state courts scrutinize proposed *cy pres* relief to ensure that class interests are protected and adequately remedied.

A recent Oregon class action, *Scharfstein v. BP West Coast Products, LLC*, 2016 WL 9735513 (Or. Cir. May 9, 2016), *aff'd*, 292 Or. App. 69 (2018), provides an example of how a trial court can effectively monitor the creation and distribution of a *cy pres* fund. In that consumer protection case, following a jury verdict and claims process, the trial court conducted several days of hearings and received extensive testimony to determine the appropriate *cy pres* recipients of approximately $66 million in residual funds. *Id.* at *1. Under Oregon Rule of Civil Procedure 32 O, the court was required to distribute at least half of the remainder fund to the Oregon Legal Services Program. The other half could be distributed to that same program or to a third-party organization for purposes "directly related to the class action or directly beneficial to the interests of class members." Or. R. Civ. P. 32 O.

After hearing from the parties and an array of expert witnesses in the relevant areas—including testimony on *cy pres* awards generally, the provision of

legal services for low income clients, consumer protection, and non-profit management—the court entered a detailed order adopting a *cy pres* plan to distribute the funds. 2016 WL 9735513 at *2. The court first determined that half of the funds should go to consumer protection, because that was the basis of the class action. *Id.* at *3 Because no entity existed in Oregon that could serve class interests and make good use of the large award, the court authorized use of the majority of the *cy pres* funds to create a consumer protection nonprofit that would serve the interests of the class. *Id.* at *4-5. The court included a detailed process for establishing the Oregon Consumer Protection Center, including an appointment of the Oregon Community Foundation, a nonprofit organization with extensive experience in asset management, to manage the *cy pres* funds. *Id.* at *5-6. The court also authorized a distribution to the University of Oregon School of Law for research into consumer issues. *Id.* at *6. The court issued a detailed *cy pres* plan to guide the formation of the new nonprofit and to guide use of the *cy pres* funds. *Id.* at *6-7.

The process followed in *Scharfstein* shows that the state courts, with the involvement of the parties, can effectively and fairly manage the distribution of *cy pres* funds to serve the interests of class members even in unusually large or complex cases. Courts in other states have engaged in similar processes in granting *cy pres* relief. *See, e.g., In re Microsoft I-V Cases*, 37 Cal. Rptr. 3d 660, 676-77 (Cal. Ct. App. 2006) (holding that the trial court did not abuse its discretion in approving a settlement agreement con-

taining a provision for *cy pres* distribution of residual funds when the trial court found—based on extensive testimony—that the distribution would provide a benefit to class members).

By contrast, state courts have not hesitated to rejected *cy pres* distributions proposed by the parties when they were inappropriate. *See, e.g., Kansas Ass'n of Private Investigators v. Mulvihill*, 159 S.W.3d 857, 862 (Mo. Ct. App. 2005) (holding that the trial court abused its discretion when, among other things, it distributed *cy pres* funds to charities unrelated to the activities of the parties in the suit and in a county where none of the class members lived); *Ousmane v. City of New York*, 22 Misc. 3d 1136(A), 880 N.Y.S.2d 874 (N.Y. Sup. Ct. 2009) (rejecting a motion for *cy pres* distribution of residual funds where the defendant was a government entity and the residual funds belonged to "a relatively small number of readily identifiable" plaintiffs); *Cavalier v. Mobil Oil Corp.*, 898 So.2d 584 (La. Ct. App. 2005) (holding that the trial court erred by disbursing twenty percent of remainder funds to a nonprofit that did not serve the area where class members lived).

The states allow *cy pres* disbursements in appropriate circumstances because they provide a benefit to class members by directing funds to groups that have similar interests to the class or to legal aid organizations that promote access to justice. A majority of states have determined that *cy pres* relief is preferable to other methods of distributing remainder funds, such as returning undistributed funds to the

defendant, increasing the pro rata share to class members who make claims, or giving those funds arbitrarily to some portion of the class. The states' experience shows that *cy pres* relief can be administered in a fair manner that adequately protects the rights of the class. We do not suggest that *cy pres* relief is always appropriate or that the doctrine cannot be misapplied. But the potential problems that can accompany *cy pres* relief are largely the same problems that relate to all mass litigation. The courts—with the help of the states—can ensure that the interests of class members are adequately represented and that settlement agreements, whether they include *cy pres* relief or not, are "fair, reasonable, and adequate."

2. In federal class actions, the states play a role in ensuring the adequacy of settlements, including those providing *cy pres* relief.

Like the state legislatures and state courts, every circuit court to address *cy pres* relief in class actions has concluded that such relief may be appropriate in the right case.[1] And in the Class Action Fairness Act, Congress expressly authorized federal courts to require *cy pres* distributions in class action

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[1] *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *In re Baby Products*, 708 F.3d at 173; *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 & n.15 (5th Cir. 2011); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004); *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997).

settlements that provide coupon remedies. 28 U.S.C. § 1712(e).[2] Although that provision is limited in scope, it shows that Congress has recognized that *cy pres* is a needed tool for distributing class action proceeds in some circumstances.

When a federal class action settles, the states can help the courts apply Rule 23 to ensure that the settlement is a good deal for their respective citizens. Under CAFA, 28 U.S.C. § 1715, the states receive notice of proposed class action settlements, which allows the states to "provide a check against inequitable settlements." S. Rep. No. 109-14, at 35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 34. The notice provision also serves to "deter collusion between class counsel and defendants to craft settlements that do not benefit the injured parties." *Id.* The states have been actively involved in monitoring class action settlements and notifying the district courts when those settlements are improper. *See, e.g., Radosti v. Envison EMI, LLC*, 717 F. Supp. 2d 37, 49-50 (D. D.C. 2010) (discussing opposition to *cy pres* award raised by Attorneys General).

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[2] 28 U.S.C. § 1712(e) provides, in relevant part: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties."

3. The Court of Appeals correctly affirmed the district court's ruling approving the *cy pres* relief in this case.

With respect to the *cy pres* relief in this case, the district court and the Court of Appeals were correct to approve the settlement. Determining whether a settlement agreement is "fair, reasonable, and adequate" under Rule 23 is entrusted to the discretion of the trial court. *In re Baby Products*, 708 F.3d at 175. There is nothing in Rule 23 to suggest that a *cy pres*-only settlement cannot satisfy that standard so long as the district court meets its duties to scrutinize the settlement and ensure that class members' interests are protected. For the reasons explained by respondents, the trial court did not abuse its discretion by concluding that (1) the settlement fund was the appropriate size in view of the harms to class members and strength of the legal claims; (2) distribution to the class was not practicable; (3) this *cy pres* distribution would provide meaningful, if indirect, benefit to the class as a whole; and (4) the recipients of the *cy pres* funds were appropriate.[3] *See* Class Res. Br. 48-53; Google Br. 29-56. Accordingly, this Court should affirm the Ninth Circuit's decision.

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[3] A group of states filed an *amicus* brief in support of petitioner. That brief, however, objects only to *cy pres* relief or *cy pres*-only settlements in general; it does not argue that there was anything wrong in particular with the settlement in this case. As explained above, neither Rule 23's fairness requirement nor CAFA categorically prohibits *cy pres*-only settlements.

B. *Cy pres* disbursements do not violate the Due Process Clause or the First Amendment.

Although the validity of state law is not before the Court, several *amici* (and petitioners very briefly) assert that *cy pres* relief has constitutional flaws that could, if their arguments were accepted, impact the states' authorization of *cy pres* relief. Specifically, *amici* argue that *cy pres* distributions raise concerns under the Due Process Clause and that such distributions violate the First Amendment by compelling the speech of absent class members. Those arguments are without merit and should not affect this Court's analysis of the Rule 23 issue.

To begin, *amici*'s due process and First Amendment arguments were not raised in the courts below and thus are not properly presented for the first time here. *See Atl. Marine Constr. Co. v. Dist. Ct. for the Western Dist. of Texas*, 571 U.S. 49, 61 (2013) (declining to address argument by *amicus* that had not been raised by the parties "at any stage of this litigation"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). *Amici* do not explain why it would be appropriate for this Court to address the constitutional questions in the first instance, when their arguments were not developed previously. In any event, if the Court were to consider the constitutional challenges, it should reject them.

1. *Cy pres* relief does not violate the Due Process Clause.

The Court has long held that aggregate litigation—when properly supervised by the trial court—can provide adequate representation and protection for the rights of absent class members. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Hansberry v. Lee*, 311 U.S. 32, 43-44 (1940). In light of the duty to protect absent class members and the burdens of aggregate litigation, class actions require "rigorous analysis" by the trial court to ensure compliance with the rules and with due process. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-52 (2011). In considering a *cy pres* distribution, state and federal courts can and do engage in that same rigorous analysis to ensure that the distribution is appropriate under state or federal law.

Amici assert that *cy pres* relief raises a host of due process problems. Cato Br. 4-24; Lawyers for Civil J. Br. 20-21. But most of the concerns they raise actually go to whether class treatment was appropriate, whether the representation was adequate, and whether counsel and the court behaved ethically. None of those issues concern whether there are inherent due process problems with *cy pres* relief. Moreover, on appeal, no one challenged the district court's decision on class certification, the adequacy of representation, or the adequacy of class notice. *See* Pet. App. 17-21, 59-60.

Amici also assert that *cy pres*-only settlements violate due process because they provide no direct benefit to the class, and so a class member has given up a meaningful property interest in the form of a claim against the defendant and gotten nothing in return. Cato Br. 21-22. But that argument disregards the foundational principles underlying both class actions and *cy pres* relief. As noted earlier, one purpose of class action litigation is to allow aggregate claims to be brought when individual claims would be impossible to litigate. *Amchem*, 521 U.S. at 617. Relatedly, *cy pres* relief serves as a way to afford relief to the class when direct disbursement to class members is impossible or impracticable. When many plaintiffs have suffered a small harm and distribution to the class would be impossible, *cy pres* relief may be the only realistic remedial option, aside from leaving the plaintiffs with no remedy whatsoever. *Cy pres* relief also makes it possible to hold defendants accountable for inflicting small injuries on millions of people.

Stated simply, *cy pres* relief does not raise any intractable due process concerns. Rather, *cy pres* relief requires only that the trial court consider the same procedural issues and perform the same rigorous analysis as in any class action settlement.

2. *Cy pres* relief does not violate the First Amendment.

Several *amici*, and petitioners very briefly, also assert that *cy pres* relief in any form violates the First Amendment because that relief compels absent class

members to subsidize the speech of groups—the *cy pres* recipients—with whom class members may not agree. *See* Cato Br. 29-34; Center for Ind. Rights Br. 3-10; Center for Const. Juris. Br. 6-8; Lawyers for Civil J. Br. 21-22; Pet. Br. 36-37. The Court should reject that argument.

As a threshold matter, court approval of a settlement agreement is not state action that implicates the First Amendment. Here, the *cy pres*-only settlement is an agreement between private parties to resolve their dispute. Although the court is required to ensure that the interests of absent class members have been protected, court approval of the agreement does not transform the actions of private parties into state action for First Amendment purposes. *See In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1113-14 (10th Cir. 2017), *cert. denied sub nom. Speedway LLC v. Wilson*, 138 S. Ct. 1299 (2018) (rejecting a compelled-speech challenge to the distribution of settlement funds to state regulators on that basis).

Beyond that, *cy pres* relief does not involve compelled speech. The First Amendment generally prevents the government "from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (citations omitted). But *cy pres* distributions do not compel absent class members to subsidize the speech of recipients of the funds even though class members may not agree with that speech. *Cy pres* distributions are not analogous to a compelled

subsidy, because class members in a federal class actions are free to opt out of class at the outset or at the time of settlement. But even if *cy pres*-only relief could compel speech, it would survive First Amendment scrutiny.

a. *Cy pres* relief does not compel speech.

Amici rely on *United Foods* as well as recent cases concerning union fees charged to nonmembers, *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298 (2012), and *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). But those cases do not suggest that *cy pres* relief is a form of compelled speech.

In *United Foods*, the Court addressed whether a mandatory assessment for mushroom advertising violated the First Amendment when the assessment was used for generic advertising to which a producer objected. The Court concluded that compelling an unwilling producer to subsidize advertisements with which it disagreed violated the First Amendment. 521 U.S. at 413. In reaching that conclusion, the Court emphasized that the producer had no choice but to subsidize the advertisements and noted that the producer had to remain a member of the group engaging in the offensive speech. *Id.*

Similarly, in *Knox* and *Janus*, public employees who had declined to join the union were required by state law to pay union fees, which were then used by the unions to engage in speech that the nonmembers did not support. In both of those cases, the Court re-

lied on the premise that nonmembers of unions had made their unwillingness to support union activities clear—by declining to join—but were nevertheless compelled to support union activities, which necessarily involved political advocacy and other speech. *Knox*, 567 U.S. at 312; *Janus*, 138 S. Ct. at 2460.

Unlike the producer in *United Foods* or the employees forced to pay agency fees in *Knox* and *Janus*, class members here were free to leave the class. In a class action under Rule 23(b)(3), class members have the right to opt out at the time of class certification, Fed. R. Civ. P. 23(c)(2)(B)(v), and the district court can require an additional opportunity to opt out at the time of settlement, Fed. R. Civ. P. 23(e)(4). The ability to opt out of a federal class action—which affords sufficient protection for members' rights under the Due Process Clause—necessarily means that a *cy pres* disbursement is not "compelled" in any meaningful sense.

Amici assert that the opt-out process in federal class actions is inadequate in light of the infringement on class members' First Amendment rights, again relying on *Knox* and *Janus*. Center for Ind. Rights Br. 6-10; Cato Br. 31. That argument is based on a misreading of *Knox*. That case does not stand for the proposition that opt-out notices are per se impermissible if a constitutional right is implicated. Rather, in *Knox*, the nonmembers had already declined to join the public employee unions and thus had made clear that they did not wish to support union activities. *Knox*, 567 U.S. at 312. In that context, requir-

ing nonmembers to opt out of a fee that would be used for political purposes to which nonmembers had already objected violated the First Amendment. *Id.* at 313-14. The Court in *Janus* began from a similar position: state employees who had already rejected the union could not be compelled nevertheless to support union speech by default. The opt-out process for class actions is different. In contrast to *Knox* and *Janus*, the class members in this case had multiple opportunities to opt out, and a class member needed to make that decision only once to be removed from the class. That opt-out process is not analogous to compelling a nonmember to pay union fees unless the nonmember affirmatively opts out a second time.

Again, this Court has expressly approved the opt-out process in class actions. *Phillips Petroleum*, 472 U.S. at 814. Moreover, a class member who wants to remain in the class but objects to a specific *cy pres* recipient can raise those concerns before the trial court. By providing class members the ability to opt out and to object, class members' First Amendment rights—to the extent they are implicated at all—are sufficiently protected.

Amici's argument that *cy pres* relief compels speech also fails because *cy pres* distributions necessarily involve funds that were not or could not be disbursed to class members, who had the opportunity to opt out of the class. *Amici*'s argument is premised on the notion that *cy pres* relief takes funds from class members and gives those funds to third parties. To be sure, class members have a property interest in

their claims that extends to funds resulting from a settlement or judgment. *Klier v. Elf Autochem N. Amer., Inc.*, 658 F.3d 468, 475 (2011). But the property interest in a class member's claim can only be reduced to actual funds through the class action process. When a court authorizes a *cy pres* distribution, the court necessarily determines that the funds are either unclaimed or cannot practicably be distributed. *See id.* *Cy pres* distribution of those funds does not compel an absent class member to transfer any property interest to a third party.

b. Even if *cy pres*-only relief compelled speech, it would survive First Amendment scrutiny.

In *Janus*, the Court applied "exacting scrutiny" in concluding that mandatory agency fees violated the First Amendment and declined to address whether strict scrutiny may be a more appropriate standard. *Janus*, 138 S. Ct. at 2465. But even if this Court were to apply strict scrutiny, *cy pres* relief does not violate the First Amendment. To survive strict scrutiny, the regulation of speech must be narrowly tailored to serve a compelling government interest. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015).

To the extent that a *cy pres*-only distribution could impact speech, it is narrowly tailored relief that serves a compelling government interest. In keeping with the purpose of mass litigation, the states (and the federal government) have a compelling interest in ensuring that injured class members can litigate their

claims and receive an adequate remedy, even when the value of a claim may be small, and in ensuring that wrongdoers are held accountable. *See Hansberry*, 311 U.S. at 41-42 (class actions are an "an invention of equity" that enables a suit to proceed to a judgment despite procedural barriers); *Amchem*, 521 U.S. at 617 (noting the importance of class actions in obtaining relief when individual recovery is small). That interest in ensuring the availability of an adequate remedy is no less compelling when direct disbursement of settlement funds is not feasible. *Cy pres*-only relief can provide an adequate remedy for injuries to class members who would otherwise have no recourse, and, in so doing, hold defendants accountable for conduct that causes widespread injury. The states have a compelling interest in both of those results. And because *cy pres*-only relief is appropriate in very limited factual circumstances—when funds cannot be feasibly distributed—and with court oversight, it is by definition a narrowly tailored remedy.

Nor does the record in this case support an argument that any *cy pres* funds in fact subsidized speech with which class members disagreed. *Amici*'s argument is entirely speculative, based on assumptions that members of a large class must have divergent political views and that those class members would not exercise their right to opt out or object. This Court has never applied the compelled speech doctrine as abstractly as *amici* suggest—nor could it, consistent with Article III's requirement that this Court adjudicate only cases and controversies. And the notion that the Court can assume that members

of any given class have speech-based objections to a *cy pres* distribution finds no support in this Court's cases. This case does not present a situation like *United Foods*, *Knox*, or *Janus*, where the record showed both that the challengers objected to the subsidy supporting speech and that the subsidy would, in fact, be used for objectionable speech. To the extent that a *particular* proposed *cy pres* distribution in a *particular* case raised concerns about the uses to which a recipient would put the funds, trial courts are capable of dealing with those situations as they arise.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK AND MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC. AND PUBLIC CITIZEN FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Public Citizen and Public Citizen Foundation (jointly, Public Citizen) are non-profit consumer advocacy organizations that appear on behalf of their members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process.

Public Citizen offers a unique perspective on this case because it has received cy pres distributions in appropriate cases, declined the opportunity to receive cy pres awards where it believed it was not an appropriate cy pres recipient, and represented objectors to settlements involving cy pres distributions. For example, Public Citizen represented an objector to the settlement in *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012), *cert. denied sub nom. Marek v. Lane*, 571 U.S. 1003 (2013), in which it argued that the settlement provided a cy pres distribution that did not benefit the class. As explained below, despite some missteps, as in *Lane*, the courts of appeals have correctly recognized the value of cy pres in appropriate

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

cases and developed standards by which to evaluate settlements involving cy pres distributions.

SUMMARY OF ARGUMENT

The plaintiffs in this case brought a class action against Google for violating users' privacy by disclosing their Internet search terms to third-party websites. The complaint alleged claims for violation of the Stored Communications Act and several state-law causes of action. The class includes approximately 129 million people. Following mediation, the parties entered into a settlement providing for injunctive relief, an $8.5 million settlement fund, and attorney's fees. Because distribution to the individual class members was infeasible, the settlement provided for cy pres distribution of the fund to organizations dedicated to protecting Internet privacy.

To allow appropriate use of cy pres settlements while preventing their misuse, the federal appellate courts have articulated a consistent set of standards to assess cy pres awards. The lower courts allow settlements involving cy pres payments when distributions to individual class members are impracticable or when class members to whom distributions are practicable have been fully compensated for their losses. And the courts agree that proposed cy pres awards must be carefully scrutinized to ensure that they adequately benefit class members in ways that have a sufficient relationship to the claims asserted by the class. The courts below properly applied these broadly accepted standards.

Although the standards adopted by the lower courts are well-tailored to guide a court's assessment under Rule 23(e) of whether a class-action settlement is "fair, reasonable, and adequate," the Solicitor General would add an Article III overlay to the evaluation of a cy pres settlement. Article III, however, neither limits the ability of parties to settle a case nor addresses the form of distribution of

compensatory relief. The Solicitor General's ultimate concern—that cy pres distributions may provide an insubstantial remedy—is one properly considered under the rubric of Rule 23(e) and one that the courts already consider in determining whether to approve or disapprove proposed settlements providing for cy pres.

ARGUMENT

I. The lower federal courts apply appropriate principles to assess cy pres distribution.

The common fund generated through resolution of a class action is "presumptively the property of the class members." Am. Law Inst., Principles of the Law of Aggregate Litigation § 3.07 cmt. b (2010). As the lower courts have broadly recognized, however, where "distribution of damages to the class members would provide no meaningful relief, the best solution may be what is called (with some imprecision) a 'cy pres' decree." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013). In a given case, individual distributions may not be viable, "either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable." Am. Law Inst., *supra*, § 3.07 cmt. b.

The notion of cy pres begins with the recognition that "there should be a presumed obligation" to benefit the class through distribution "to an entity that resembles, in either composition or purpose, the class members or their interests." *Id.* The alternatives of awarding no damages at all or returning undistributed funds to the defendant "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable." *Id.; see, e.g., In re LivingSocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1,

13 (D.D.C. 2013) (approving cy pres distribution "where the alternatives would be to return the funds to defendant, thereby reducing the deterrent effect of the suit, or to escheat to the state"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1356 (S.D. Fla. 2011) (approving cy pres use of funds due to class members who could not reasonably be identified because certain of the defendant bank's older transaction data was not in a reasonably searchable form, on the ground that "[w]hat would be legally unjustified here is for unclaimed funds to revert to [defendant]").

A. In many cases, direct distribution is not viable because, although the defendant's wrongdoing affected a large number of people, the amount of damages per person is small. For example, in *State of New York by Vacco v. Reebok Int'l Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996), the court approved an $8 million cy pres payment in lieu of direct payment, in the settlement of a price-fixing claim involving the sale of an estimated 1.7 million pairs of shoes, where damages were about $4 per pair. The court noted the "impracticality of attempting to distribute the settlement proceeds among the multitude of unidentified possible claimants." *Id.* "[S]uch distribution would be consumed in the costs of its own administration." *Id.* (citation omitted).

In other cases, statutory caps on damages may make individual distribution infeasible. The Fair Debt Collection Practices Act (FDCPA), for instance, caps damages in a class action at 1% of the defendant's net worth. 16 U.S.C. § 1692k(a). In a case against a debt collector for violating the FDCPA, this cap can preclude distribution to the class. For example, in an FDCPA case, a court approved "$15,000.00 as a Cy Pres payment to the Queens County Legal Aid Society for use defending consumers against lawsuits brought by debt collectors," noting that "[w]ere the case to proceed to trial, the distribution to the class

could not exceed $10,000, representing 1% of [the defendant's] net worth of $1,000,000. With a class of over 45,000 persons, this recovery would be de minim[i]s." *Reade-Alvarez v. Eltman, Eltman, & Cooper, PC*, No. CV-04-2195, 2006 WL 3681138, at *4, *7 (E.D.N.Y. Dec. 11, 2006).

Other consumer-protection statutes include similar class-action damages caps. *See, e.g.*, Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(f); Homeowners Protection Act, 12 U.S.C. § 4907(a); Truth in Lending Act, 15 U.S.C. § 1640(a)(2(B); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b); Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a)(2)(B). In class actions under these statutes, cy pres distribution provides a way to deter and punish violations of federal law, providing a benefit to the class where a large number of consumers were harmed by the statutory violation but without putting the defendant-wrongdoer out of business.

Without the cy pres option, Congress's express decision to allow claims under these statutes to proceed as class actions would be significantly undercut, and the deterrent value of federal statutory causes of action would be significantly weakened. *See also Hughes*, 731 F.3d at 676 (stating that cy pres awards "prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement" or judgment to the class members (citation omitted)).

B. The Solicitor General urges that cy pres should not be approved without "careful" scrutiny. U.S. Br. 16. The courts of appeals—including the court below—are a step ahead: They have already developed principles to guide careful consideration of cy pres settlements.

To begin with, the courts have broadly adopted the principle, discussed above, that cy pres awards are appropriate only when distribution to individual class members is not economically viable. *See, e.g., In re BankAmerica Corp.*

Sec. Litig., 775 F.3d 1060, 1064–65 (8th Cir. 2015) (stating that the cy pres "inquiry *must* be based primarily on whether 'the amounts involved are too small to make individual distributions economically viable'" (quoting Am. Law Inst., *supra*, § 3.07(a)); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 32 (1st Cir. 2012) (affirming use of cy pres where burden of locating and directing payment to additional class members would be prohibitive); *Powell v. Georgia-Pac. Corp.*, 119 F.3d 703, 706 (8th Cir. 1997) (approving cy pres distribution of remainder where it "would be extremely difficult to distribute the funds pro rata"); *In Re Agent Orange Product Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987) (noting the availability of cy pres remedies where individual payment to class members would otherwise be unmanageable).

Thus, where distribution to class members *is* feasible, courts have not allowed cy pres. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d at 1064–65 (disallowing cy pres where "from the perspective of administrative cost, a further distribution to the class was clearly feasible"); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (reversing district court order of cy pres where distribution to subclass members of unused medical-monitoring funds was feasible).

In addition, the courts scrutinize proposed recipients to ensure that cy pres awards go to "recipient[s] whose interests reasonably approximate those being pursued by the class." Am. Law Inst., *supra*, § 3.07. In evaluating proposed recipients, the courts look to factors such as "the purposes of the underlying statutes claimed to have been violated, the nature of the injury to the class members, the characteristics and interests of the class members, the geographical scope of the class, the reasons why the settlement funds have gone unclaimed, and the closeness of the fit between the class and the cy pres recipient." *In re*

Lupron Mktg., 677 F.3d at 33 (adopting "reasonable approximation test"); *see Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (stating that cy pres distribution is permissible where it "account[s] for the nature of the plaintiff's lawsuit, the objectives of the underlying statutes, and the interests of the silent class members"). Through this evaluation, courts ensure that the recipients are "tethered to the nature of the lawsuit and the interests of the silent class members." *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012).

Applying the factors set forth in cases such as *In re Lupron* and *Nachshin*, courts seek to assure that a cy pres distribution (whether as the only form of compensatory relief or of a remainder) provides an "indirect benefit" to the class that approximates that of the direct payment of damages for the injuries inflicted by the claimed unlawful conduct at issue. For example, in *Perez-Farias v. Global Horizons, Inc.*, No. CV-05-3061-RHW, 2014 WL 1399420 (E.D. Wash. Apr. 2, 2014), the court approved cy pres recipients with "lengthy track records providing [pertinent] outreach services and legal representation to farm workers in eastern Washington," *id.* at *2, but disallowed "proposed worthy charities" whose work was not as pertinent to the case and the class members, *id.* *2 n.1.

Applying the same considerations, in *In re Motor Fuel Temperature Sales Practices Litigation*, No. 07-MD-1840-KHV, 2012 WL 5876558 (D. Kan. Nov. 20, 2012), the court rejected a cy pres recipient, where "[a]lthough the Court [was] confident that [the organization] does wonderful work, its selection would not serve the interests of silent class members or the deterrence goals of underlying state consumer protection statutes" at issue in the case. *Id.* at *9 (citing *Nachshin*, 663 F.3d at 1039); *see also In re Apple iPhone/iPod Warranty Litig.*, No. CV-10-01610, 2014 WL 12640497, at *11 (N.D. Cal. May 8, 2014) (approving cy

pres recipients where "[e]ach organization focuses on consumer protection, has a demonstrated track record in research regarding and in educating and assisting consumers with the resolution of warranty-related disputes and violations of consumer protection statutes involving warranty-related issues, and has proposed using any cy pres funds to further their activities in that regard—which are the very issues raised in Plaintiffs' complaints"); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, No. 02-MD-1468-JWL, 2013 WL 2476587, at *4 (D. Kan. June 7, 2013) (approving cy pres recipient with "more than 40 years of experience and an impressive track record of advocating on behalf of" the class).[2]

Reflecting the courts' consensus principles on cy pres, the two cases on which the Solicitor General primarily relies—*In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013), and *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014)—both agree that cy pres relief, including cy pres-only relief, may be appropriate in particular cases. In *In re Baby Products*, for example, although the Third Circuit vacated a district court's approval of a cy pres settlement because the district court had lacked information pertinent to the determination whether the settlement was in the interest of the class as a whole, the court at the

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[2] The American Law Institute also recommends that "[a] cy pres remedy should not be ordered if the court or any party has any significant prior affiliation with the intended recipient that would raise substantial questions about whether the selection of the recipient was made on the merits." Am. Law Inst., *supra*, § 3.07 cmt. b. While it is unclear whether this recommendation is, for practical purposes, already incorporated in the principles that the courts apply, the decision below noted that no circuit has adopted this comment, which might be read to make the mere existence of "questions" dispositive. Pet. App. 15 n.5. Nonetheless, the court considered the point at some length and found that no substantial question existed on the facts before it. *Id.* 15–20.

same time "join[ed] other courts of appeals" in holding that cy pres distribution may be an appropriate part of a class-action settlement. 708 F.3d. at 172. The court explained that approval of a class-action settlement "is warranted when the court finds that the settlement, taken as a whole, is 'fair, reasonable, and adequate' from the perspective of the class. Inclusion of a *cy pres* provision by itself does not render a settlement unfair, unreasonable, or inadequate." *Id.* at 172–73 (quoting Fed. R. Civ. P. 23(e)(2)).

And in *Pearson*, the Seventh Circuit, while reversing approval of a cy pres settlement, did not suggest that cy pres distribution was inappropriate generally. Rather, consistent with the approach applied by the other circuits (including the court below), it stated that cy pres awards are appropriate where "it's infeasible to provide that compensation to the victims—which ha[d] not been demonstrated" in that case. 772 F.3d at 784.

Importantly, the principles adopted by the courts of appeals are not empty words, but the basis for "vigilant and realistic" review. *Id.* at 787. And applying these principles, courts have both approved and rejected cy pres settlements. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d at 1064–65 (disallowing cy pres where a further direct distribution to the class was feasible); *Reebok Int'l*, 96 F.3d at 49 (affirming approval of cy pres-only distribution, as discussed *supra* at p.4); *Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *9 (S.D. Fla. Jan. 31, 2008) (in case about misleading labeling of collectible coins, approving settlement providing for injunctive and cy pres relief "given the relatively small amount of damages the Class Members are likely to be able to establish due to the fluctuating value of the U.S. bullion coin market and the size of the individual losses," as well as "the size of the fund [and] the cost of administration"); *New York v. Salton, Inc.*, 265 F. Supp. 2d

310, 314 (S.D.N.Y. 2003) ("Because of the difficulty in identifying and locating individual purchasers of the [product], and the minimal amount of recovery an individual consumer would be entitled to compared to the cost of administering individual relief, the Court finds that the cy pres method of distribution proposed in the Settlement Agreement is reasonable and adequate."); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1307, 1311–12 (9th Cir. 1990) (invalidating a cy pres distribution to the Inter-American Fund for "indirect distribution" in Mexico, in a class action brought by undocumented Mexican workers regarding violations of the Farm Labor Contractor Registration Act, because the distribution was "inadequate to serve the goals of the statute and protect the interests of the silent class members").

Far from being out of step with the trend toward allowing cy pres settlements only where direct distribution is infeasible and subject to rigorous scrutiny of the appropriateness of the recipients, the court below has long been a leader of it. *See Six Mexican Workers*, 904 F.2d at 1307 (establishing guidelines). In *Dennis v. Kellogg Co.*, for example, the court considered a settlement of a case concerning false advertising of Kellogg's cereal, under which cy pres payments would be distributed to "charities that provide food for the indigent." 697 F.3d at 867. Because cy pres relief properly must provide a benefit to the class and be pertinent to the claim alleged, the court rejected the settlement, explaining that "appropriate *cy pres* recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising." *Id.*

Likewise, in *Nachshin*, the plaintiffs brought claims for breach of electronic communications privacy, unjust enrichment, and breach of contract, relating to AOL's provision of commercial e-mail services. 663 F.3d at 1040.

The proposed *cy pres* recipients were the Legal Aid Foundation of Los Angeles, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center Foundation. Because those organizations did not "have anything to do with the objectives of the underlying statutes on which Plaintiffs base their claims," and also because the proposed recipients did not account for the geographic scope of the class, the court rejected the settlement. *Id.* As the court explained, cy pres relief must be "tethered to the nature of the lawsuit and the interests of the silent class members." *Id.* at 1039; *see also Six Mexican Workers*, 904 F.2d at 1311–12, *described supra at* p.10.

As with any legal standard, courts may sometimes err in the application of these principles in particular cases. *See, e.g., Lane*, 696 F.3d 811 (in which Public Citizen represented an objector). Nonetheless, the case law establishes that the approval in *Lane* is an outlier. Overall, the track record of the federal courts of appeals, including the court below, reflects that the existing standards are adequate to enable the courts to determine whether proposed settlements that include cy pres are fair, reasonable, and adequate from the standpoint of the class.

II. Cy pres distribution is appropriate on the facts of this case.

Consistent with these well-established principles, which are reflected in many of the cases cited by both petitioners and the Solicitor General, the court below required a demonstration that distribution of damages to individual class members was infeasible and that the cy pres distribution had a substantial nexus both to the interests of the class members and the interests protected by the laws on which the class's claims are based. In so doing, the court properly fulfilled its obligation to ensure

that the settlement was fair, reasonable, and adequate, as required by Rule 23(e).

Affirming the district court's order approving the settlement, the court of appeals "scrutinized the proceedings to discern whether the [district] court sufficiently" considered the possibility that the class representatives or class counsel "sacrificed the interests of absent class members for their own benefit." Pet. App. 7–8. Agreeing with a Fifth Circuit case, it recognized that "cy pres-only settlements are considered the exception, not the rule." *Id.* at 8. And it stated that cy pres-only settlements are limited to situations in which "the settlement fund is 'non-distributable.'" *Id.*

Importantly, petitioners neither challenged the reasonableness of the amount of the settlement fund in relation to the value of the claims in the case, nor contested the conclusion that distribution to the class was not feasible. *Id.* 9. The question here, then, is whether a settlement that includes injunctive relief directly benefiting the class together with a cy pres distribution that provides indirect benefit is fair, reasonable, and adequate, when the alternative is no damages relief at all. For the reasons recognized by the American Law Institute and numerous courts of appeals, the answer to this question is yes.

A. Petitioners, joined by the Solicitor General, now ask the Court to second-guess the feasibility of distribution, suggesting that the lower court should have based the feasibility determination on the assumption that the fund would be distributed to the class through a claims process under which a very small percentage of class members would submit claims. *See* Pet. Br. 44; U.S. Br. 28. This suggestion has several flaws.

First, under the hypothetical posited by the Solicitor General, $4.00 would be distributed to each of approximately 1.3 million people (1% of the 129 million-

person class). That scenario assumes no administrative costs, when in reality the costs of administering the claims process—notice, claims processing, mailing—would be substantial. *See* Francis McGovern, *Second-Generation Dispute Sys. Design Issues in Managing Settlements*, Ohio St. J. on Disp. Resol. 53, 57 (2008) (describing a 2007 settlement in which notice provided by print and electronic media to 20.8 million people cost $941,000 and the total cost of claims processing was approximately $25 million). Thus, even assuming only a 1% claims rate, the funds distributed to each person would be far less than the $4.00 posited by the Solicitor General; indeed, the costs of notice and claims administration could easily exhaust the $5.3 million available for distribution under the settlement. *See also id.* at 63 (discussing tensions between efficiency and equity in the claims distribution process); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d at 475 n.15 (recognizing that "[i]n large class actions, substantial administrative costs attend the distribution of settlement funds," so that "[a]s the settlement funds are disbursed and the amount still available for distribution to the class declines, there comes a point at which the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution").

Second, the actual number of claimants cannot be known in advance of sending notice and implementing a claims process. "No one outside of the industry of administering class action settlements" knows the average claims rate for consumer class actions. Alison Frankel, *FTC's class action claims investigation could be "bombshell" for consumer cases*, Reuters, Nov. 15 2016. One expert, though, has estimated that the average response rate for a consumer class action is 5%–8%. *See Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 290 (6th Cir. 2016) (describing expert testimony). Assuming a claims rate at the low end of this range, each claimant here would receive

only 82 cents—less the costs of claims administration. Given the likelihood of such a result if a claims process were utilized, the court's approval of a settlement that put the full amount of the fund to the indirect benefit of all class members, rather than one that expended a significant portion of the fund on administrative costs with the expectation of providing only a minuscule direct benefit to a small fraction of the class, fully comports with Rule 23(e).

Third, the better the notice and the less cumbersome the claims procedures, the higher the claims rate would be. *See* McGovern, Ohio St. J. on Disp. Resol. at 57 (describing an increase in claims rate from 0.45% to 27% after better notice and improved claims process). In evaluating whether the proposed settlement was fair, reasonable, and adequate, the lower courts' assumption that a claims process, if provided, would be appropriately user-friendly cannot properly be deemed an abuse of discretion. And assuming effective notice and a user-friendly claims process, it is entirely reasonable to assume a claims rate higher than the 1% of the 129 million-person class posited by the Solicitor General, making distribution to individual class members infeasible.

Conversely, for the court knowingly to approve an ineffective notice and claims process with the expectation and intent of keeping the claims rate low would be to flout the requirements of Rule 23(e). Reliance on such methods to make individual distribution practicable is no better than the arbitrary lottery process proposed by petitioners, which the Solicitor General correctly recognizes does not seem "reasonable." U.S. Br. 27 n.2. *Cf. In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d at 34–35 ("Because the consumer fund was established for the benefit of all consumer purchasers of Lupron, not just the 11,000 who filed claims, the court appropriately determined that the 'next best' relief would be a cy pres distribution which

would benefit the potentially large number of absent class members. Such relief may yield tangible benefits for class members in the form of lower prices for existing drugs, more effective or more cost-efficient versions of current drugs, or even new cures altogether.").

In short, an approach to distribution of the fund based on the unrealistic assumption of no administrative costs or premised on an ineffective claims process would not be fair, reasonable, and adequate.

B. Petitioners also argue that, if distribution directly to class members is not feasible, then certification should be denied on the ground that a class action is not "superior" to individual actions. Pet. Br. 53. In many cases, however, particularly cases where the value of each class member's claim is small, if the class-action device is effectively unavailable, the alternative to the rough justice of cy pres relief is no justice at all, because an economically rational individual would not bring an individual suit. *See Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."); *see also Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 245 (2013) (Kagan, J., dissenting) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands."); 7AA Charles Alan Wright, et al., Federal Practice & Procedure § 1779 (3d ed. 2002 & Sept. 2018 update) (stating that where "a group composed of consumers or small investors typically will be unable to pursue their claims on an individual basis because the cost of doing so exceeds any recovery they might secure, ... it seems appropriate to conclude that the class action 'is superior to other available methods for the fair and efficient adjudication of the controversy'" (quoting Rule 23(b)(3))).

Moreover, petitioners are wrong to suggest that this concern is not presented in the subcategory of cases where a statute provides for statutory damages and attorney fees. Pet. Br. 53. To begin with, statutory damages under consumer protection statutes are for relatively small amounts. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). "A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.* In such cases, the "financial barriers may be overcome by permitting the suit to be brought" as a class action. 7AA Fed. Prac. & Proc. Civ., *supra*, § 1782.

"This fact" has led numerous courts to find that a "class action is a superior means of proceeding in class actions under the FDCPA and other consumer-protection statutes," such as the Fair Credit Reporting Act and the Fair and Accurate Credit Transactions Act, notwithstanding the possibility of recovering statutory damages and fees. *Id.* & nn.14–15. As the Seventh Circuit has explained: "True, the FDCPA allows for individual recoveries of up to $1000. But this assumes that the plaintiff will be aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her case. These are considerations that cannot be dismissed lightly in assessing whether a class action or a series of individual lawsuits would be more appropriate for pursuing the FDCPA's objectives." *Mace*, 109 F.3d at 344.

In addition, as discussed above, in some of those statutes, Congress has also expressly contemplated class actions and, at the same time, limited the amount of damages recoverable in a class action. *See supra* p.5. Where

the class-action damages cap makes distribution infeasible, disallowing cy pres would either let the defendant off "scot-free," *Hughes*, 731 F.3d at 676, or disadvantage the defendant by exposing it to a large number of individual damages and attorney fee awards, not subject to any cumulative cap and therefore with a potentially crippling effect. Neither outcome advances the interests of Congress as embodied in the federal statute—and neither is "superior" to class treatment with the indirect class-wide benefit of cy pres. *See Six Mexican Workers*, 904 F.2d at 1306 ("Where the goals of the underlying statute are strictly compensatory, a class action resulting in substantial unclaimed funds will not further that goal. But where the statutory objectives include enforcement, deterrence or disgorgement, the class action may be the 'superior' and only viable method to achieve those objectives, even despite the prospect of unclaimed funds." (citing 7A Charles Wright, Arthur Miller, et al., Federal Practice and Procedure § 1780 at 584 (1986))).

III. The Solicitor General's Article III redress argument lacks merit.

A. Article III does not place limitations on cy pres settlements.

The Solicitor General argues that Article III's case-or-controversy requirement bars settlements that include cy pres distributions, absent a showing that the cy pres will redress the specific injuries asserted by the plaintiffs in the class-action litigation. U.S. Br. 22–24. This argument lacks merit.

As an initial matter, whether the relief included in a settlement agreement redresses the plaintiff's injuries does not affect whether the case presents an "actual and concrete dispute[], the resolution[] of which ha[s] direct consequences on the parties involved." *Id.* at 22–23 (quoting *United States v. Sanchez-Gomez*, 138 S. Ct. 1532,

1537 (2018)). This standard is met when "three conditions are satisfied," which together establish Article III standing: The plaintiff must have "'suffered an injury in fact' that is caused by 'the conduct complained of'" and that is capable of being "'redressed by a favorable decision.'" *Camreta v. Greene*, 563 U.S. 692, 701 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Importantly, although Article III jurisdiction requires that the relief *requested* by the plaintiff's complaint be likely to redress the plaintiff's injury, *see, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), jurisdiction does not turn on whether the injury ultimately is redressed. Thus, when a court rules that a plaintiff has failed to prove a necessary element of her claim, the court will dismiss the claim on the merits, not for lack of Article III jurisdiction. Although the judgment in the case does not redress the plaintiff's injury, it still embodies the resolution of an "actual and concrete dispute" and has "direct consequences" for the parties. *Sanchez-Gomez*, 138 S. Ct. at 1537. Likewise, as long as a class-action plaintiff has standing to bring the case (and the case has not become moot), a settlement is the resolution of a concrete dispute and has direct consequences for the parties, regardless of the relief it contains. The terms of a settlement cannot retroactively void the Article III case or controversy that the case was brought to (and did) resolve.

Further, Article III does not prohibit a court from approving a settlement in which the parties agree to terms that a court could not itself order in contested litigation. As this Court has recognized in the context of consent decrees, "in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of" the agreement and order. *Firefighters v. Cleveland*, 478 U.S. 501, 522 (1986); *see id.* at 525 (stating that the parties' agreement "serves as the source of the court's authority to

enter any judgment at all" and that "creates the obligations embodied" in the order).[3] Thus, although the parties' agreed-upon decree is entered as a judgment, "a federal court is not necessarily barred from entering [it] merely because the decree provides broader relief than the court could have awarded after a trial." *Id.* at 525.

Likewise, "[a] court may approve a settlement that proposes a cy pres remedy even if such a remedy could not be ordered in a contested case." Am. Law Inst., *supra*, § 3.07.[4] The question for the court reviewing a proposed settlement is not an Article III issue, nor is it whether the relief corresponds to what the class could obtain if it prevailed, but whether the settlement is "fair, reasonable, and adequate" under Rule 23(e)(2). For example, had the settlement included a provision that Google search pages would show no advertisements on Fridays—a term unrelated to the alleged injury—that term would be

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[3] *See also Rufo v. Inmates of Suffolk Cty.*, 502 U.S. 367, 389 (1992) (stating that although "[f]ederal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated," a court through a consent decree may order "more than what a court would have ordered absent the settlement").

[4] A class-action settlement is a settlement to which the class representative has consented on behalf of the class. In considering objections, the court is not resolving a contested issue as to whether the class is entitled to relief, but determining whether the class representative has fulfilled his fiduciary duties to the class by entering into a fair, reasonable, and adequate settlement. *See, e.g., Isby v. Bayh*, 75 F.3d 1191, 1196–97 (7th Cir. 1996). If the class representative has fulfilled his duties to the class in consenting to the settlement (and class certification meets the requirements of Rule 23 and due process, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–29 (1997)), the court's authority to approve it and enter its terms as a decree is the same as in a case involving a consent decree. *See, e.g., EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888–89 (7th Cir. 1985).

considered as part of the Rule 23(e) assessment; it would not implicate Article III.

B. The relief provided by the settlement is fair, reasonable, and adequate to redress the injuries alleged by the plaintiff class.

The plaintiffs' complaint in this case sought damages as a remedy for Google's past conduct and injunctive relief as a remedy for its ongoing conduct—requests for relief that readily satisfied the redressability requirement of Article III standing by, respectively, seeking to remedy both the past and the ongoing injuries alleged by the plaintiffs. The form of relief for which the plaintiffs ultimately *settled* does not implicate Article III's requirements, for the reasons discussed above. Even if, however, Article III imposed an actual-redress limitation on the relief awarded in a court-approved settlement, the order approving the settlement in this case would satisfy it, as it provides both damages and injunctive relief aimed at redressing the plaintiffs' claims of both past and continuing injury.

The Solicitor General suggests as part of his actual-redress argument that cy pres—the form of compensatory relief in this case—is permissible only on a *showing* of either a continuing violation that causes injury or an imminent, future violation that would inflict the same injury because, in the Solicitor General's view, cy pres offers only prospective benefits to the class. U.S. Br. 23. To begin with, in all types of litigation, both class-actions and otherwise, a settlement is typically a resolution made *without* a showing that the plaintiff is entitled to relief on the merits. No authority supports the Solicitor General's notion that Article III permits a class settlement only upon proof of the claim on the merits.

Moreover, the Solicitor General's premise is incorrect: Cy pres relief is not a form of prospective relief comparable

to an injunction, but rather a way of awarding compensation for past injuries by providing comparably valuable relief to the class in circumstances where direct monetary compensation is not possible. *See Six Mexican Workers*, 904 F.2d at 1307 (stating, when considering cy pres, that "the question is how to distribute the damages"). To be sure, through cy pres, the compensation is provided indirectly, as in-kind relief, through distribution to entities "tethered to the objectives of the underlying statutes and the interests of the silent class members." Pet. App. 12. But Article III neither speaks to the method of distributing compensation nor bars the parties from agreeing that relief will be provided indirectly.

Failing to recognize that the cy pres distribution is a form of compensatory relief, the Solicitor General wrongly invokes case law addressing standing to bring citizen suits seeking injunctive relief and civil penalties. In that context, the Court has stated, the harm sought to be addressed "lies in the present or future, not in the past." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 187–188 (2000) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)). This conclusion arose from the text of the Clean Water Act's citizen-suit provisions, which tie injunctive relief (which is necessarily forward looking) to civil penalties and describe the "citizen" who may sue as one whose interest "is or may be adversely affected." *Gwaltney*, 484 U.S. at 59. Similarly, the passage of *Steel Co.* from which the Solicitor General quotes to support his contention that a continuing or future injury is required addresses injunctive relief, which by its nature cannot remedy a past injury. *See* 523 U.S. at 108 (stating that injunctive relief "cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating [the statute] in the future").

Elsewhere, *Steel Co.* explains that the possibility that a lawsuit might result in civil penalties paid to the government does not support standing because such penalties would not remediate a plaintiff's injury, but rather would vindicate the "undifferentiated public interest" in the rule of law. *Id.* at 107. Here however, plaintiffs sought no civil penalty; they sought—and the order approving the settlement provided—injunctive relief as to the ongoing dispute and compensatory relief as to the harm that already occurred. Compensatory relief cannot properly be equated with civil penalties, as the two are distinct. *See, e.g.*, 31 U.S.C. § 3729(a) (providing for both damages and a civil penalty under the False Claims Act). The Solicitor General's novel suggestion that a showing of continuing injury is required for a plaintiff to seek compensation for past injury is illogical and patently wrong.[5]

At bottom, the Solicitor General's actual-redress argument reflects doubts about whether the indirect relief provided by cy pres is adequate to remedy the injury experienced. *See* U.S. Br. 24–25 (positing that cy pres that has only an "insubstantial" effect on the class members or provides "exclusively emotional relief" poses an Article III question). Whether a settlement is adequate, however, has nothing to do with Article III; it is a matter of whether the settling parties have correctly evaluated the costs and benefits of settling. That concern is not properly addressed by contorting Article III and standing doctrine, but by a court's evaluation under Rule 23(e)(2) of whether a proposed settlement is fair, reasonable, and adequate—the very evaluation that, as the Solicitor General

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[5] The Solicitor General does not explain why the allegations of future injury in this case, which support the injunctive component of the award, would not also suffice to support the cy pres component under his theory.

recognizes, the lower courts perform. *See id.* at 25 (citing cases). As described above and reflected in the cases cited by the Solicitor General, courts have developed appropriate principles to ensure that settlements providing for cy pres distributions satisfy Rule 23, including that the cy pres recipients are appropriate to provide a benefit, albeit indirect, to the class. The court below properly applied those principles here.

CONCLUSION

For the foregoing reasons and those set forth in the brief of respondents Gaos, et al., the decision below should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

THEODORE H. FRANK and
MELISSA ANN HOLYAK,

Petitioners,

v.

PALOMA GAOS, individually and on behalf of
all others similarly situated, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF PROFESSOR WILLIAM B. RUBENSTEIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Bruce Bromley Professor of Law at Harvard Law School and, for the past decade, the sole author of *Newberg on Class Actions*, the leading treatise on class action law in the United States. In 2014, *amicus* re-wrote the chapter of the *Newberg* treatise concerning damages in class actions (Chapter 12). The new 180-page chapter encompasses an 81-page treatment of *cy pres* issues in class action lawsuits. This is one of the most comprehensive scholarly treatments of the topic and is often cited by the lower federal courts in adjudicating *cy pres* issues. *See, e.g., In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 741 (9th Cir. 2017); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 445 n.13 (3d Cir. 2017); *Fraley v. Batman*, 638 F. App'x 594, 599 (9th Cir.), *cert. denied sub nom. K.D. v. Facebook, Inc.*, 137 S. Ct. 68 (2016) (Bea, J., dissenting); *Poertner v. Gillette Co.*, 618 F. App'x 624, 628 (11th Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 20 n.16 (1st Cir. 2015); *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013).

Amicus respectfully submits this brief to provide this Court with (1) empirical information concerning

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[1] Pursuant to Supreme Court Rule 39(6), *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no party, no party's counsel, and no person or entity, other than *amicus*, has made a monetary contribution to its preparation or submission.

All of the parties in this case have consented to the filing of this brief.

the frequency with which the issues in this case arise; (2) clarification of the two questions presented in the petition for *certiorari*; and (3) a scholarly perspective on *cy pres* that differs from that of other leading commentators, including the American Law Institute.

Amicus submits this brief in his individual capacity as a scholar and not on behalf of The Presidents and Fellows of Harvard College. Petitioners allege that a conflict of interest exists in this case because one of the class's counsel is a graduate of Harvard Law School and some of the *cy pres* funds are directed to a program at Harvard University (the Berkman Klein Center for Internet & Society). Pet. Br. at 54-56. *Amicus* has no relationship to the lawyer at issue in the case nor to the Berkman Klein Center and does not stand to benefit in any way from the proposed allocation of monies to Harvard's Berkman Klein Center. *Amicus* also takes no position on this issue in this brief.

SUMMARY OF ARGUMENT

Amicus makes three points in this brief.

1. Class action law employs trust law's *cy pres* concept in two distinct fashions and this case involves only one such use. In nearly every class action case involving monetary damages, there will be residual funds not claimed by the class members. *Cy pres*—sending these funds to a charity that is consistent with the class's claims—is one of four common methods of dealing with such funds. I refer to this as "residual *cy*

pres." In a very small band of cases, where the size of the class so far outstrips the depth of the common fund that distribution of damages is infeasible, courts have approved sending the full fund to charities via the *cy pres* doctrine. I refer to this as "full *cy pres*." *See also* William B. Rubenstein, 4 *Newberg on Class Actions* § 12:26 (5th ed. 2014) (*Newberg*) (utilizing phrase "100% *cy pres*").

The two parts of the single question presented in this case both concern full *cy pres* cases, not residual *cy pres*, as they reference cases in which "no direct relief" is offered to class members. *See* Pet. Br. at (i) ("Whether, or in what circumstances, a class-action settlement that provides a *cy pres* award of class action proceeds but ***no direct relief*** to class members comports with the requirement that a settlement binding class members must be 'fair, reasonable, and adequate' and supports class certification.") (emphasis added).

Part I of this brief: (1) presents empirical evidence showing that full *cy pres* cases are extraordinarily rare—federal courts approve about one such settlement a year—and explains why class action lawyers lack any incentive to promulgate such settlements artificially; (2) demonstrates that the issues presented here are very narrow because full *cy pres* is conceptually so distinct from residual *cy pres* that rules concerning one may not easily apply to the other; and (3) explains that if the Court addresses issues arising from residual *cy pres* in this case, a host of complex procedural and constitutional concerns would be implicated, such as the fact that the state of California

(whose law governs the case) has a specific state statute regulating the distribution of residual *cy pres* awards.

These factors combine to argue in favor of a very narrow opinion addressing a rarely-occurring phenomenon, if not outright dismissal of the petition as having been improvidently granted.

2. Monetary damages in Rule 23(b)(3) class actions are individualized in nature. A class action court's goal is to distribute each class member's recovery to her. When that mark cannot be hit, courts have, *inter alia*, sent class members' monies to charitable organizations via the *cy pres* doctrine. Petitioners contest such distributions because they send a class member's money to a legal stranger and they propose instead that some absent class members' money be sent to other class members.

Petitioners' approach is no less a *cy pres* approach —it too takes some class members' property and gives it to legal strangers—it simply substitutes as the recipient another class member instead of a charitable organization. Petitioners attempt to evade the weight of this conclusion by arguing that the settlement fund is the "class's money," but they are wrong: there is no such thing as a "class's money" in a (b)(3) class action, only individual class member recoveries.

Part II of this brief unmasks this defect in the Petitioners' approach and then argues that *cy pres* is preferable to Petitioners' favored redistribution schemes for four reasons: (1) intra-class redistribution

generates remarkable windfall profits for some class members at the expense of other class members; (2) intra-plaintiff redistribution would not happen in non-aggregate litigation; (3) intra-class redistribution produces no benefit for the majority of class members, whereas *cy pres* awards aim to promote the class's underlying common interest; (4) intra-class redistribution violates class counsel's Rule 23(g) duty to represent the entire class, as it places class counsel in the position of favoring some class members over others. For these reasons, the District Court did not abuse its discretion in concluding that the full *cy pres* distribution of these class members' recoveries was fair, reasonable, and adequate as those terms are used in Rule 23(e)(2).

3. It is fair to ask whether a class should be certified when the monetary relief cannot be directly distributed to class members, but that is not a question that Rule 23 in fact asks. The only prong of class certification at issue here is Rule 23(b)(3)'s superiority prong. Part III of this brief explains that this prong asks whether a class suit is superior to "other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3), not whether a class suit is superior to forgoing adjudication altogether. Nothing in the doctrine of class certification forecloses certification because some of the class's relief will be indirect, rather than direct. If these very rare types of class suits argue for another form of dispute resolution than litigation, such a change is best left to Congress.

ARGUMENT

I. The Court Should Dismiss The Writ As Improvidently Granted Or Render A Narrow Decision Because The Questions Presented—And Facts Of The Case—Involve Only Rarely-Arising Full *Cy Pres* Settlements And Are Therefore Exceptionally Limited In Nature

Courts have employed the trust doctrine of *cy pres* in two distinct ways in class action law. *First*, in nearly every class action case involving monetary funds, there are likely to be leftover or unclaimed funds. *Cy pres*—sending the leftover funds to charitable organizations undertaking work consistent with the class's claims—is one of four common methods of addressing the unclaimed funds problem. *Second*, in a very small band of cases—likely fewer than 20, ever—the class's size so far outstrips the class's relief that courts may deem distribution of the settlement fund to class members to be infeasible. In these exceedingly rare circumstances, courts have approved distribution of the full fund to *cy pres* recipients.

This case involves the second type of *cy pres*: a full, 100% *cy pres* distribution. The petition for *certiorari* presented two questions solely about full *cy pres* distributions—whether such settlements are fair and whether classes can be certified in such cases—as the petition limited itself to a settlement that "provides no direct relief to class members."

Because this case is limited to questions about full *cy pres* cases, a review of the distinctions between the two types of *cy pres* helps clarify the very limited nature of the questions presented.

A. Residual *cy pres*

Almost every class action lawsuit involving a monetary fund is likely to generate residual, or unclaimed, funds. This is so because in a common fund case, class members typically, though not invariably, must step forward to claim the class's proceeds, usually through a claiming program. 4 *Newberg* §§ 12:15-12:25. Given that most class actions are for small amounts of money, class members do not have an enormous incentive to file a claim, a fact that is exacerbated if the claim forms are onerous. Although there is a dearth of reliable empirical data on claiming rates in class action lawsuits, *id.* at § 12:18, it is fair to assume that rates are below 100%—often well below—leaving unclaimed monies in the common fund. Courts must then decide how to distribute those unclaimed funds.

Four common methods exist: (1) unclaimed funds may revert to the defendant, *id.* at § 12:29; (2) unclaimed funds may be distributed *pro rata* to those class members who did file claims, *id.* at § 12:30; (3) unclaimed funds may escheat to the government, *id.* at § 12:31, or be directed by a specific state statute to be used for certain particular purposes, *id.* at § 12:35; or (4) unclaimed funds may, according to the *cy pres* doctrine, be directed to charities whose goals are

consistent with the underlying causes of action. *Id.* at § 12:32.

There are costs and benefits to each approach, but generally speaking courts are hesitant to approve reversionary funds and the recent trend appears to be toward encouraging redistribution *pro rata*, particularly since the American Law Institute embraced this approach nearly a decade ago. American Law Institute, *Principles of the Law of Aggregate Litigation* § 3.07, cmt. b (2010) ("ALI, *Principles*") (concluding that "in most circumstances distributions to class members better approximate the goals of the substantive laws than distributions to third parties that were not directly injured by the defendant's conduct").

B. Full *cy pres*

While a court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible, there are instances when that goal is unattainable. One such circumstance is when the class members are so numerous and the individual claims are so small that an individualized distribution to each harmed class member is, as a practical matter, infeasible. In such circumstances, the monies recovered from the defendant may be directed to one or more charities via a *cy pres*—or "next best"—award. 4 *Newberg* § 12:26.

I refer to these cases as involving "full *cy pres*" because all of the monetary recovery is directed to charities. To be clear, however, the monetary payments in

full *cy pres* cases rarely constitute the class's full relief. In most full *cy pres* cases, monetary disgorgement is complemented by some form of injunctive-like relief for the class. Here, for example, the District Court found that:

> Under the terms of the parties' agreement, and contrary to what the objectors argue, future users of Google's website will receive something from the injunctive relief: the capability to better understand Google's disclosure practices before conducting a search on its website, and the ability to make a better informed choice based on that information.

Pet. App. 49-50.

Full *cy pres* distributions serve several purposes. *First*, they ensure that the defendant is disgorged of a sum certain, even if that money does not compensate class members directly. This disgorgement furthers the deterrence goals of the class suit. ALI, *Principles* § 3.07, cmt. b (noting that without *cy pres*, defendants could retain the funds otherwise distributed to charities, and that such an outcome "would undermine the deterrence function of class actions and the underlying substantive-law basis of the recovery by rewarding the alleged wrongdoer simply because distribution to the class would not be viable"). *Second*, full *cy pres* distributions provide indirect compensation to the plaintiff class by funding activities that are in the class's interest. Indeed, large multimillion dollar contributions to charities related to the plaintiffs' causes of action do more good for the plaintiffs than would a minuscule

sum of money distributed directly to them. *Third*, the resolution of the class suit brings finality and repose to the defendant and relieves the judicial system of the possibility of myriad individual (or further class) suits.

Notwithstanding these points, a few critics argue, as do Petitioners here, that full *cy pres* settlements violate various constitutional or statutory provisions; that class certification should simply be denied in situations where all of the class's money would be distributed to *cy pres* organizations; that since the class action remedies belong to the class, they cannot be sent to non-class members; or that the possibilities of collusion between class and defense counsel are heightened in these circumstances.

Despite the controversy, courts in at least six circuits have approved such full *cy pres* outcomes, *see* 4 *Newberg* § 12:26 (listing cases from five circuits); *see also In re Google Inc. Cookie Placement Consumer Privacy Litig.*, No. CV 12-MD-2358 (SLR), 2017 WL 446121, at *4 (D. Del. Feb. 2, 2017), on appeal, and no court has ever rendered the ruling Petitioners seek here: that full *cy pres* settlements are *per se* unreasonable. Nonetheless, full *cy pres* distributions remain exceptional outliers. Damages recovered in a class suit are presumptively the property of the individual class members. Therefore:

> [F]ull *cy pres* is appropriate only if a court finds that individual distributions are not viable because it is difficult or impossible to identify the persons to whom damages should be assigned or distributed and thus proceeds

> cannot be economically distributed to the class members. Courts have rejected full *cy pres* settlements that do not meet these standards, without actually rejecting the concept of full *cy pres* itself.

4 *Newberg* § 12:26 (internal quotation marks and citations omitted).

C. Why the distinction matters

The facts of this case, and the questions presented in the *cert.* petition, concern full *cy pres* settlements, not residual *cy pres* awards. A clear understanding of this fact brings home three critical points: full *cy pres* settlements are exceedingly rare; the issues preserved for appeal and presented in the petition for *certiorari* are therefore remarkably narrow; and significant procedural and constitutional concerns would arise were the Court to use this narrow full *cy pres* case as an occasion to generate broad residual *cy pres* principles.

1. Full *cy pres* cases are remarkably rare

The questions presented by the *cert.* petition—whether class certification and settlement approval are appropriate in full *cy pres* cases—rarely ever arise. Generally speaking, the federal courts terminate about one full *cy pres* case a year. To put that in perspective, if any more perspective is necessary: the federal courts terminate about 275,000 cases per year, *see* U.S. District Courts—Judicial Business 2017, available at

http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017, roughly 350 of which are class actions. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Studies 811, 817-818 (2010). Following an extensive review of several thousand class action cases, my research assistants and I have been able to identify a total of 18 cases in which federal courts have *ever* approved full *cy pres* settlements, or about 1/year for the past two decades. These data are charted in Table 1 below. (A list of these cases, and the methodology used to identify them, appears as an Appendix.) It is possible that our research did not capture 100% of the approved full *cy pres* cases—and the decision whether or not to include a few other cases on the list is open to interpretation—but I am confident that the research accurately represents the general magnitude of full *cy pres* settlement approvals.

TABLE 1
NUMBER OF FULL *CY PRES* SETTLEMENTS FINALLY APPROVED BY FEDERAL COURTS
(By Year of Final Approval)

2017	1
2016	1
2015	1
2014	1
2013	2
2012	1
2011	1
2010	2
2009	1
2008	3
2007	1
2006	1
1997	1
1995	1

These data support four conclusions.

First, these data undermine the argument that this form of class action settlement is either rampant or expanding. Rather, they show that the questions presented in the *cert.* petition impact a minute portion of American litigation and that the category they impact has shown no sign of expanding in any meaningful way.

Second, these data support the conclusion that the lower federal courts have shown care in scrutinizing full *cy pres* matters. As noted in the Appendix's list, in three of these 18 cases, the federal courts initially

rejected the full *cy pres* proposal, with final approval being granted only after the parties addressed particular problems. In a handful of other cases, courts have rejected particular full *cy pres* settlements outright. *See, e.g., Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071 (9th Cir. 2017); *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 943-44 (N.D. Cal. 2013) (describing rejection of prior full *cy pres* settlement in approving later settlement encompassing monetary relief for class), *aff'd sub nom. Fraley v. Batman*, 638 F. App'x 594 (9th Cir. 2016), *cert. denied sub nom. K.D. v. Facebook, Inc.*, 137 S. Ct. 68 (2016); *Zimmerman v. Zwicker & Assocs., P.C.*, No. CIV. 09-3905 RMB JS, 2011 WL 65912 (D.N.J. Jan. 10, 2011).

Third, these data support the conclusion that full *cy pres* cases arise almost exclusively in two distinct doctrinal areas, each with its own complex legal setting, rendering problematic any sweeping generalizations or legal rules. Eleven of the 18 full *cy pres* cases arose under the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* (FDCPA). In enacting that statute, Congress capped damages in class action lawsuits at the lesser of $500,000 or 1% of the defendant's net worth. 15 U.S.C. 1692k(a)(1)(B). Because of the small net worth of some debt collectors, that cap is occasionally so low that distribution of recoveries to even medium-sized classes is infeasible. (Nonetheless, these full *cy pres* settlements remain the exception, not the rule, among FDCPA settlements.) Five of the 18 full *cy pres* cases involved privacy-related allegations—typically arising under another federal statute, the Stored

Communications Act, 18 U.S.C. 2701 *et seq.*—against large internet-based companies like Google, Facebook, Netflix, and AOL. As in this case, the enormous size of the plaintiff class rendered distribution of modest damage amounts infeasible. The final few full *cy pres* cases also involved massive classes, but in consumer protection cases.

Fourth, the data refute Petitioners' contentions that class counsel are incentivized to displace true compensatory damage settlements with full *cy pres* settlements. Pet. Br. at 57. These few full *cy pres* cases are not ones that conventionally would have resulted in compensatory damages but were perverted into full *cy pres* settlements. Moreover, class counsel have no incentive to propose artificial full *cy pres* settlements. They recover no extra fees for sending money to *cy pres* recipients. If a monetary distribution is feasible, the court overseeing the class action will inquire as to why it is not proposed, and if class counsel do not have a good explanation, the court will reject the settlement; class counsel will then have to re-negotiate a new settlement. *See, e.g.*, *Fraley*, 966 F. Supp. 2d at 943-44. This whole process will cost class counsel time and money, cause them reputational harm, and could lead to a diminution in their fees. *See, e.g.*, *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013) ("Where a district court has reason to believe that counsel has not met its responsibility to seek an award that adequately prioritizes direct benefit to the class, we therefore think it appropriate for the court to decrease the fee award.").

Full *cy pres* cases are, in sum, (1) few; (2) scrutinized by skeptical federal judges; (3) confined to several very specific doctrinal situations; and (4) neither presently displacing true compensatory damage cases nor likely to do so.

2. The questions preserved for appeal by Petitioners' objection and then presented in the *cert.* petition are few and narrow

In *Marek v. Lane*, 571 U.S. 1003 (2013), this Court denied a petition for *certiorari*, with the Chief Justice writing in a concurring statement that the case "focused on the particular features of the specific *cy pres* settlement at issue [such that] [g]ranting review . . . might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation. . . ." *Id.* at 1006 (statement of Roberts, C.J., respecting the denial of *certiorari*). The Chief Justice went on to identify seven such issues:

> [1] when, if ever, such relief should be considered; [2] how to assess its fairness as a general matter; [3] whether new entities may be established as part of such relief; if not, [4] how existing entities should be selected; [5] what the respective roles of the judge and parties are in shaping a *cy pres* remedy; [6] how

> closely the goals of any enlisted organization must correspond to the interests of the class; and [7] so on.

Id. (brackets added).

The limited nature of this case is remarkably similar to the Chief Justice's conclusion about *Marek* for three reasons.

First, the underlying case involves only full *cy pres*, not residual *cy pres*, so the facts of the case limit the scope of the issues presented. While some similar issues arise in both full and residual *cy pres* cases, the reason for turning to *cy pres* is distinct in each setting and not all principles of law necessarily apply across the settings. In the former (residual fund) situation, class members have been provided notice and an opportunity to claim their recoveries but have failed to do so. Courts must then address how to proceed with what could be characterized as abandoned property. In the latter (full *cy pres* cases), the parties are proposing to foreclose class members' causes of action without providing direct monetary compensation to them because individualized distribution is infeasible.

Thus, the Chief Justice's two core questions—"when, if ever, such relief should be considered" and "how to assess its fairness as a general matter," *id.*—trigger differing concerns and call for distinct rules across the two settings, as do subsidiary questions about, for example, whether and how class members should be involved in the selection of *cy pres* recipients.

(*Amicus* has similarly struggled to comprehend a literal application of the trust analogy to each setting, *see* 4 *Newberg* § 12:32 n.7, but it seems clear that the analogy would vary depending upon whether the funds at issue are abandoned or not.) Put simply, the differences between the two types of *cy pres* are more differences of kind than degree.

Second, Petitioners objected to only a few features of the full *cy pres* settlement, Pet. App. 112-150, and they are, according to this Court's precedents, permitted to appeal only those issues actually raised in their objections. *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002) (holding that an objector "will only be allowed to appeal that aspect of the District Court's order that affects him—the District Court's decision to disregard his objections").

Third, the scope of this Court's review is then set forth in the *certiorari* questions accepted for review; as noted, these are limited to questions about full *cy pres* settlements.

Given this legal framework, very few of the Chief Justice's above-referenced inquiries are properly before the Court in this case—and those that are raise quite limited concerns, as set forth in Table 2 below.

TABLE 2

LIMITED NATURE OF *CY PRES* CONCERNS PROPERLY AT ISSUE IN THIS CASE

1	when, if ever, such relief should be considered;	At issue here only as to full *cy pres* settlements
2	how to assess its fairness as a general matter;	At issue here only as to full *cy pres* settlements
3	whether new entities may be established as part of such relief; if not,	Not an issue in this case
4	how existing entities should be selected;	Not raised in Petitioners' objection
5	what the respective roles of the judge and parties are in shaping a *cy pres* remedy;	Not raised in Petitioners' objection
6	how closely the goals of any enlisted organization must correspond to the interests of the class;	Not raised in Petitioners' objection[2]
7	and so on	Whether the *cy pres* recipients are disqualified because of certain specific pre-existing relationships with class counsel or the defendant(s)

[2] In the District Court, one of the two Petitioners (Frank) objected to the AARP "receiving money as a proxy for the class" because, according to his declaration, the group "takes numerous political positions that I believe contravene good public policy." Declaration of Theodore H. Frank, *In re: Google Referrer Header*

In sum, this case bears striking similarity to the *Marek* case, which this Court deemed an inappropriate vehicle for thorough consideration of *cy pres* issues, because it involves only the rarely-occurring topic of full *cy pres* and then, within that topic, only the few concerns that were properly preserved for appeal.

3. A decision setting rules for residual *cy pres* cases would raise complex procedural and constitutional concerns

If the Court were to use this case as a mechanism for generating rules concerning residual *cy pres* situations, it would trigger a series of procedural and constitutional concerns. Google's terms of service mandate application of California law to the resolution of disputes. *See* Google Terms of Service, available at https://policies.google.com/terms. Like at least a dozen other states, 4 *Newberg* § 12:35, California has an explicit statute governing the distribution of unclaimed or abandoned funds in class action litigation. Cal. Civ. Proc. Code 384. If the Court uses this case as a vehicle for rulemaking as to residual funds, it would have to ascertain the applicability of this provision to litigation

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Privacy Litigation, No. 5:10-cv-04809-EJD, ECF No. 70-2 at 2 (August 8, 2014). He does not pursue that factual "nexus" argument in this Court, however, instead now framing his objection as a legal one of compelled speech, Pet. Br. at 12, buttressed with citations to the First Amendment. *Id.* at 17, 36. Because Petitioners never raised First Amendment issues in their objection—those two words never appear, *see* Pet. App. 112-150—they cannot raise them on appeal. *Devlin*, 536 U.S. at 9.

in federal court, a complex choice of law question. *Cf. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). Were the statute deemed to apply to this litigation—the California residual funds statute says nothing about class certification standards and hence it would not necessarily suffer the fate that befell the New York provision at issue in *Shady Grove*—it would further support the parties' use of *cy pres*.

Petitioners' contentions herein would therefore arguably call into question the constitutionality of California's statute, a fact that triggers procedural protections for the State of California requiring notice and an opportunity to be heard on these constitutional concerns, 28 U.S.C. 2403(b), if not rendering the State a required party to the litigation. Fed. R. Civ. P. 19. All of these intricate procedural and constitutional concerns lie dormant if the Court limits itself—as do the questions presented—to consideration solely of full *cy pres* awards.

* * *

These three factors—the rarity of full *cy pres*, the limited nature of the questions preserved for appeal and presented in the *cert.* petition, and the concerns raised if the Court strays into residual *cy pres* issues—combine to argue in favor of a very narrow opinion addressing a rarely-occurring phenomenon, if not outright dismissal of the petition as having been improvidently granted.

II. This Full *Cy Pres* Settlement Meets Rule 23(e)(2)'s Requirement That It Be Fair, Reasonable, And Adequate

Money damages in 23(b)(3) class action lawsuits are individualized in nature. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364 (2011) (rejecting certification of money damage claims under Rule 23(b)(2) because of their individualized nature and holding that (b)(3) certification is required because of "the need for plaintiffs with individual monetary claims to decide for themselves whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 481-82 (1980) ("The members of the class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery.").

Here, the claims of 129 million class members were settled for $8.5 million, meaning that the gross value of each class member's recovery was roughly 6.6 cents. Distribution of that amount, net of fees and expenses, to each individual class member is both illogical and infeasible. The settling parties therefore proposed utilizing the money for the "next best" purpose by directing each class member's individual recovery to fund work consistent with the class's underlying legal claims.

Petitioners contend that the "class's damages," Pet. Br. at 29-30, should be awarded only to the class and accordingly argue for a claiming program reliant on under-claiming and/or a lottery-like system, either

of which would ensure that 100% of the settlement funds remain with class members themselves. *Id.* at 44-45. This is effectively similar to the *pro rata* redistribution approach to residual funds supported by the American Law Institute. ALI, *Principles* § 3.07, cmt. b. It has the surface appeal of distributing the "class's damages" solely within the class.

When probed, however, that appeal is elusive for one simple reason: there is no such thing as "the class's damages." A class action settlement fund is a collection of individualized monetary recoveries, not a group's fund. To re-direct one class member's recovery to another class member keeps that recovery among class members, but it is no less the direction of one person's property to a stranger than is the direction of that same property to a non-profit organization.

Once the Petitioners' redistribution scheme is properly framed as simply an alternative form of *cy pres*, it poses the question of whether Petitioners' *cy pres* scheme is a better use of each class member's individual recovery than the use proposed by the parties herein. There are four reasons that it is not.

First, the Petitioners' redistribution scheme results in a rather miraculous windfall for some class members at the expense of others. At one extreme, Petitioners propose splitting the present $8.5 million fund among 50,000 class members, Pet. Br. at 44, meaning each would receive a gross amount of $170; as the gross value of each individual's share of the settlement is 6.6 cents, this yields an award 2,576 times

greater than the settlement value of the claim; even at the Petitioners' other extreme—splitting the fund among 1,000,000 class members, *id.*—each would receive $8.50 or 129 times the claim's settlement value.

Second, because Petitioners' scheme would not occur outside the class action context, the Court should be especially reluctant to embrace it within that context. Petitioners acknowledge this measuring stick, stating that, "Courts and class counsel should not have the authority to divert [settlement-fund proceeds] to third parties any more than attorneys for individual clients do." *Id.* at 17. But a review of what attorneys for individual clients are able to accomplish argues against Petitioners' intra-plaintiff redistribution scheme and in support of *cy pres*. A simple example (initially involving residual funds) brings home the point. If a lawyer represented three co-plaintiffs in a lawsuit, secured awards of $50,000 for each, but one did not step forward to claim her recovery, no one would seriously suggest distributing that $50,000 to the other two co-plaintiffs. Because the monetary recovery belongs to that plaintiff, her counsel would look for her, then for her legal heirs, with fully unclaimed funds ultimately escheating to the state.

Those who argue for the redistribution of residual funds among claiming class members note that the settling class members likely did not receive the full value of their claims and/or were charged transaction costs (*i.e.*, fees and expenses) and thus conclude that even with the redistribution, the class members are barely made whole. 4 *Newberg* § 12:30 n.5 (citing cases). But

the three-plaintiff situation shows that this justification is not terribly convincing: even if plaintiffs #1 and #2, who did step forward to claim their recovery, received less than 100% of the value of their claims and were taxed attorney's fees and expenses, it would nonetheless remain remarkably peculiar, if not flatly illegal, for counsel to hand plaintiff #3's unclaimed recovery to them. Intra-plaintiff redistribution of a *residual* recovery is simply not an option in the normal non-class case.

Intra-plaintiff redistribution of the *full* recovery would also be peculiar, if not perverse, in the non-class context. If a lawyer represented several plaintiffs in a private lawsuit involving important but largely immeasurable harm, and the defendant proposed, as a settlement, making a charitable contribution to groups of the plaintiffs' choosing, the lawyer would surely have an obligation to take that settlement offer to the client and the client would have every right to accept it. Indeed, this is a familiar occurrence. *See, e.g.*, *Beastie Boys v. Monster Energy Co.*, 983 F. Supp. 2d 369, 373 (S.D.N.Y. 2014) (describing copyright infringement settlement whereby alleged infringer "agreed to make annual payments of 1% of its gross revenue, until the total payments reached $1 million, to a charitable organization chosen by the [copyright holder] and approved by [the alleged infringer] which supports 'science, technology, engineering and/or mathematics education for girls'"). What would be far odder would be for the defendant to propose, and for the plaintiffs to accept, that a small amount of money be distributed

to one of the co-plaintiffs following a lottery. Unlike the charitable settlement, intra-plaintiff redistribution schemes are not a familiar form of dispute resolution in a non-class setting.

Thus, consideration of a non-class action variant of the present situation demonstrates that the Petitioners' proposed redistribution schemes are more problematic and less acceptable than the settling parties' *cy pres* approach.

Third, and most obviously, *cy pres* distributions aim to provide an indirect benefit to class members by supporting organizations undertaking work consistent with their causes of action; intra-class redistribution provides no benefit whatsoever for those class members other than the few receiving the other class members' money as their windfall. The Petitioners' attempt to refute this point by citing a 2004 decision in which Judge Posner stated that, "There is no direct benefit to the class from the defendant's giving the money to someone else." Pet. Br. at 33 (quoting *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004)). However, nine years later, writing for another Seventh Circuit panel, Judge Posner (and the Seventh Circuit) effectively repudiated this statement in holding:

> Payment of $10,000 to a charity whose mission coincided with, or at least overlapped, the interest of the class (such as a foundation concerned with consumer protection) would amplify the effect of the modest damages in protecting consumers. ***A foundation that receives $10,000 can use the money to do***

> ***something to minimize violations of the Electronic Funds Transfer Act; as a practical matter, class members each given $3.57 cannot.***

Hughes v. Kore of Indiana Enter., Inc., 731 F.3d 672, 676 (7th Cir. 2013) (emphasis added). Petitioners do not cite to this later development, nor to the numerous courts that, in supporting *cy pres* distributions, have so found. 4 *Newberg* § 12:32 n.12 (listing examples).

Fourth, because *cy pres* aims to benefit the absent class members while redistribution schemes do not, class counsel's ethical duties under Rule 23 arguably compel them to seek such an approach. Rule 23(g), which sets forth those duties, mandates that class counsel "must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). The Advisory Committee Notes emphasize that:

> Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, ***class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole***.

Fed. R. Civ. P. 23 advisory committee note (2003) (emphasis added). *See also id.* (stating that the Rule

"articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members"). Given class counsel's obligation to represent the interests of the entire class, a decision to direct un-distributable funds to organizations undertaking work consistent with the interests of the entire class is completely defensible, whereas a decision to confer windfall recoveries on some class members at the expense of others is not.

* * *

Because *cy pres*, unlike Petitioners' proposal, (1) does not result in windfalls; (2) would be the approach used in an individual litigation setting; (3) aims to benefit the entire class; and (4) is compelled by class counsel's duties, it is a reasonable solution to the problem presented in rarely-occurring full *cy pres* situations such as this one. *See also* U.S. Br. at 27 n.2 ("Petitioners do not explain why a truly random distribution of settlement funds would be 'reasonable' under Federal Rule of Civil Procedure 23(e)(2) or why it would necessarily result in greater relief to the class as a whole than a properly tailored *cy pres* award.").

III. Rule 23 Does Not Prohibit Class Certification In Full *Cy Pres* Cases

Though one of the two questions presented is whether Rule 23 permits class certification in a full *cy pres* case, Petitioners devote just two pages of their 57-page brief to the question, Pet. Br. at 52-54, and make

only one argument therein: that this class suit does not meet Rule 23(b)(3)'s superiority requirement "because every single class member is worse off than if they opted out and reserved their claims to litigate individually." *Id.* at 53. Petitioners are correct that only the superiority prong of Rule 23 is arguably at issue: this is the only certification prong that the Petitioners raised in their class action objection, Pet. App. 131-134, and hence the only available ground for appeal. *Devlin*, 536 U.S. at 9. But they are wrong in their understanding of that requirement.

Rule 23(b)(3) asks a specific question: whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). It requires a court to compare a class action to, for example, individual actions. 2 *Newberg* § 4:85. Notably, Petitioners fail to undertake that task: they simply argue, incorrectly, that class members are better off opting out and *reserving* their claims. But they do not consider the question of whether class members could individually *litigate* their claims more "fairly and efficiently" than in a class suit.

They likely do not undertake that analysis because the outcome supports class certification. Full *cy pres* cases tend to arise in statutory damage situations, as discussed above, and thus raise the question of whether class litigation is superior to individual litigation in statutory damage cases. Litigants have raised two distinct concerns, each of which is now well-settled.

First, some defendants had argued that the multiplication of statutory damages by the number of class members could generate a judgment value so out of proportion to (often technical) statutory violations that class certification should be denied. *Id.* at § 4:84. This Court laid that argument to rest in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). In that case, New York State had enacted a statute that essentially barred class certification in cases seeking statutory damages. This Court held that Rule 23, and not the New York limitation rule, governed class certification in federal court. If Rule 23 itself barred class actions for statutory damages, there would have been no clash between Rule 23 and the New York statute at issue in *Shady Grove* and the federal court could have simply applied the New York provision. Moreover, the Court explicitly held that Rule 23 applies across the board but for the exceptions that *Congress* creates. *Id.* at 400.

Second, a few courts have held that a plaintiff is worse off in a statutory damage class action than in individual litigation when a Congressional cap on class action damages means that her class recovery could be lower than her potential recovery in individual litigation. 2 *Newberg* § 4:83; *see also* 7 *Newberg* § 21:6 n.34 (FDCPA cases); *id.* at § 21:3 n.34 (TILA cases). The problem, of course, is that it is highly unlikely that any class member would individually litigate a case for $1,000 in statutory damages. Even if the relevant statute authorized a fee for a prevailing attorney, the cost of litigating against Google or a similar corporate

defendant is so high, and the single individual's statutory recovery so low, that counsel are unlikely to invest in such a suit. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 245 (2013) (Kagan, J., dissenting) (discussing costs of individual arbitration in antitrust suit and concluding that, "No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands."). This is particularly true given the risk that the defendant may simply pick off the plaintiff by offering a $2,000 settlement on the eve of the $1,000 trial, after plaintiff's counsel have invested their time and money to reach that point.

Because denying class certification in statutory damage cases therefore inures only to the benefit of the wrongdoer, the Seventh Circuit rejected this line of argument more than 20 years ago, writing:

> [A] de minimis recovery (in monetary terms) should not automatically bar a class action. The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor. True, the FDCPA allows for individual recoveries of up to $1000. But this assumes that the plaintiff will be aware of her rights, willing to subject herself to all the burdens of suing and able to find an attorney willing to take her

> case. These are considerations that cannot be dismissed lightly in assessing whether a class action or a series of individual lawsuits would be more appropriate for pursuing the FDCPA's objectives.

Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997). Many courts have followed suit. *See* 7 *Newberg* § 21:6 n.36 (listing FDCPA cases on point); *see also id.* at § 21:3 n.35 (identifying two TILA cases on point); 2 *Newberg* § 4:87 n.11 (identifying five Fair Credit Reporting Act (FCRA) cases on point).

Together these two points suggest that class action litigation is superior to individual litigation as a means of "fairly" litigating the controversy.

Third, a class action is also, of course, far more efficient: Rule 23 here affords relief (albeit some indirect) to a class of 129 million Google users in one proceeding. No one seriously proposes, nor expects, 129 million individual proceedings, but there will either be so many that they will flood the courts or so few that the class action is shown to be the sole—and hence superior—means of relief.

Petitioners barely pursue the argument that class actions fail the superiority test in full *cy pres* (typically statutory damage) cases and the scant argument they make is unconvincing. Absent a class suit, a wrongdoer will simply face no liability whatsoever.

CONCLUSION

For the foregoing reasons, if the writ is not dismissed as improvidently granted, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 5, 2018

APPENDIX

LIST OF FULL *CY PRES* SETTLEMENTS
FINALLY APPROVED BY FEDERAL COURTS
(By Year of Final Approval)

1. *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, No. CV 12-MD-2358 (SLR), 2017 WL 446121 (D. Del. Feb. 2, 2017), on appeal (internet privacy)

2. *Graff v. United Collection Bureau, Inc.*, Civ. Action No. 2:12-cv-02402 (E.D.N.Y. Apr. 26, 2016) (following remand from *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 485 (E.D.N.Y. 2016)) (FDCPA)

3. *Gonzalez v. Dynamic Recovery Sols., LLC*, No. 14-CIV-20933, 2015 WL 738329 (S.D. Fla. Feb. 23, 2015) (FDCPA)

4. *Klewinowski v. MFP, Inc.*, No. 8:13-CV-1204-T-33TBM, 2014 WL 1418263 (M.D. Fla. Apr. 11, 2014) (FDCPA)

5. *Fairchild v. AOL, LLC*, Civ. Action No. 09-03568 CAS (C.D. Cal. Dec. 12, 2013) (following remand from *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011)) (internet privacy)

6. *In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013) (internet privacy)

7. *In re Bluetooth Headset Prod. Liab. Litig.*, No. 07-ML-1822 DSF EX, 2012 WL 6869641 (C.D. Cal. July 31, 2012) (following remand from *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011)) (consumer protection)

8. *In re Google Buzz Privacy Litig.*, No. C 10-00672 JW, 2011 WL 7460099 (N.D. Cal. June 2, 2011) (internet privacy)[1]
9. *Catala v. Resurgent Capital Servs. L.P.*, No. CIV.08CV2401 NLS, 2010 WL 2524158 (S.D. Cal. June 22, 2010) (FDCPA)
10. *Lane v. Facebook, Inc.*, No. C 08-3845 RS, 2010 WL 9013059 (N.D. Cal. Mar. 17, 2010), *aff'd*, 696 F.3d 811 (9th Cir. 2012) (internet privacy)
11. *Gravina v. Client Services, Inc.*, No. 08-3634 (E.D.N.Y. Aug. 25, 2009) (FDCPA)
12. *Huffman v. Zwicker & Assocs., P.C.*, No. 1:07CV01369-LJO-SMS, 2008 WL 11385386 (E.D. Cal. Sept. 3, 2008) (FDCPA)
13. *Voris v. Resurgent Capital Services, L.P.*, No. 06-2253 (S.D. Cal. June 17, 2008) (FDCPA)
14. *Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124 (S.D. Fla. Jan. 31, 2008) (deceptive trade practices)
15. *Davern v. Arrow Financial Services, LLC*, No. 06-6655 (E.D.N.Y. Sept. 7, 2007) (FDCPA)
16. *Reade-Alvarez v. Eltman, Eltman, & Cooper, P.C.*, No. CV-04-2195 CPS, 2006 WL 3681138 (E.D.N.Y. Dec. 11, 2006) (FDCPA)
17. *Drennan v. Van Ru Credit Corp.*, No. 96 C 5789, 1997 WL 305298 (N.D. Ill. June 2, 1997) (FDCPA)
18. *Gammon v. GC Servs. Ltd. P'ship*, 162 F.R.D. 313 (N.D. Ill. 1995) (FDCPA)

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[1] *Amicus* was one of 15 lawyers with designated class counsel roles in this case. *Id.* at 2.

METHODOLOGY

My research assistants and I generated these data in four ways:

1. We ran a series of broad searches on Westlaw (such as <"class action" & "*cy pres*">) and then followed up on those with more targeted searches utilizing specific terms such as <FDCPA & "*cy pres.*">. These searches generated hundreds of results that we then read through to find full *cy pres* settlements.

2. We searched for full *cy pres* cases in a database of more than 1,000 class action lawsuits that I maintain. My prior research assistants originally generated this database from information contained in the journal, *Class Action Attorney Fee Digest* ("CAAFD"). CAAFD was published monthly from January 2007 to September 2011, for a total of 57 issues. In those 57 issues, it reported on 1,187 unique court-approved state and federal class actions. For each case, a CAAFD case abstract describes the awarding court and judge, the subject matter of the dispute, the settlement/judgment benefits, the attorney fee and expense awards (both as requested by plaintiff's counsel and as approved by the court), the case filing and attorney fee award dates, any named plaintiff awards, and miscellaneous data on case and settlement/judgment administration. My current research assistants identified full *cy pres* cases in this database and then verified the information by reviewing each case's original documents on PACER.

3. We reviewed briefs filed by the Petitioners in this case and read through all of the *cy pres* cases cited therein.

4. We reviewed the primary scholarly literature on *cy pres* in class actions and tracked down any cases cited within these articles. *See, e.g.*, Martin H. Redish et al., Cy Pres *Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617 (2010) (finding only 10 cases among 120 from 1974-2008 that distributed more than 75% of class recovery to *cy pres* recipients).

No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK
AND MELISSA ANN HOLYOAK,
Petitioners,

–v–

PALOMA GAOS,
ON BEHALF OF HERSELF AND ALL OTHERS
SIMILARLY SITUATED, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* SPECTRUM SETTLEMENT RECOVERY, LLC IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether it was an abuse of discretion under Fed. R. Civ. P. 23(e)(2) for a district court to approve a *cy pres* award of Fed. R. Civ. P. 23(b)(3) settlement proceeds where that court correctly concluded that administrative costs would so deplete available funds that class members would likely receive negligible payments, rendering a direct distribution infeasible.

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INTEREST OF AMICUS CURIAE

Spectrum Settlement Recovery, LLC ("Spectrum") is a third-party claim-filing company with years of experience recovering funds in Rule 23(b)(3) class actions.[1] Spectrum's experience includes many cases with truly vast classes—so-called "mega-class" settlements with tens of millions of class members.

Spectrum's primary business activity is to act as the agent of companies that are entitled to share in class action settlements. Spectrum collects and presents relevant corporate records and other evidence of loss to support its clients' claims and to maximize their recoveries. For this service, Spectrum is usually paid a contingent commission based on the client's recovery. Companies engage Spectrum because of its experience in recovering hundreds of millions of dollars of claims, an expertise seldom maintained by the companies themselves. Spectrum has represented more than 20% of the Fortune 1000 in this capacity in past and pending class action settlements over the last decade and a half.

Because Spectrum's business depends on direct distributions, our interest in the issues before the Court is closely aligned with those of class members: to obtain a direct monetary recovery whenever possible.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, this brief is filed with the consent of all parties.

Spectrum often intervenes, both representing specific corporate clients and also as *amicus curiae*, to expedite and maximize class recoveries, and also to encourage more transparent reporting of the claim filing process. Spectrum typically supports direct distributions to class members and generally opposes *cy pres* awards. At the same time, Spectrum recognizes that there are instances, like this case, where a *cy pres* award is the best practical solution to the challenges attendant to the distribution of comparatively small sums to massive numbers of class members.

While the parties to this action and other *amici curiae* have exhaustively briefed the case history and decisions of the lower courts discussing the standards that have been applied to class action *cy pres* awards, Spectrum respectfully submits that there is an important additional consideration that may properly inform the Court's deliberations. The record below and the briefs submitted thus far do not analyze how much class members would likely have received had a direct distribution been ordered in lieu of the approved *cy pres* award. Spectrum offers just such an analysis here, and does so relying on readily available data from this case, as well as its experience concerning the complexities and costs associated with identifying qualified class members, providing adequate notice, validating claims, and ultimately making distributions. Further, the analysis presented is supported by a survey of all known studies discussing class participation rates. All of these factors point to the inescapable conclusion that the district court's decision that a direct distribution was not feasible in this mega-class settlement was, in fact, correct.

SUMMARY OF ARGUMENT

The central issue in this case is not a matter of law that requires resolution by this Court. It is instead a purely factual question—did the district court abuse its discretion in approving a *cy pres* award after finding that a direct distribution of settlement proceeds to members of this class action was "infeasible" because it would confer, at best, a trivial economic benefit to the class?

Unfortunately, the district court did not conduct a public, detailed, evidence-driven analysis regarding the question of feasibility. Instead, it seems to have relied on its experience in similar cases and its awareness that the massive number of class members rendered the limited settlement funds insufficient to a meaningful distribution directly to class beneficiaries. And in affirming the district court's conclusion, the Ninth Circuit's decision did not enhance the admittedly thin record.

Nonetheless, reliable and readily available data exists from which one can easily conduct such an analysis. *Amicus curiae* Spectrum did just that, and its analysis demonstrates that the district court's summary finding of infeasibility is almost certainly correct. This is true even assuming only a small fraction (1% to 2%) of eligible class members bothers to submit claims. And the administrative costs of a slightly higher participation rate (3% or greater) would unquestionably render a distribution not just impracticable but financially impossible. Spectrum's analysis, summarized below, shows that it is likely that a direct

distribution would have paid class members less than $1, with administrative costs exceeding the amount paid as a direct distribution. The best case outcome would return approximately $2 each to class members. In the worst case scenario, the administrative costs of a direct distribution would wholly deplete (or even exceed) the available common fund.

In short, Spectrum's analysis shows that, whatever its deliberative process, the district court reached an eminently reasonable conclusion in finding that distribution of funds to class members would not be economically feasible. The circuit court deferred to this finding as within the lower court's discretion as the finder of fact, as should this Court. In this circumstance, Spectrum submits that the proper course now is for the Court to dismiss the writ as improvidently granted.

ARGUMENT

I. THE STANDARDS FOR DETERMINING WHETHER A *CY PRES* AWARD OF CLASS ACTION PROCEEDS IS PERMISSIBLE ARE NOT GENUINELY IN DISPUTE

It is broadly accepted that class members essentially have a property interest in class action settlement proceeds and are entitled to receive a direct distribution of their respective shares whenever such a distribution is "feasible." *See, e.g. In re Bank-America Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015); *In re Lupron Marketing and Sales Practices Litig.*, 677 F.3d 21, 32-33 (1st Cir. 2012).

A determination of feasibility requires a finding of fact by the district court that turns on case-specific considerations. While a number of court decisions have identified factors that ought to be considered, there is no universally accepted list or set of bright-line tests for feasibility, nor can there be.

Several courts have addressed the process for making this determination. In *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173-74 (3d Cir. 2013), the Third Circuit ruled that trial courts must make "a thorough analysis of settlement terms" and evaluate "the degree of direct benefit provided to the class." This process should include the size of the proceeds available for distribution compared to the number of potential claimants, the percentage of such claimants who are likely actually to file a claim and collect on it, and the likely costs of the required claims administration process. The Third Circuit emphasized that, if the parties do not provide it, the trial court should on its own initiative "affirmatively seek out such information." *Id.* at 174 (quoting *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 351 (3d Cir. 2010)). *See also In re BankAmerica Corp. Sec. Litig.*, 775 F.3d at 1067.

Petitioners attempt to frame a certiorari-worthy issue based on a purported split between the Ninth Circuit and other circuits, arguing that in the instant case, the Ninth Circuit imposed a rule that a direct distribution would be deemed infeasible unless all class members could receive a share of the proceeds. The Ninth Circuit did no such thing. While it observed, as did the district court, that a distribution to all class members would result in a negligible per member recovery (about $0.04 before considering the costs of

administering the distribution), it nowhere suggested—much less ruled—that this is the sole factor to be considered. Although the Ninth Circuit could have seized the opportunity to mandate specific factors to be evaluated and the weight to be assigned to them when evaluating the feasibility of a direct distribution, its failure to do so hardly constitutes a legal error that this Court is compelled to correct.

The issue instead is whether the district court abused its discretion in correctly finding that a direct distribution here would not be "logistically feasible and economically viable." *See Klier v. Elf Atochem North America Inc.*, 658 F.3d 468, 475 (5th Cir. 2011). It might well have been preferable for the district court to make more explicit its reasoning in reaching its finding of infeasibility. But its disposition of what is a highly fact-intensive issue does not warrant this Court's attention, where—as here—that decision is very likely correct and certainly not an error of sufficient magnitude to be reversible under the applicable abuse of discretion standard. Spectrum's neutral and clear-eyed consideration of the principal factors that go into such an analysis support a finding that a direct distribution to class members, in this case, would be illogical and economically irrational.

II. THE PRINCIPAL FACTORS TO BE CONSIDERED IN AN ANALYSIS OF THE FEASIBILITY OF A DIRECT DISTRIBUTION IN THE INSTANT CASE ARE NOT CONTROVERSIAL

The principal factors pertinent to a reasoned feasibility analysis in this setting are straightforward. First, the court must determine how much of the common fund will actually be available for distribution.

This amount is not just what remains of the whole fund after deducting attorneys' fees and litigation costs (in this case $5.3 million). The distribution process itself entails substantial costs, both fixed and variable, that must be deducted before determining the how much can be paid to the class. So in this case, $5.3 million is just the starting point in calculating how much can actually be distributed, which is inevitably a much lower figure. Second, the court must estimate the likely number of class members who will submit a valid claim: a number that will inevitably be a fraction of the total number of class members.

While most of the cost-related variables can be ascertained with some certainty by the trial court at the time it evaluates a proposed settlement, the likely percentage of class participation is less easily predicted. This is particularly true in mass consumer class actions where the identities and contact information of beneficiaries are unknown, and where the amount distributed even under the most favorable circumstances will be relatively small. Nonetheless, based on published data and an anecdotal consensus, the likely participation percentage here can be confidently estimated with sufficient accuracy to determine whether the district court abused its discretion in finding that distribution of the settlement fund to class members was not feasible.

Trial courts assess the factors relevant to feasibility either without a mandated formula or process in some circuits and with more guidance in other circuits. Regardless of local practice, some boundaries are obvious. As to economic feasibility—which is the controlling issue in this case—it quite clearly would be

infeasible to mandate a direct distribution to class members where the result would be grossly inefficient or wasteful. Spending $2 in administrative costs to distribute just one cent per participating class member would be nonsensical, and courts are not required to order irrational outcomes. There is no reason to believe that a small distribution would in any meaningful way compensate class members for their injuries. In these circumstances, a closely tailored *cy pres* alternative would be superior and likely of greater value to the class.

Trial courts frequently engage in precisely this sort of analysis when distributing class action funds. Some have employed the tactic of setting a minimum payment below which there will not be distributions. These courts have selected from a broad range of values based on their assessments of what low threshold is both rational and economically feasible considering the size of the class, the settlement fund, and costs of distribution. *See, e.g.*, *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 463-64 (E.D. Pa. 2008) (approving a $50 minimum payment); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02-1484, 2007 WL 4526593, at *12 (S.D.N.Y. Dec. 20, 2007) ($50 minimum payment required to efficiently administer the settlement fund); *In re Sprint Corp. ERISA Litig.*, 443 F.Supp.2d 1249, 1268 (D. Kan. 2006) ($25 *de minimis* threshold amount ruled fair); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) ($10 *de minimis* threshold found reasonable); *Miller v. Ghirardelli Chocolate Co.*, No. 12-cv-04936-LB, 2015 WL 758094, at *1 (N.D. Cal. Feb. 20, 2015) (granting final approval of a class settlement where claimants received up to $1.50 per uncorroborated

product purchase, up to a maximum of $24). Other courts have rejected imposing any low-dollar floor for participating class members, ensuring that every claimant receives something. In *In re Polyurethane Foam Antitrust Litigation*, the court ordered distributions as low as $1.50 on the thesis that "something is better than nothing." 168 F.Supp.3d 985, 999 (N.D. Ohio 2016) (quoting *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, at *3 n.3 (N.D. Ohio July 12, 2010), *judgment vacated by Whirlpool Corp. v. Glazer*, 569 U.S. 901 (2013)). Even in that case, however, the court acknowledged that cases might exist where a low-dollar floor could be justified. *See id.* It is hard to envision imposing on trial courts a bright-line rule imposing a minimum dollar recovery beyond which distribution is not rational. Each case is entirely dependent on its particular facts.

In large class actions, substantial administrative costs attend the distribution of settlement funds. Because these costs are variable depending on participation, the resulting fund expenditures to notify claimants, process claims, and make payments can be wildly disproportionate to what class members may receive. For instance, a trial court faced with a range of participation outcomes may responsibly conclude that the best-case recovery would be $5 but that it was likely that any recovery would actually be impossible. If $4 million were technically available for distribution after paying fixed costs, but the cost of verifying the claim and mailing a check were $1 per claimant and 5 million class members file valid claims, this additional, variable cost of distribution

($5 million) would exceed by $1 million the funds available, resulting in no distribution to claimants.

The district court could, of course, determine definitively how much class members would receive by having counsel actually incur the costs of engaging a settlement administrator, providing notice to class members, and tallying the legitimate claims. But if, after these costs were incurred, this process demonstrated that no distribution would be feasible because class members' recovery had turned out to be zero or negligible, the result would be to significantly expend millions of dollars from the common fund with no benefit to class members. This exercise would affirmatively harm the class members since it would reduce the indirect benefits by leaving less for *cy pres* recipients. In a settlement where there is little upside to running such an experiment and substantial potential for loss, the district court should properly consider this risk in making its feasibility determination.

III. The Determination of Whether a Direct Distribution Is Feasible Rests with the District Court as the Trier of Fact and Is Reviewable Only for Abuse of Discretion

District courts, as the triers of facts, are charged with the responsibility to decide factual questions related to feasibility, including the likely participation rate and costs of distribution, and ultimately conclude whether a direct distribution is economically viable and rational considering the specific circumstances in the case. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d at 174. As *Klier* recognized, "Our decision lies comfortably with prior decisions of this Court

and our sister circuits, which have necessarily taken case-specific approaches to the role of the federal district judge in the distribution of monies left unclaimed after administration of a class settlement." 658 F.3d at 478.

The standard of review in considering whether to approve a proposed settlement of a class action was succinctly summarized in *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975), as being properly "left to the sound discretion of the district court." A circuit court will reverse the district court's approval of a class settlement only for a clear abuse of discretion. *E.g., Bryan v. Pittsburgh Plate Glass Co.* (*PPG Industries, Inc.*), 494 F.2d 799, 801 (3d Cir. 1974). And this Court typically will "not overturn a finding of fact accepted by two lower courts." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S.Ct. 2507, 2544 (2015).

While the district court's determination can be criticized for failing to demonstrate explicit findings on the various factors pertinent to feasibility—and in an appropriate case this Court would be justified in clarifying that district courts should make such findings—under a rational examination of the available data, the district court's ultimate finding that direct distributions are infeasible in this case is demonstrably correct.

The record shows that the district court initially based its finding of infeasibility on a simple mathematical evaluation, dividing the total settlement less attorneys' fees and litigation costs ($5.3 million) by the size of the entire class (129 million Google users

during the class period).[2] The resulting direct distribution from this equation would yield less than four cents per beneficiary. Of course, the four cents calculation fails to consider distribution costs, which would further reduce the distributable share. Conversely, this equation presupposes 100% class participation in the distribution, an assumption that is unsupported and insupportable. The court's simple exercise in division is of limited value, and the trial record does not show that the district court inquired into either (i) research regarding participation rates in comparable consumer class actions or (ii) the impact of administrative costs based on those projections.

Without conducting its own analysis, the Ninth Circuit held that the "district court's finding that the settlement fund was non-distributable accords with our precedent" on grounds that a distribution is "'infeasible' where each class member's individual recovery would have been '*de minimis*.'" Opinion at 9, *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012), *cert. denied sub nom. Marek v. Lane*, 531 U.S. 1003 (2013)).

Significantly, the Ninth Circuit's decision did not turn on some legal standard at odds with other circuit court decisions, a result that could justify Supreme Court review. Instead, it represented simple deference

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[2] The estimate of class members came from comScore (a company that provides Nielsen-like analytics of websites), which calculated that 129.9 million people visited Google's search website in the six months preceding the motion to preliminarily approve the settlement. Decl. of Richard W. Simmons, Docket Item No. 52-4, ¶ 25.

to a district court with extensive experience in large-scale technology-driven consumer class action matters. In fact, due to the centrality of Silicon Valley to the technology industry, the Northern District of California is arguably the epicenter of these technology-based, mega-class cases. Notwithstanding deficiencies in the lower courts' analytical approaches, Spectrum's independent analysis of the issue of feasibility strongly suggests that they reached the right result.

IV. DIRECT DISTRIBUTION OF THE GOOGLE REFERRAL SETTLEMENT FUNDS TO INDIVIDUAL CLASS MEMBERS IS ALMOST CERTAINLY NOT FEASIBLE

Ultimately, a determination of whether a relatively small settlement fund created in compensation for a mega-class can be feasibly distributed to the class turns on two factors. First, and most important, is an informed estimate of the likely recovery per class member. Second are the surrounding factors, including the perceived value of such recoveries by class members, the nature of the claimed harm, whether that harm can be ameliorated in any realistic sense by the size of the payment, and whether the alternative *cy pres* award is likely well designed to mirror the class's interests and ideally provide a genuine, albeit indirect, benefit to the class. Spectrum limits the discussion below to the first issue—the likely recovery per class member. If, as here, that recovery is sufficiently small —or indeed potentially zero—that alone strongly supports a finding of infeasibility. In this evaluation, Spectrum chose what are clearly extraordinarily conservative estimates as to costs and participation rates.

A. The Widely Accepted Approach to Evaluating What Class Members Would Likely Receive in a Direct Distribution

While requiring some informed estimation, the methodology for calculating a projected per class member recovery is not intrinsically complicated, and most of the information needed to do so is readily available. In the interest of assisting the Court in its consideration of this matter, Spectrum performed just such an analysis. Before we show our math, there are a few basic parameters that need to be understood.

In mega-class cases, the relationship between the class members and the defendant can have a material effect on the cost and effectiveness of notice, and also the cost of making actual distributions. There are basically three kinds of relationships:

1 Paid Subscriber

Where most class members are current, paid subscribers, a *cy pres* award is almost never justified. By way of example, a settlement resolving an over-charge by a phone company or cable TV provider involves class members who receive an ongoing bill for their subscription services against which settlement benefits can readily be credited. This allows for an "automatic distribution" where class members receive benefits without having to complete a claim form or even negotiate a check or other form of payment. There is essentially no cost in paying these class members. While notice is required for purposes of opting out or objecting to a settlement, once ready for distribution, there is no need for a claims filing process or further

notice. Class benefits as small as a few pennies can simply be credited against a subsequent bill.

2 Nonpaying Subscriber

Where class members are not routinely billed, but are non-paying subscribers to the defendant's service, the cost of claims administration can be substantially reduced. Facebook provides a good example here. Users do not pay for the service, and there is no way to simply credit funds back to them. But communicating the availability of funds is extremely easy. Defendants have class member email addresses or can otherwise "push" notice directly to the class. In nonpaying subscriber settlements, a broad notice ad campaign, mailed notice, and other administrative costs are not necessary, which substantially reduces the administrative costs of distributing the settlement proceeds. Because such notice costs and costs incurred in proving the eligibility of individual class members typically account for a substantial portion of the overhead costs, direct distributions in this setting are frequently feasible.

3 Unpaid User

The instant case involves an Unpaid User mega-class, where class members use an online service, but need not have an account or any further relationship with the service provider. Google's search engine is available to all comers, and for purposes of the instant action, no account is required. "An individual can run a Google search without logging into a Google account. Google also does not have addresses or similar identifying information for many Google account-holders." Respondent Google's Br.33 n.11. Identifying

class members in these cases is more difficult, making it harder to project notice costs and participation rates, but estimates can still be reached with a reasonable degree of confidence.

With a recognition of those parameters, and as applied to this case, the two key variables that control the per class member recovery—administrative costs associated with distributions and the expected participation rate—are discussed below.

B. The Costs That Affect Class Member Recoveries

In this case, $5.3 million remains in the common fund, after allowing for attorneys' fees, opt-out notice, and litigation costs, but these funds are not entirely available for distribution. Substantial costs are necessarily incurred in making a direct distribution. And these costs must be paid from the common fund and thus will deplete the money available for distribution. These costs can be divided into two classes—fixed and variable.

Fixed costs can broadly be grouped into (i) claims administration and (ii) notice. In virtually all direct distributions, courts must authorize hiring a professional claims administrator to create a claim form, establish a case database, build a settlement website, create an 800 number automated support system, and otherwise prepare for the influx of both valid and invalid claims. All of these costs must be expended before the first claim can be filed. There are also a number of fixed costs that are incurred during claims processing and at the end of the process, including tax reporting, the re-issuance of checks as required, skip tracing, account reconciliation, remailing undelivered

checks, and final declaration and reporting to the court and counsel. In a mass-class action such as this, a minimum estimate for claims administration activities from setup through completion would conservatively range between a quarter and a half million dollars. For this analysis, Spectrum used the low end of this range or $250,000.

Just as due process requires adequate notice prior to settlement approval (so that class members can object, opt out, and otherwise weigh in on the disposition of their legal interests), direct distributions typically require additional notice prior to claims administration to solicit claim submissions by class members. The cost of notice can be highly variable, and its results may be counter-intuitive. The more effective the notice—which typically requires a higher expenditure—the greater the likely number of class member who will participate, but the less of the common fund that remains available for payment to the class. Highly effective notice campaigns thus have the paradoxical effect of reducing per class member recoveries both by depleting the common fund and by increasing the number of claimants.[3] Here, the actual cost of preapproval settlement notice in this litigation provides a reasonable basis for estimating the cost associated with a second notice to solicit claims from the class. The record here shows that notice costs were approximately $855,539. Decl. of Richard W. Simmons, Docket Item No. 52-4, at Ex. 4-C. In fact, this level of expenditure is likely minimally

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[3] For a discussion of this "Goldilocks Dilemma," *see* Francis McGovern, *Distribution of Funds in Class Actions-Claims Administration*, 35 J. of Corp. L. 123-34 (2009).

sufficient to meet due process requirements and provide class members with a reasonable opportunity to participate in the settlement. If the common fund were substantially larger—say $20 million as in *Fraley v. Facebook, Inc.*, 966 F.Supp.2d 939, 943 (N.D. Cal. 2013)—an expenditure of $2 million or more would be easily justified, although it would increase participation and further lower what here would already be a tiny per class member recovery. The $850,000 (rounded down for convenience) estimated here would be spent on several forms of notice. Typically a press release is issued as a form of notice by publication. Beyond that, the vast majority of the money set aside for notice would go into banner advertising and social media outreach on platforms such as Facebook, Instagram, and Twitter.[4] Combined, the fixed costs in this action could be expected to total, at a minimum, $1.1 million ($250,000 for setup and $850,000 for notice).

Variable costs are those incurred on a claim-by-claim basis as forms are submitted by putative class members and typically account for the lion's share of incurred expenses in a direct distribution. The majority of variable costs fall into three specific categories. First, claims administrators charge a per claim fee to

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[4] Intuitively, it might be assumed that effective and inexpensive notice could be achieved by using Google's existing advertising placement platform to communicate with class members. In fact, this assumption is unfounded. Selling ads is the core of Google's business, and requiring Google to provide notice to class members for free would displace the ad space available for its paying customers resulting in an obvious loss of revenue for Google. Yet Google agreed to settle this action for $8.5 million, not $8.5 million plus millions of dollars more of in-kind free advertising.

process, verify, audit for fraud or duplication, and authorize payment of each valid claim form submitted, whether by mail or online. Second, since funds must be transmitted to each qualifying class member, physical checks must be printed, envelopes addressed, and appropriate supporting information included in the prepared distribution package. Third, checks are disbursed typically through the U.S. Postal Service, which charges postage on a per piece basis.

Claims administrators charge between 50 cents and $1 per processed claim; Spectrum's analysis below again uses the most conservative value at the bottom of that range which in this case is 50 cents. The cost of a printed check, addressed envelope, and the inclusion of basic information explaining the reason a recipient is receiving the check can range widely, but in no case would it be less than 30 cents, so that is the value included in Spectrum's calculations. Finally, the easiest value to include is first class U.S. Mail, which costs 42 cents per piece. Added together, the minimum variable costs amount to $1.22 per compensated class member.

C. Participation Rates

The second key factor affecting the size of the payment available for distribution to qualifying class members is the participation rate, that is, the likely percentage of the eligible class that will actually file a viable claim for a share of the fund. Plainly, the larger the number of viable claims submitted, the smaller the available payout per claimant. If the participation rate is high enough—and it need not be very high in a mega-class action like this one—the associated administrative costs that will need to be

expended in the distribution will swallow the entire available fund, leaving a net deficit and creating, by definition, an infeasible distribution.

A natural way to estimate participation rate is by reference to similar cases.[5] Unfortunately, data on participation rates is rare.[6] But there is research, both academic and commercial, that can be used to estimate likely participation rates in cases such as this. One leading claims administration firm reported claim filing rates ranging between 2% and 20% in consumer cases.[7] Another study, cited by Petitioners

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[5] While research on participation rates is limited, all such work suggests low filing rates in consumer class actions. Perhaps the most comprehensive survey of reported participation rates was conducted by Brian Fitzpatrick and Robert Gilbert in *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. L. & Bus. 767 (2015). The survey reported a participation rate of between 1% and 70% in 15 "small stakes consumer class actions lawsuits." *Id.* at 770.

[6] As an active participant in the class action arena, if there were one change Spectrum could impose, it would be to require mandatory reporting of claim filing results at the end of cases. Requiring trial courts to report the results of the claims distribution process, including specifically participation rates, could only further the interests of justice by providing future courts with more accurate, reliable indices predictive of participation rates which are so essential to any judgment regarding whether a direct distribution is practical and thus whether an all *cy pres* payment is consistent with Rule 23(e)(2).

[7] Tiffany Janowicz, Anticipating Claims Filing Rates in Class Action Settlements (Mar. 2013), *available at* https://perma.cc/7FV3-KJKY (reporting ranges of 2-20% in consumer cases, 20-35% in securities cases, and 20-85% in employment cases). *See also* Fitzpatrick and Gilbert, *supra* note 5, at 776 n.34 (citing same study).

here, was conducted by the Mayer Brown law firm (the "Mayer Brown Study")[8] at the behest of United States Chamber of Commerce as part of the Chamber's advocacy against consumer class actions. While subject to the risk of bias, given its sponsor,[9] the Mayor Brown Study produced a median participation rate of 1.5%. Though not definitive, the Mayer Brown 1.5% participation rate appears representative of the consensus that consumer class action settlements like this one typically see low participation rates and are likely to be at the low end of the spectrum. Thus, Spectrum is comfortable relying on the Mayer Brown Study's median participation rate of 1.5% and uses this in its analysis for purposes of demonstrating the likely recovery by class members in this case.[10]

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[8] *See* Mayer Brown LLP, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions, (Dec. 11, 2013), https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

[9] "In light of the duty of law firms to zealously represent their clients' viewpoints, we do not put the same stock in the Mayer Brown study, of course, as we do in academic studies. Nonetheless, the study collected data using neutral criteria, and we have no reason to believe that the data were reported in a biased manner." Fitzpatrick and Gilbert, *supra* note 5, at 776.

[10] Other studies found significantly higher participation rates. *See* Fitzpatrick and Gilbert, *supra* note 5, at 770. As demonstrated *supra*, rates much above 2% would result in no distribution to class members, making use of the lower Mayer Brown Study median rate a more useful basis for analysis.

D. The Results of Spectrum's Analysis

Using as a baseline the values discussed above, at a 1.5% participation rate, class members in this case would be expected to receive less than $1 each.

Number of Class Members	129,000,000
Participation	1.50%
Number Participants	1,935,000
Common Fund Pool	$5,300,000
CLAIMS ADMINISTRATOR SETUP	
Fees	$250,000
Notice	$850,000
VARIABLE COSTS	
Printing @ $.50 each	$580,500
Postage @ $.42 each	$812,700
Net Fund Available	$1,839,300
Payment per Participant	$0.95

Spectrum further evaluated the likely per claimant recovery by assuming a participation rate .5% below and above the Mayer Brown Study median rate of 1.5%. Thus, if the participation rate was as low as 1%, the payment would rise to $2.04 per participant.

Number of Class Members	129,000,000
Participation	1.00%
Number Participants	1,290,000
Common Fund Pool	$5,300,000
CLAIMS ADMINISTRATOR SETUP	
Fees	$250,000
Notice	$850,000

VARIABLE COSTS	
Printing @ $.50 each	$387,000
Postage @ $.42 each	$541,800
Net Fund Available	$2,626,200
Payment per Participant	$2.04

If, on the other hand, the rate reached 2%, each participant's share would shrink to $0.41.

Number of Class Members	129,000,000
Participation	2.00%
Number Participants	2,580,000
Common Fund Pool	$5,300,000
CLAIMS ADMINISTRATOR SETUP	
Fees	$250,000
Notice	$850,000
VARIABLE COSTS	
Printing @ $.50 each	$774,000
Postage @ $.42 each	$1,083,600
Net Fund Available	$1,052,400
Payment per Participant	$0.41

In each of these examples, the costs of administering the claims process and distribution of funds would exceed the amount actually distributed to class members.

There is a foreseeable outcome that is much worse. The results in the above tables are premised on an expectation that there would be a relatively low level of class member participation. Given that Google has among the highest profiles of any possible consumer

class action defendant, and in light of the relatively large $15 payments in *Fraley v. Facebook* which may well have convinced consumers that they could realize substantial benefits from online privacy class actions against the largest technology companies,[11] it would not be irrational to project participation to be at least somewhat above the high end of the presented range. A participation rate just slightly higher—even 3%—would result in negative $0.13 per class member, rendering any distribution impossible. Regardless of whether one assumes the high, low, or median participation rate, what is immediately apparent is that the recovery per class member here would be at best vanishingly small and may even be zero.

In short, while the district court might not have conducted a rigorous, transparent analysis of whether the likely recovery per class member rendered a direct distribution infeasible, it is evident that even using extrordinarly conservative estimates as to costs and participation rates, such an analysis would show that the court almost certainly got it right. Best case, the amount available for distribution to each qualified claimant would be economically insignificant. It is nearly certain that a distribution, in this case, would fall below the threshold of minimum payments adopted by courts across a number of circuits. Particularly given the alternative—a well-targeted *cy pres* award where the funds might at least provide an indirect benefit to the class—the district court's finding that a

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11 *See A Check From Facebook Might Be Heading Your Way—But Don't Get Too Excited*, Fortune, Nov. 24, 2016, http://fortune.com/2016/11/23/facebook-checks-sponsored-story-payout-advertising-class-action/.

direct distribution to claimants would be infeasible cannot be considered an abuse of discretion.

Thus, this case is the wrong vehicle to consider whether a district court abused its discretion in authorizing a *cy pres* award. It would not be inappropriate, of course, for this Court to remand to the district court with instructions to conduct its own detailed finding as to the likely recovery (if any) per class member and transparently disclose its factual findings. But Spectrum submits that based on the available data the Court could and should just as reasonably conclude that this would be a fruitless exercise in light of the analysis provided here and instead dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, amicus curiae Spectrum Settlement Recovery, LLC, respectfully submits that the Court should dismiss this writ as improvidently granted.

Respectfully submitted,

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